case note:

ROBERTS ON BEHALF OF THE WIDJABUL WIA-BAL V ATTORNEY-GENERAL OF NEW SOUTH WALES [2019] FCA 1158

Ross Mackay, SOLE PRACTITIONER

This judgment of Rangiah J addresses separate questions arising out of the Widjabul Wia-bal claim on the North Coast of NSW. The separate questions involve the application of s 47B of the *Native Title Act 1993* (Cth) (NTA) to different types of tenure within the claim area.

Section 47B was introduced into the NTA in 1998[1] to allow for historical extinguishment of native title to be disregarded in land that is currently vacant Crown land. In other words, it allows for native tile to be recognised in vacant Crown land, even if that land has been subject to an extinguishing act at some time in the past.[2] It is a critically important provision for native title claimants in NSW and the south-east of Australia generally, given the extensive historical dispossession of traditional owners and formalization of non-Indigenous interests in land.

The separate questions before the Court involved five parcels of land, covering three tenure types:

- Reserves set aside from sale, pending determination of the portion to be set aside for public recreation, created under s 101 of the *Crown Lands Act 1884* (NSW) (Reservations Pending Determination);[3]

- Reserves for future public requirements created under s 87 of the *Crown Lands Act 1989* (NSW) (Reserves for Future Public Requirements);[4] and

- Permissive occupancies for grazing under s 136K of the *Crown Lands Consolidation Act 1913* (NSW) (Permissive Occupancies for Grazing).[5]

There are a number of preconditions within s 47B that must be satisfied for it to apply to a particular parcel of land. Relevant to this judgment was the requirement of s 47B(1)(b)(ii) that a parcel not currently be subject to a reservation (or similar) by the Crown for use for public purposes or for a particular purpose.[6]

In relation to the three tenure types in question, the Court found as follows:

- Section 47B does not apply to Reservations Pending Determination;[7]

- Section 47B does apply to Reserves for Future Public Requirements;[8] and

- Section 47B does not apply to Permissive Occupancies for Grazing.[9]

The potential ramifications of the second of these conclusions are significant for NSW. Although, as with all questions of tenure and extinguishment, each parcel needs to be considered on its own facts, the precedent from this judgment is that s 47B is capable of being applied to Reserves for Future Public Requirements. Given there are a significant number of such Reserves across the Eastern and Central divisions of NSW, the likely result is that native title rights and interests will now be able to be recognised across a large number of Reserves throughout NSW. It may also set a precedent for similar types of tenure in other jurisdictions.

The other findings of the Court are being appealed by the Applicants, with a hearing expected early in 2020.

Further consideration of the precedent implications for Reservations Pending Determination and Permissive Occupancies for Grazing (the latter of which are also numerous in NSW) will be able to be made once the appeal has been determined.

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[1] By the *Native Title Amendment Act 1998* (Cth).

[2] See discussion at [3] of the judgment.

[3] See [54]-[58] and [80] of the judgment for a discussion of this tenure type.

[4] See [84]-[91] and [122] of the judgment for a discussion of this tenure type.

[5] See [120]-[125] and [133]-[136] of the judgment for a discussion of this tenure type.

[6] See [11]-[13] of the judgment. A detailed analysis of the provision is carried out at [14]-[53].

[7] At [72] and [81] of the judgment. The reasoning for this finding is at [64]-[71].

[8] At [119] and [123] of the judgment. The reasoning for this finding is at [92]-[118].

[9] At [132] and [137] of the judgment. The reasoning for this finding is at [126]-[131].