Compulsory Acquisition powers: *Griffiths v Minister for Lands Planning and Environment* [2008] HCA (15 May 2008)

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On 15 May 2008, the High Court of Australia handed down a decision in its first native title case for some years with little fanfare or media coverage. The case concerned a compulsory acquisition of native title by the Northern Territory government in the Timber Creek township. The case required the High Court to consider some fundamental questions of the reach of executive power to divest private citizens of their property. The case therefore has broader reach than the acquisition of native title. Indeed, while there are many issues that could have been considered in the jurisprudence of native title, the majority of the Court dealt with the case as one concerning any ordinary title.

The case was precipitated in 1997 by a request from the holder of a grazing licence to purchase the land under which the licence was held and other blocks in the Timber Creek area for development as commercial enterprises. In 2000 the Northern Territory government issued three notices to acquire all native title rights and interests in particular parcels of land. The traditional owners of the area had lodged objections to the acquisition and lodged an application for a determination of native title over the area in response to the notices and were successful: *Griffiths v Northern Territory* (2007) 243 ALR 72.

The notices clearly stated that the purpose of the acquisition was to grant a lease, which could be exchanged for freehold upon completion of the development. This raises a central question of the power of the Crown to acquire the private rights of one citizen (or group of citizens) for the immediate benefit of another private citizen.

Section 43 of the Northern Territory *Lands Acquisition Act* (LAA) had previously provided the Minister with a power to compulsorily acquire land for 'public purposes' and later more simply to 'acquire land'. In 1998 the Act was amended to allow the Minister to acquire land for 'any purpose whatsoever' so long as the 'pre-acquisition procedures' were complied with.

The 1998 amendments to the LAA took into account the amendments to the *Native Title Act 1993* (Cth) (NTA). Indeed, the provision was amended to refer to 'any purpose whatsoever' so as to ensure that the processes for acquisition of land in the Northern Territory complied with the NTA. The legislature may also have had in mind the decision of the High Court in *Clunies Ross v The Commonwealth* [1984] HCA 65; (1984) 155 CLR 193. In that case, the High Court determined that the power to acquire land for a public purpose, under the federal legislation, required that there be a proposed use or application for the land that advances a public purpose. The legislature had clearly intended to remove any fetters on the executive power to acquire land.

The majority of the High Court in *Griffith* (Gummow, Hayne and Heydon JJ, with Gleeson CJ and Crennan J agreeing) agreed that, whether there were any ultimate limits on the broad phrasing of s.43, they at least include acquisition 'for the purpose of enabling the exercise of powers conferred on the executive by another statute of the territory'; in this case, the *Crown Lands Act*, s.9, which provides that the Minister may grant estates in fee simple or lease Crown land: [30]. The majority disregarded cases involving local government and statutory authorities that establish a clear line of authority against local governments interfering with the

private title of A for the private benefit of B: eg *Werribee Council v Kerr*1928] HCA 41; (1928) 42 CLR 1 at 33.

Justice Kiefel disagreed with the majority on this issue. For Kiefel J, the question turned on whether there was a relevant 'purpose'. Her Honour was of the view that there was no proposed use or purpose for the acquisition within any wider plan by the NT government for the use of the land. Rather, the acquisition was simply to support the proposal of a developer for their private benefit. Kiefel J invoked the line of authority in relation to local governments and the established principle of statutory interpretation stated in *Clissold v Perry* in 1904, that statutes 'are not to be construed as interfering with vested interests unless that intention is manifest': [1904] HCA 12; (1904) 1 CLR 363 at 373. On her construction, the power to acquire land for a purpose requires a need for the land, and the need must be that of the acquiring agency or authority, not the needs of another private individual; that is, there must be a 'governmental' purpose at the heart of the need to acquire the land: [173]. Kiefel J considered the processes that were required before an acquisition was approved, including the hearing by a tribunal, and the right to object and additional considerations to be taken into account in relation to native title in particular. However, Kiefel J argued that they were limited in their effectiveness as safeguards: [178-9].

Justice Kirby, who also disagreed with the majority, engaged in a more detailed analysis of the jurisprudence around 'clear and plain intention' generally, and in relation to native title in particular [107]. Like Justice Kiefel, Kirby J pointed to the strong tradition in common law that protects the basic rights of individuals from arbitrary deprivation by the state ? an compulsory acquisition of property has always been at the heart of this tradition. Kirby J agreed with Kiefel J that s.43 does not provide for a power to acquire land completely 'independently of purpose'. He argued that 'specificity and high particularity' in the legislation are required to permit the executive to acquire native title interests for the private benefit of another.

Kirby J emphasised the unique nature of native title, and indeed the special connection to the land it seeks to protect, as requiring additional rigours. His Honour expressed his view to this effect:

> …against the background of the history of previous non-recognition; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded. [107]

As a result, in his view, extinguishment must be contained within 'very specific and clear legislation that unmistakeably has this effect': [109]. Kirby J pointed to comparative treatment of Indigenous titles in Canada and New Zealand where the significance of the land to the group has an impact on the legal principles to be applied: [107-8]. He argued against the approach of the Court, which is encouraged by the 'freehold equivalence' tests in the NTA, in dealing with this issue as simply a matter of two indistinguishable competing interest in the land. Section 24MD (6A) gives native title holders 'the same' procedural rights as a holder of any ordinary title.

Kirby J noted that no one had presented the argument in this appeal about the interaction between ss.122 and 51(xxxi) of the Constitution, which he argues should constrain the powers delegated to the Territory.

The Northern Territory Government must still comply with the provisions of the NTA. The applicants sought an alternative basis for rejecting the acquisition in the terms of the NTA.

Section 24 MD(2) provides for the extinguishment of native title on just terms compensation under a Commonwealth state or Territory law by compulsory acquisition of 'all non-native title rights and interests … is also acquired', and native title holders suffer no greater disadvantage that is caused to non-native title holders. The appellants argued that the word 'all' meant that the provision could only be satisfied if there was a non-native title interest in existence; that is, if as in this case there were no other extant interests in the land, the land could not be acquired consistently with the NTA. All of the judges agreed that 'all' should be understood as 'any and all'. Any other reading, they suggest, would have an arbitrary result. Gleeson CJ pointed out that the key purpose of the provision of the NTA is to avoid racial discrimination an ? the avoid extinguishment of native title rights in order to relieve other interest from any co-existing native title rights. Gummow, Hayne and Hayden JJ pointed out that if the NTA allowed such acquisition it would fall foul of the *Racial Discrimination Act 1976* (Cth). However, the result in this case is to achieve that very effect. The rights of the native title holders have been removed to make way for the rights of the licence holder to be increased to a lease and then to freehold without seeking to reach agreement with the native title holders.