TJUNGARRAYI & ORS v STATE OF WESTERN AUSTRALIA & ORS (P37/2018);

Court appealed from: Full Court, Federal Court of Australia
[2018] FCAFC 35

Date of judgment: 16 March 2018

Date special leave granted: 21 June 2018

KN (DECEASED) AND OTHERS ON BEHALF OF THE TJIWARL AND TJIWARL#2 v STATE OF WESTERN AUSTRALIA & ORS (P38/2018)

Court appealed from: Full Court, Federal Court of Australia
[2018] FCAFC 8

Date of judgment: 1 February 2018

Date special leave granted: 21 June 2018

These appeals arise from two native titles claims in Western Australia. The issue raised in P37/2018 ("*Tjungarrayi*") is whether a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) ("the *Petroleum Act*") is a "lease" within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) ("the NTA"). If it is a "lease", then s 47B(2) of the NTA, requiring prior extinguishment of native title to be disregarded, cannot operate. P38/2018 ("*Tjiwarl*") raises the same issue in relation to a mineral exploration licence granted under the *Mining Act 1978* (WA).

In *Tjiwarl* the first respondent ("the State") submitted that the definition of "lease" in s 242 of the NT Act included licences and authorities to mine. Relying on the definition of "mine" in s 253 of the NTA, it further submitted that a mining exploration licence is a "lease" for the purposes of the NTA. Mortimer J did not accept that submission, as she considered that it did not give effect to the text of s 242(2). Her Honour held that the NTA defines a mining lease narrowly. It looks to the use of the land, and requires that the land be used "solely" or "primarily" for mining. As there was no evidence in this case that the exploration licences permitted the licensee to use the land or waters they covered "solely" or "primarily" for mining, they were not leases within s 47B(l)(b)(i).

The Full Federal Court (North, Dowsett & Jagot JJ) disagreed. They considered that the scheme established by Div 3 of Pt 15 of the NTA was clear. There was no reason not to give the word "mining", wherever it appeared in Div 3, the meaning given to "mine" by s 253, which included "to explore or prospect for things that may be mined". Accordingly, when s 245 referred to a mining lease being a lease that permits land to be used solely or primarily for the purpose of "mining", the word "mining" was to be given the same meaning as "mine" in s 253. As a result, a lease that permitted the lessee to use land solely or primarily for exploring or prospecting for things that may be mined was a lease that permitted use of the land solely or primarily for mining. Further, to work out what "lease" and "lessee" meant in s 245, the answers were to be found in s 242(2) (references to "mining lease" include a

licence issued or authority given) and s 243(2) (in the case of a lease that is a mining lease because of s 242(2), the expression lessee means the person to whom the licence was issued or authority given and their successors).

The Full Court considered that the contrary arguments did not confront the plain words of the statutory scheme. The legislative intention to treat all licences and authorities to mine as leases for the purpose of the NTA was evident from that scheme, as was the legislative intention to treat the concept of a “mine” or “mining” as encompassing exploring or prospecting for things to mine. This legislative intention was supported by the extrinsic material, in particular, the *Supplementary Explanatory Memorandum, Native Title Bill 1993* (Cth).

In *Tjungarrayi*, the first respondent made similar submissions in relation to petroleum exploration permits. Barker J considered that the analysis provided by Mortimer J in Tjiwarl was not clearly wrong and that he should apply it, with the result that the petroleum exploration permits did not constitute a “lease” for the purposes of s 47B(1)(b)(i).

The State’s appeal to the Full Court (North, Jagot & Rangiah JJ) was heard after the Full Court handed down its decision in *Tjiwarl*. The State contended that *Tjiwarl* decided all issues with the consequence that the appeals should be allowed. The Full Court found that *Tjiwarl* correctly reflected the scheme of the NTA. The same reasoning that applied to mineral exploration licences in that case had to be applied to the petroleum exploration permits in *Tjungarrayi*. The Court noted that in s 253 of the NTA, “mine” is also defined to include, “extract petroleum or gas from land or from the bed or subsoil under waters”. Thus, sub-paragraph (a) of the definition, which refers to “explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c))”, meant that a permit to explore for petroleum is a mining lease if that instrument permits the land to be used solely or primarily for exploring the land for petroleum. The petroleum exploration permits satisfied this requirement because, being grants under s 38(1) of the *Petroleum Act*, they permitted the holder “subject to this Act and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area”.

The ground of appeal in P37/2018 (*Tjungarrayi*) is:

- The Full Court erred in holding that each of petroleum exploration permit EP 451 and EP 477 granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) is a “lease” within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth).

The ground of appeal in P38/2018 (*Tjiwarl*) is:

- The Full Court erred in holding that exploration licence E57/676 granted under the *Mining Act 1978* (WA) is a “lease” within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth).