HIGH COURT OF AUSTRALIA

McHUGH J,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

BROADCAST AUSTRALIA PTY LTD APPELLANT

AND

MINISTER ASSISTING THE MINISTER FOR NATURAL RESOURCES (LANDS) RESPONDENT

Broadcast Australia Pty Ltd v Minister Assisting the Minister for Natural Resources (Lands)
[2004] HCA 4
10 February 2004
S161/2003

ORDER

1. Appeal allowed with costs.

2. The orders of the Court of Appeal of New South Wales dated 24 May 2002 are set aside, and in lieu thereof, it is ordered that:

(a) the question raised by the Notice of Motion filed by the respondent in the Land and Environment Court of New South Wales dated 16 May 2000, namely:

> *"Whether the permissive occupancy granted by the Minister was revoked by reason of the declaration made by the Minister for Finance and Administration on 29 April 1999?"*

be answered: "No";

(b) the appeal to the Court of Appeal be dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with A E Galasso for the appellant (instructed by Minter Ellison)

B A J Coles QC with N Perram for the respondent (instructed by Crown Solicitor for the State of New South Wales)

S J Gageler SC with K M Richardson intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Broadcast Australia Pty Ltd v Minister Assisting the Minister for Natural Resources (Lands)

Real property – Permissive occupancy – Commonwealth was granted permissive occupancy over a parcel of New South Wales Crown land – Condition of permissive occupancy that it not be transferred or sold without the prior consent of the respondent – Commonwealth law declaring that the permissive occupancy would vest in the appellant as its successor – Respondent's prior consent not obtained – Whether permissive occupancy an asset capable of being vested in another by statute – Whether permissive occupancy revoked by reason of the Commonwealth declaration.

Constitution, s 109.
National Transmission Network Sale Act 1998 (Cth), ss 3, 9, 12.
Crown Lands Consolidation Act 1913 (NSW), ss 6, 136K.
Crown Lands (Continued Tenures) Act 1989 (NSW), ss 5, 11, Sched 2 Pt 6, Sched 5 cl 11.

McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ.

Background

1 This appeal turns upon the interrelation between federal "privatisation" legislation, the *National Transmission Network Sale Act* 1998 (Cth) ("the Commonwealth Act") and New South Wales legislation providing for "permissive occupancies" of Crown lands in that State. The appellant contends that there has been vested in it by operation of law such an interest previously held by the Commonwealth in respect of land where a television transmitting station was erected and operated. Though the point at the heart of this appeal is a short one, it is desirable to set out the background in some detail.

2 In New South Wales for many years before 1958 it had been the practice of the Lands Department to grant "permissive occupancies" of Crown lands for various purposes, including grazing, boatsheds, jetties, slipways and the extraction of sand and gravel. The Department assumed that it had the power to do this, and that assumption was shared by Parliament in various pieces of legislation, but there was thought to be no express legislative authority for it, and in particular not in the *Crown Lands Consolidation Act* 1913 (NSW) ("the 1913 Act")[1]. In 1958 challenges to the validity of two permissive occupancies were brought respectively in the Equity Court and the Land and Valuation Court of New South Wales. The government thereupon introduced a Bill on 22 October 1958 in order to place beyond doubt the "title" which it was intended to create by those and all other permissive occupancies, which numbered 16,500, and the right of the relevant Minister to continue the practice of granting them[2].

3 Further, though the matter was not referred to in the course of debate in the Legislative Assembly, less than eight months earlier, on 4 March 1958, Sugerman J had pointed out that there was no reference in the 1913 Act or its precursor to a permissive occupancy, despite the fact that the practice of granting them was a "well recognised practice which has gone on for a very great number of years and has led to a very large number of such occupancies being granted".[3] He found it necessary to analyse the jurisdiction of the Land and Valuation Court

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1 Second Reading Speech of the Minister for Lands relating to the Crown Lands (Permissive Occupancies) Amendment Bill 1958, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 1958 at 1561.

2 Second Reading Speech of the Minister for Lands relating to the Crown Lands (Permissive Occupancies) Amendment Bill 1958, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1958 at 1499.

3 *Barrow v Brooksby* (1958) 37 LVR 14 at 18. The account in the Second Reading Speech of the challenge in the Land and Valuation Court does not in its details match the facts of *Barrow v Brooksby*.

of New South Wales to entertain appeals by persons who were unsuccessful or partially unsuccessful in their applications for permissive occupancies to the Local Land Board at Nyngan on alternative hypotheses. One hypothesis was that grants of permissive occupancies contravened the prohibition contained in s 6 of the 1913 Act against dealings in Crown lands outside that Act. The other was that grants of permissive occupancies were not dealings because they conferred no more than "a mere personal licence".[4] Sugerman J did not have to decide between these hypotheses, but on either of them, permissive occupancies were not supported by the 1913 Act. In consequence Sugerman J's judgment has been described as expressing[5], or causing the expression of[6], doubts on the practice of granting permissive occupancies.

4 The matter proceeded with haste. On 22 October 1958 the Bill was read a first time in the Legislative Assembly; on 23 October 1958 it was read a second time, went into Committee and was read a third time; on 28 October 1958 it returned from the Legislative Council without amendment; and on 3 November 1958 royal assent was given. The effect was to amend the 1913 Act by the insertion of s 136K. Sub-section (1), in its current form, provides:

> "The Minister may grant permissions to occupy Crown lands, whether above or below or beyond high water mark, or whether reserved from lease or license or not, for such purposes and, subject to this section, upon such terms and conditions as to him may seem fit."

Sub-section (5) relevantly provides:

> "… [A] permission to occupy Crown lands granted under subsection (1) shall be terminable at will by the Minister."

5 In 1961 approval was given to the Commonwealth to occupy a parcel of Crown land at Mt Sugarloaf, near Newcastle, for the purpose of constructing and operating a national television transmitting station ("the 1961 permissive occupancy"). The station was constructed and began to operate.

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4 *Barrow v Brooksby* (1958) 37 LVR 14 at 18.

5 *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 159 per McHugh JA, 166-167 per Clarke AJA.

6 *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 156 per Kirby P.

6 Among the conditions of the 1961 permissive occupancy were the following:

> "1. The rent for each year shall be paid in advance to the Under Secretary for Lands, Sydney.
>
> 2. The Minister, upon giving at least three (3) months notice to the tenant, may review and alter the amount of the rental.
>
> 3. The Permissive Occupancy is terminable at will by the Minister.
>
> …
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> 6. The tenant shall not sublet or part with possession of the premises, or any part thereof, or sell or transfer the Permissive Occupancy herein referred to, without the consent of the Minister for Lands having first been obtained. On termination of the Permissive Occupancy the tenant shall deliver up quiet and peaceable possession of the premises."

7 Although the 1913 Act was repealed by the *Crown Lands Act* 1989 (NSW), the tenures in force under the 1913 Act immediately before its repeal remained in force pursuant to ss 5 and 11 and Sched 2 Pt 6 of the *Crown Lands (Continued Tenures) Act* 1989 (NSW) ("the Continued Tenures Act").

8 On 29 June 1998 a notice of redetermination of the rent was given under Sched 5 cl 11 of the Continued Tenures Act. On 21 September 1998 the Commonwealth lodged an objection pursuant to cl 11(2). On 2 March 1999 the rent was redetermined in the sum of $74,000 per annum. On 12 April 1999 the Commonwealth appealed to the Land and Environment Court of New South Wales pursuant to Sched 5 cl 11(3)(b) of the Continued Tenures Act.

9 On 29 April 1999 an event took place which triggered the present controversy. The Minister for Finance and Administration published a declaration ("the Commonwealth Ministerial declaration") pursuant to s 9 of the Commonwealth Act. That Act was expressed to bind the States (s 4(1)). It provided, by s 9(1):

> "(1) The Minister for Finance and Administration may, by notice in the *Gazette*, declare all or any of the following, in relation to a company specified in the notice:

(a) a specified Commonwealth asset vests in the company at a time specified in the notice (the *transfer time*), without any conveyance, transfer or assignment;

(b) at the transfer time, the company becomes the Commonwealth's successor in law in relation to the transferred asset;

(c) a specified instrument relating to the transferred asset continues to have effect after the transfer time as if a reference in the instrument to the Commonwealth … were a reference to the company."

Section 3 defined "Commonwealth asset" as meaning "an asset of the Commonwealth". Section 3 also defined "asset" as meaning:

"(a) any legal or equitable estate or interest in real or personal property, including a contingent or prospective one; and

(b) any right, privilege or immunity, including a contingent or prospective one."

Section 9(2) made similar provision for Commonwealth liabilities as that made in s 9(1) for Commonwealth assets. Section 9 continued:

"(3) Declarations in relation to both assets and liabilities may be included in the same notice. The same notice may include declarations in relation to more than one asset or liability.

(4) A declaration under this section has effect according to its terms."

10 The Commonwealth Ministerial declaration defined as a "Specified Asset" an asset in Pt 1 of Sched A, which included "any legal or equitable estate or interest or right or entitlement which the Commonwealth has in, or in relation to" numerous specified sites. One of these sites was the Mt Sugarloaf site the subject of the 1961 permissive occupancy. The Commonwealth Ministerial declaration proceeded to declare, pursuant to s 9(1) of the Commonwealth Act, that at 30 April 1999 "Each Specified Asset vests in the [appellant] without any conveyance, transfer or assignment".

11 On 25 May 1999 the National Transmission Company Pty Ltd, which was later called NTL Australia Pty Ltd before becoming Broadcast Australia Pty Ltd, the appellant in these proceedings, was substituted for the Commonwealth in the

Land and Environment Court proceedings. The State Minister, who was the respondent in those proceedings and is the respondent in this Court, filed a Notice of Motion in the Land and Environment Court which led to the formulation of a preliminary question as to whether the 1961 permissive occupancy was "revoked" by reason of the Commonwealth Ministerial declaration. The Land and Environment Court (Pearlman J) answered that question in the negative[7]. A majority of the New South Wales Court of Appeal (Mason P and Sheller JA; Hodgson JA dissenting) were of the contrary view[8].

12 It was common ground that the grant of the 1961 permissive occupancy was a valid exercise of the power given by s 136K(1) of the 1913 Act, and that the conditions imposed did not go beyond what s 136K(1) permits; that the Commonwealth Act was a valid exercise of the legislative powers conferred by s 51(v) and (xxxix) of the Constitution; that there was no problem under s 51(xxxi) of the Constitution; and that s 52 of the Constitution had no application. While agreements of these kinds are not binding on this Court, on various grounds there is no reason not to accept them for present purposes.

The State Minister's argument

13 To some degree the issues as presented to this Court are different from those considered by the courts below. An effort was made in the submissions for the State Minister in the Court of Appeal to locate analogues in the general law to the statutory regime of "permissive occupancies" and then to treat the most forensically convenient analogue as a substitute for fuller statutory analysis. For example, attention was invited to the analysis of tenancies at will by Jordan CJ in *Commonwealth Life (Amalgamated) Assurance Ltd v Anderson*[9] and to the early nineteenth century English authorities to which Jordan CJ referred. On the other hand, despite one or two passing references, the courts below were not invited to analyse the matter in the light of s 109 of the Constitution.

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7 *NTL Australia Pty Ltd v Minister for Land and Water Conservation* (2001) 112 LGERA 403.

8 *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53.

9 (1945) 46 SR (NSW) 47 at 49-50.

14 The argument put by the State Minister in this Court was that while the 1961 permissive occupancy was in a sense an asset in the hands of the Commonwealth, it was not an asset capable of being vested by statute in some other person's hands. While the Commonwealth Act was capable of transferring any rights which the Commonwealth had immediately before a Commonwealth Ministerial declaration was made to the fullest and most ample extent of their transmissibility, the 1961 permissive occupancy was not transmissible. The State Minister again attempted to draw analogies between the 1961 permissive occupancy and tenancies at will; between the results that would flow if the Commonwealth had attempted by contract to transfer the benefit of the 1961 permissive occupancy to the appellant without the State Minister's consent, and the results of the Commonwealth Ministerial declaration; and between the Commonwealth Act and the operation of the *Bankruptcy Act* 1966 (Cth), s 58 or the *Wills, Probate and Administration Act* 1898 (NSW), s 44.

Immaterial issues

15 Various issues that were referred to in the courts below and, briefly, in argument in this Court are interesting but immaterial. Thus it is immaterial whether if, independently of the Commonwealth Act the Commonwealth had attempted to assign the benefit of the 1961 permissive occupancy to the appellant, that would have given the appellant rights against the State Minister[10].

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10 That is a proposition denied in the Court of Appeal (*Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 56-57 [7]) on the authority of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (and *Re Turner Corporation Ltd (In Liq)* (1995) 17 ACSR 761, which followed it). But in *Linden Gardens Trust* at 104 Lord Browne-Wilkinson, with whom all other members of the House of Lords agreed, was prepared to accept that the issue was one of contractual construction, and that a possible construction, though cases of it were "very unlikely to occur", was that an assignment in breach of a covenant against assignment was not invalid as between obligor and assignee, though it gave the obligor a right to sue the assignor for damages. The same possibility, without any limitation as to likelihood, was identified in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 236 per Northrop, Gummow and Hill JJ. *Bruce v Tyley* (1916) 21 CLR 277 at 289 and Starke, *Assignments of Choses in Action in Australia*, (1972) at 65-67 were also cited by the Court of Appeal majority; but those passages related to the special area of contracts having an element of personal skill or personal confidence in the assignor, and Starke's work at 66 is to the same effect as the *Devefi* case.

It is immaterial whether the 1961 permissive occupancy is to be characterised as a tenancy or a "personal licence such as would afford a defence to an action for trespass"[11]. It is immaterial whether in Condition 6 of the 1961 permissive occupancy the "consent" of the State Minister is a consent which cannot be unreasonably withheld. It is immaterial whether a breach of Condition 6 by a private dealing would automatically terminate the 1961 permissive occupancy[12]. It is immaterial whether the transfer of rights under the 1961 permissive occupancy with the State Minister's consent pursuant to Condition 6 creates a new permissive occupancy or effects a continuation of the existing permissive occupancy[13] or whether the Commonwealth Act created new rights[14]. It is immaterial whether various propositions asserted by Jordan CJ[15] and relied on by the majority in the Court of Appeal[16] about purported assignments of tenancies at will are supported by the authorities he cited[17]. These issues were not fully

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11 As the majority said (*Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 58 [14], referring to McHugh JA's quotation in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 161 of the words of Sugerman J in *Barrow v Brooksby* (1958) 37 LVR 14 at 19); Hodgson JA spoke to the contrary at 71 [62]-[63]. The question would depend on a close analysis of the Conditions of the 1961 permissive occupancy, which may have been different from those applying to the permissive occupancies in *Barrow v Brooksby*. The question would also depend on whether it is appropriate to seek to refer the rights created by the 1961 permissive occupancy under s 136K of the 1913 Act to categories found in the common law.

12 As the majority thought: *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 59-60 [21].

13 Hodgson JA favoured the latter view: *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 71 [64].

14 As Hodgson JA said: *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 72-73 [71].

15 *Anderson v Toohey's Ltd* (1937) 37 SR (NSW) 70 at 74; *Commonwealth Life (Amalgamated) Assurance Ltd v Anderson* (1945) 46 SR (NSW) 47 at 49-50.

16 *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 58-59 [17].

17 *Buckworth v Simpson* (1835) 1 CM&R 834 [149 ER 1317]; *Pinhorn v Souster* (1853) 8 Ex 763 [155 ER 1560].

argued, because the appellant, at least, did not see it as necessary to resolve most of them. In this it was correct.

Conclusion

16 The operation of s 9 of the Commonwealth Act, read in the light of the definition of "asset" in s 3, is clear and wide. The width of its operation is supported by s 12, which relevantly provides:

> "The operation of this Part is not to be regarded as:
>
> …
>
> (c) placing a person in breach of any contractual provision prohibiting, restricting or regulating:
>
> (i) the assignment or transfer of any asset or liability …"

17 The State Minister accepted that the Commonwealth Act was valid. It follows that effect must be given to it according to its terms. The State Minister also accepted that just before the Commonwealth Ministerial declaration the Commonwealth had an asset as defined in the Commonwealth Act, for even if the 1961 permissive occupancy did no more than create an immunity in the Commonwealth against being sued for trespass, it fell within par (b) of the definition of "asset" contained in s 3 of the Commonwealth Act.

18 The State Minister's argument rested on one basic proposition: that the 1961 permissive occupancy was in its nature as the creation of particular statute law of the State, incapable of being the subject of a transfer by operation of law of the type purportedly effected by the Commonwealth Ministerial declaration under the Commonwealth Act. If this proposition is false, and the 1961 permissive occupancy was susceptible to such a transfer, there is no reason in State law why the Commonwealth Act and the Commonwealth Ministerial declaration could not take effect. There would be no contrariety between the two laws and no occasion for the operation of s 109 of the Constitution. But if the proposition is true, it can be true only because there is some provision of State law – some term of the 1961 permissive occupancy created under s 136K(1) of the 1913 Act and preserved by the Continued Tenures Act – preventing the Commonwealth law from taking effect according to its terms and insulating the 1961 permissive occupancy from the Commonwealth law. If a provision of State law did have that effect, it would have altered, impaired or detracted from the

operation of the Commonwealth law. It would thus be invalid under s 109 of the Constitution to the extent of the inconsistency[18]. Hence, on neither view of the proposition advanced by the State Minister, do the Commonwealth Act and the Commonwealth Ministerial declaration fail to take effect according to their terms.

Orders

19 There is a procedural curiosity in the position of the State Minister in this Court. The State Minister's Notice of Motion in the Land and Environment Court of New South Wales sought a declaration:

> "That the permissive occupancy granted by the Respondent was revoked by reason of the declaration made by the Minister for Finance and Administration on 29 April 1999."

The primary judge then formulated the following question[19]:

> "Whether the permissive occupancy granted by the Minister was revoked by reason of the declaration made by the Minister for Finance and Administration on 29 April 1999?"

20 The State Minister sought an affirmative answer to that question. One of the arguments advanced to the primary judge was[20]:

> "The purported assignment by the Commonwealth pursuant to the Minister's declaration followed by the giving up of the site to the applicant

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18 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 per Dixon J; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 464 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

19 *NTL Australia Pty Ltd v Minister for Land and Water Conservation* (2001) 112 LGERA 403 at 406-407 [3].

20 *NTL Australia Pty Ltd v Minister for Land and Water Conservation* (2001) 112 LGERA 403 at 415 [38].

> terminated the right of occupation formerly residing in the Commonwealth by virtue of the permissive occupancy."

That argument does not match the terms of the question. In any event, the Land and Environment Court answered the question in the negative. The State Minister's Notice of Appeal in the Court of Appeal requested an affirmative answer to the question. The State Minister supported that request by repeating the argument advanced to the primary judge[21]. The majority reasoning in the Court of Appeal accepted the State Minister's argument[22]. It was for those reasons that the majority of the Court of Appeal ordered that the question should be answered affirmatively.

21 In this Court the State Minister's submissions wavered. While accepting that "one way of putting it" was to say that the Commonwealth Ministerial declaration caused the Commonwealth's right to come "to an end", the State Minister also said of the Commonwealth's right:

> "It is interesting but not necessarily ultimately to the point to analyse how the right came to fall away. It is probably correct to say that once the Commonwealth went out of occupation then the purpose of the permission went away with it. In other words, the Commonwealth gave up the right, therefore, there was no either desire on the Commonwealth's part or intention on the Minister's part that the right should continue to subsist."

That raises different questions from the question which the State Minister asked the courts below to consider. One different question is: "Was the 1961 permissive occupancy terminated by the departure of the Commonwealth from occupation?" Another question is: "Does the appellant have the benefit of the 1961 permissive occupancy, or some permissive occupancy carrying the same rights?"

22 However, the parties did not seek to alter the question which the courts below were invited to answer. Each appeared content, for practical purposes,

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21 *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 70 [55].

22 *Minister for Land and Water Conservation v NTL Australia Pty Ltd* (2002) 122 LGERA 53 at 57 [8], 59-60 [21], 60 [25] and 60-61 [26].

with the respective answers for which each contended. There is no point in reformulating the question now.

23 The following orders should be made.

1. The appeal is allowed.

2. The orders of the Court of Appeal of New South Wales are set aside.

3. The question raised by the Notice of Motion filed by the State Minister in the Land and Environment Court of New South Wales dated 16 May 2000, namely:

> "Whether the permissive occupancy granted by the Minister was revoked by reason of the declaration made by the Minister for Finance and Administration on 29 April 1999?"

is answered: "No".

4. The State Minister is to pay the costs of the appellant in the Court of Appeal and in this Court.