DATES V NSW MINISTER FOR PLANNING

New South Wales Land and Environment Court (Biscoe J)
6 April 2009
[2009] NSWLEC 38

Judicial review – constitutional law – racial discrimination and rights to equality before the law – protection under ss 9 and 10 of the *Racial Discrimination Act 1975* (Cth) – approval of highway bypass affecting Aboriginal land and heritage sites – whether breach of or inconsistency with ss 9 or 10 of the RDA makes s 75U(1)(d) of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA') invalid by operation of s 109 of the *Australian Constitution* – whether the project's conditions of approval made under Part 3A of the EPA breach or are inconsistent with ss 9 and 10 of the RDA and are consequently invalid by operation of s 109 of the *Constitution*

Facts:

The applicant is a member of the Aboriginal Worimi Nation and considers himself the traditional owner of lands east of Bulahdelah over which the NSW Minister for Planning granted conditional approval to the Roads and Traffic Authority ('RTA') under s 75J of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA') to build a dual carriage highway bypass. The carriageway would pass along the western slope of Alum Mountain. This area is very sacred to the Worimi Nation and there are a number of Aboriginal cultural heritage items and sacred sites in the area.

According to s 75U(1)(d) of the EPA, a s 75J approved project does not require consent under ss 87 and 90 of the *National Parks and Wildlife Act 1974* (NSW) ('*NPW Act*') to disturb or damage Aboriginal objects. The conditions for approval of the carriageway in 2.9 to 2.14 of the Approval deal with impacts on Aboriginal heritage. The issue the Land and Environment Court had to decide was whether s 75U(1)(d) of the EPA and conditions 2.9 to 2.14 of the Approval breach or are inconsistent with ss 9 and 10 of the *Racial Discrimination Act 1975* (Cth) ('RDA'), and are therefore invalid as a consequence of s 109 of the *Australian Constitution* insofar as they purport to allow the destruction and/or damage of Aboriginal objects without consent pursuant to ss 87 and 90 of the *NPW Act.* In relation to the question of invalidity the Court had to consider whether the applicant and other relevant Aboriginal persons had a right in the nature of a legitimate expectation to be consulted under ss 87 and 90 of the *NPW Act* based on the process established in guidelines pertaining to the *NPW Act*. The applicant claimed that this right also constituted the right to equal participation in cultural activities referred to in art 5(e)(vi) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, incorporated by reference in s 10 of the RDA.

Held, dismissing the summons:

1. Section 9 of the RDA applies to the discriminatory acts of persons. That section can only render a State law invalid by reason of invalidity under s 109 of the *Constitution* where the State law is dealing with racial discrimination and the Commonwealth law intends to exclusively occupy the field or where the State law makes lawful an act which s 9 of the RDA forbids. Neither of these circumstances applies to this case: [37]–[39]; *Gerhardy v Brown* (1985) 159 CLR 70 followed, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 considered, *Viskauskas v Niland* (1983) 153 CLR 280 considered.

2. Section 10 applies to a law that is claimed to be discriminatory in its terms or its practical effect. In assuming that the applicant and relevant Aboriginal persons had a legitimate expectation to be consulted in relation to the application process under ss 87 and 90 of the *NPW Act*, and that such expectation was not in fact met as a result of the operation of s 75U(1)(d) of the *EPA Act*, s 75U(1)(d) of the EPA is nevertheless still not invalid by operation of s 109 of the

Constitution due to any inconsistency with s 10 of the RDA. This is because s 75U(1)(d) is not a racially directed provision resulting in the unequal enjoyment of rights; Aboriginal persons are not denied a right of consultation given to non-Aboriginal persons. Even if ss 87 and 90 of the *NPW Act* guaranteed the right to consultation, s 75U(1)(d) would not come within s 10 of the RDA as Parliament can take away a right that it has previously granted: [44]–[47]; *Gerhardy v Brown* (1985) 159 CLR 70 considered, *Kartinyeri v Commonwealth* [1998] HCA 22 applied.

3. Conditions 2.9 to 2.14 and 6.4 (where it applied) of the Approval cannot be said to be inconsistent with s 9 of the RDA because the conditions do not authorise conduct involving any distinction based on race. Additionally, the conditions do not have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom – namely, the right to equal participation in cultural activities – and the applicant made no submissions outlining the manner in which they could do so. No submissions were made in relation to the conditions breaching s 10, and even so they would not be accepted because s 10 deals with statutes. Thus, there is no question of invalidity that may arise by operation of s 109 of the *Constitution*: [50]–[53].