Questions of extinguishment

The applicant submitted that the Tribunal had the necessary jurisdiction and that extinguishment had been effected by the *Starcke Pastoral Holdings Acquisition Act 1994* (the Acquisition Act). The respondents accepted that the Tribunal had jurisdiction to decide whether the relevant land was "non-exclusive land" and conceded that the Tribunal could determine an extinguishment question if it were manifestly clear that native title was extinguished, such as by the grant of a fee simple. But, it was argued, factual findings as to the content of native title were needed in this case and those findings were the exclusive jurisdiction of the Federal Court. This, it was submitted, meant that the Tribunal had to conclude that the land was "non-exclusive land".

The Tribunal held that there was nothing in the *Native Title Act 1993* (Cth) (NTA) which expressly or impliedly ousted a State court or tribunal's jurisdiction to determine whether extinguishment of native title has occurred. The Tribunal agreed that questions of extinguishment should usually await the anterior determination of native title, but that there were some circumstances where that exercise could be undertaken, such as those cited by the High Court in *Wilson v Anderson*[1]: the grant of an estate in fee simple, the grant of a common law lease, and a previous exclusive possession act under s 23B of the NTA.

The Acquisition Act in this case compulsorily acquired the underlying pastoral holdings and rendered the land as unallocated State land. The Tribunal noted that s 24MD(2)(a)-(c) of the NTA provides that native title is extinguished by certain types of compulsory acquisition laws.

Decision

The Tribunal held that the question of whether the Acquisition Act is a compulsory acquisition law which under the NTA would effect an extinguishment of native title was an appropriate question for the Tribunal to address. Such a question is capable of separate determination prior to the factual determination of the claimed native title rights and interests because a determination of the legal effect of the Acquisition Act would not rest on those factual findings. The Tribunal decided that it would determine the question as a preliminary issue.

ASSESSMENT OF COMPENSATION UNDER PETROLEUM ACT 1923 (QLD)*

Sullivan v Oil Company of Aust Ltd & Anor ([2003] QCA 570, Queensland Court of Appeal, 19 December 2003)

Appeal from Land and Resources Tribunal – Section 99 Petroleum Act 1923 – Compensation – Injurious affection – Consequential damages

Background

The respondents (the Sullivans) acquired a lease under the *Land Act* over land. The lease was subject to a reservation to the Crown of all petroleum in the land and all rights of access necessary for the exploitation of the petroleum. The lease was later converted to freehold. The respondents used the land for grazing and cropping.

The appellants (Oil Company of Australia Limited and Santos Petroleum Operations Pty Ltd) each held a 50% interest in an authority to prospect (ATP) and two petroleum leases under the

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1 (2002) 76 ALJR 1306.

* Peter Schmidt, Graduate Lawyer and Katherine Graff, Senior Associate, Corrs Chambers Westgarth, Brisbane.

Petroleum Act 1923 (the Act). About 20 hectares of the 3,225 hectare property of the Sullivans was subject to the appellants' activities.

Respondents Claim

The respondents claimed for compensation in the Land and Resources Tribunal (LRT) based on ss 18, 88 and 99 of the Act. The LRT (constituted by Smith DP) awarded compensation in the amount of $170,682.78 (with various orders as to interest) including amounts of:

- $95,760.00 for injurious affection in respect of the reduced market value of the balance of the respondents' land; and
- $7,245.00 for legal fees incurred in preparation of the respondents' claim for compensation,

which were regarded by the LRT as "consequential damages" under s 99(1)(e) of the Act.

After substantial consideration of the interpretation of s 99(1)(e), the LRT took the view that s 99(1)(e) of the Act was effectively an additional head of compensation and was broad enough to encompass all losses resulting from entry and activity on a property under an ATP or a petroleum lease.

The Appeal Decision

The appellants appealed the decision of the LRT. The issue before the Court of Appeal was whether the respondents were entitled to compensation for injurious affection and legal expenses as "consequential damages" pursuant to s 99(1)(e) of the Act.

Holmes J, in her judgment, considered the compensation regimes under the *Petroleum Act 1915* and the *Mining for Coal and Mineral Oil Act 1912* in addition to the compensation regime under the Act (both as enacted and as amended).

In a unanimous decision,[1] the Court of Appeal held that the language of the Act does not permit a conclusion that injurious affection is embraced in the phrase "consequential damages" in s 99(1)(e) of the Act. The reference to "consequential damages" in s 99(1)(e) must be considered in light of the preceding paragraphs of s 99(1) (and the other provisions of the Act relevant to compensation) and did not of itself confer a separate right to compensation encompassing other adverse effects on land such as injurious affection.

The court also held[2] that legal fees paid in connection with the preparation of a claim for compensation were not properly characterised as damage suffered consequentially upon the occupation of the land by the appellants under the ATP or petroleum leases.

The amount of the compensation was reduced by the amounts of $95,760 and $7,245 and the LRT judgment was varied to reflect the amended compensation total of $67,677.78.

QUEENSLAND MOVES TO INTRODUCE SECURITY OF PAYMENT LEGISLATION*

Introduction

On 26 November 2003, the Queensland Government introduced the *Building and Construction Industry Payments* Bill 2003 (Qld) (Bill) into Parliament. The Bill is substantially similar to the New South Wales security of payment legislation.[1]

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1 Davies JA and Atkinson J agreeing with the reasons and orders of Holmes J.

2 Citing *Minister for the Army* v *Pacific Hotel Pty Ltd* [1944] St R Qd 112 at 122, 123, 129.

* Jay Leary, Solicitor, Freehills.

1 See Legislative Note about the New South Wales Act at p 103 of this Journal.