National Native Title Tribunal

NATIVE TITLE Hot Spots

No. 22, December 2006

Contents

Recent cases

Injunction sought to restrain representative body

***Charlie v Cape York Land Council* [2006] FCA 1418**

Greenwood J, 31 October 2006

Issue

The main issue in this case was whether an interim injunction restraining a native title representative body from holding a meeting to authorise amendments to a claimant application should be made. Final relief by way of a declaration that the representative body had failed to comply with its statutory duty under s. 203BB(1) of the *Native Title Act 1993* (Cwlth) (NTA) to facilitate and assist persons who may hold native title was also sought, along with consequential orders.

Background

Gordon Charlie made the application to the Federal Court for the interim injunction. He had previously been one of the people who constituted 'the applicant' for the Dingaal Native Title Application (the Dingaal application) but was removed and replaced pursuant to an order made under s. 66B on 17 September 2003.

The native title claim group for the Dingaal application is the Dingaal people. At a meeting held early in 2006, members of the claim group unanimously resolved to (among other things):

- amend the Dingaal application to include members of the Thanil, Nguuruumungu, Gulaal, Ngaatha and Thittaar People in the native title claim group; and
- convene a meeting of those five groups and the Dingaal People to provide information on the progress of the claim and the conduct of further discussions about the compiling a 'connection' report.

In March and May 2006, Mr Charlie was informed of the outcome of that meeting via a letters from the representative body acting for the claimants, Cape York Land Council (CYLC), with the May letter (among other things) also advising him that the Dingaal application may need to be amended and attaching a work plan setting out the steps to be taken, including a timetable for further meetings.

On 17 October 2006, the CYLC again wrote to Mr Charlie enclosing notice of a meeting (the proposed meeting) of all Dingaal, Ngaathawarra, Thittaar, Nguuruumungu, Thanil and Gulaal Peoples to discuss amending the native title claim group for the Dingaal application to include the other five groups and, if appropriate, to authorise other amendments that might be required. In the letter, CYLC offered to provide transport to those who wished to attend.

On 20 October 2006, Mr Charlie wrote to the CYLC advising that 85 people sought travel assistance to the proposed meeting and that a private security guard would need to be available for the duration of the meeting because of 'an apprehension about fights and threats'. No response was received from the CYLC.

Subsection 69(2) application

Mr Charlie sought an interim injunction to restrain the CYLC from holding the proposed meeting. Since the interim relief was sought in aid of a declaration that the CYLC failed to discharge its obligations under s. 203BB(1), the court accepted this an application 'in relation to a matter arising under' the NTA for the purposes of s. 69(2)—at [6].

Facilitation and assistance functions

Subsection 223BB(1) provides that, among other things, the 'facilitation and assistance functions' of a representative body are:

- to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
- to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to native title applications.

Subsection 203BA(2) provides that such a function is to be performed in the manner that:

- maintains administrative processes that promote the satisfactory representation by the body of native title holders and persons who may hold native title in the area for which it is the representative body;
- maintains administrative processes that promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area for which it is the representative body; and
- ensures that the processes operate in a fair manner, having particular regard to the matters set out in paragraphs 203AI(2)(a) to (f).

Mr Charlie's contentions

The allegation was that CYLC had failed to discharge its duty under s. 203BB(1) because it failed to:

- have regard to the interests of the Dingaal native title claim group or be satisfied it's members consented to any general course of action;
- promote the satisfactory representation of native title holders or maintain a process that promoted consultation and operated in a fair manner
- assist Dingaal native title claim group and the Brim family group (the members of which had resided in and around Kuranda for a significant period but traced their genealogy to a Charlie family ancestor) in negotiations and proceedings in relation to the claimant application;
- give reasonable notice to claim group members.

The court noted that, on the evidence, it appeared that Mr Charlie had not informed CYLC of the Brim family group's relationship with the Charlie family (i.e. as a sub-group) at any time after the receipt of the CYLC's March and May 2006 letters—at [13].

Balance of convenience favoured allowing the meeting

It was found that:

- the CYLC had incurred considerable cost in convening the proposed meeting and the delay and dislocation caused by granting the interim injunction would significantly prejudice both the claim group and the CYLC in providing support to claim group members in the prosecution of the Dingaal application;
- Mr Charlie made his application for the injunction 'at the last minute' i.e. the delay in agitating the matter was considerable;
- therefore, the balance of convenience favoured allowing the meeting to proceed—at [13].

Threshold question—Mr Charlie's capacity to seek the injunction

Among other things, it was noted that, apart from question of the balance of convenience:

- the threshold issue was whether convening the proposed meeting by CYLC and consideration of the questions to be resolved by the claim group gave rise to an arguable breach of duty that was actionable by Mr Charlie;
- on the evidence, Mr Charlie had not demonstrated an 'arguable question of… connection on the part of the Brims' and, in any case, Mr Charlie was apparently the recognised elder of the Brim family group and he had received notice of proposed meeting;
- it was the Brims who should advance the contentions made in support the injunction but, since Mr Charlie's had a 'mandate' to speak for, and represent, the Brims (via a document signed by 70 members of the Charlie and Brim families), the court proceeded on the footing that Mr Charlie brought the interlocutory proceedings as a representative of the Brim family group—at [15] to [20].

No failure to discharge obligations

It was found that:

> There is no evidence in any of the material that the CYLC has failed to discharge any of the obligations conferred upon it by ss 203BA, 203BB, 203BC or 203BJ. As to s 203BJ(b), there is no evidence that the CYLC has failed to identify persons who may hold native title in the area the subject of the claim for which the body is the representative body. That function, of course, is not absolute, it is a function to be discharged 'as far as is reasonably practicable'. The CYLC has established processes reflected

in the correspondence, Work Plan and steps taken to convene meetings of relevant claim group members or those members asserting interests in respect of the lands the subject of the claim, to discharge that obligation—at [27].

Court intervention may not be appropriate where review available

After noting that s. 203BI provides for an internal review of a representative body's performance of its functions, his Honour found that the matters raised by Mr Charlie were arguably matters which ought properly be dealt with via the NTA review process—at [29] and [30].

Failure to give reasonable notice

As the evidence was that Mr Charlie had responded to the CYLC's correspondence regarding the proposed meeting 11 days prior to the date of that meeting, the court was not satisfied that the notice of meeting was too short and so there was no failure on the part of the CYLC to perform functions in this respect.

Decision

Mr Charlie's application was dismissed.

Late news

On 5 December 2006, Greenwood J dismissed a second application for an interim injunction to restrain CYLC from holding the authorisation meeting, this time with an order that Mr Charlie pay the CYLC's costs: see *Charlie v Cape York Land Council (No. 2)* [2006] FCA 1683 <http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1683.html> . It will be summarised in the next issue of *Native Title Hot Spots*.

Party status—removal as lack a relevant interest

Kuuku Ya'u v Queensland & Others [2006] FCA 1500

Greenwood J, 13 November 2006

Issue

The issue before the Federal Court was whether John and Nancy Wolff should be removed as respondents to the proceedings relating to the combined Kuuku Ya'u claimant application.

Background

On 20 March 2003, the Kuuku Ya'u application was amended to remove parcels of land in which John and Nancy Wolff (the Wolffs) held an interest. The relevant lots were special leases, all of which had expired by 31 July 1998. The relevant area had been subsumed into a national park in March 2000.

On 1 November 2006, the applicant in the Kuuku Ya'u application sought an order under s. 84(8)of the *Native Title Act 1993* (Cwlth) (NTA) that the Wolffs be removed as parties. That subsection provides that the Federal Court may, at any time, order that a person (other than the applicant), cease to be a party to the proceedings. The court is to consider making an order under s. 84(8) if, among other things, it is satisfied that 'the person never had, or no longer has, interests that may be affected by a determination in the proceedings'.

Decision

His Honour Justice Greenwood held that the Wolffs should be removed as parties because:

- neither of them continued to hold the interest which they held at the moment in time when there were joined as parties;
- they no longer had interests that may be affected by a determination in the proceedings—at [15] to [16].

Amendment of claimant application—appeal against dismissal

Wiri People No. 2 v Queensland [2006] FCAFC 158

Stone, Allsop and Greenwood JJ, 10 November 2006

Issue

The issue before the Full Court of the Federal Court was whether to allow an appeal against a decision by Dowsett J refusing leave to appeal from a 'self-executing' order dismissing a claimant application and for refusing an extension of time to comply with the order to file and serve an amended application.

Background

On 6 October 2005, his Honour Justice Dowsett ordered that the applicant for Wiri People #2 file and serve an amended application on or before

14 October 2005 and, in default thereof, the application would stand dismissed. On 19 June 2006, as summarised in *Native Title Hot Spots* Issue 21, his Honour refused leave to appeal from the 'self executing' order and refused an extension of time to comply with that order: *Wiri People #2 v Queensland* [2006] FCA 804.

Factual inaccuracies

The Full Court held that Dowsett J made an error of fact of sufficient importance to permit the court to re-exercise the discretion by giving weight to matters containing factual inaccuracies— at [18].

The relevant paragraph of his Honour's reasons was:

> There is no requirement in the [*Native Title Act 1993* (Cwlth)]…for grid co-ordinates. The matters which were of primary concern at the time that the order was made concerned constitution of the claim group and authorisation of the claim. Those difficulties would have been resolved by compliance with the order, notwithstanding that it may have been necessary further to amend the application to insert appropriate grid references if the applicants wished to proceed to registration in the Tribunal.

Compliance attempted

Their Honours Stone, Allsop and Greenwood held that:

- compliance was attempted, in that an affidavit was filed with a draft amended application annexed to the affidavit
- had the amendment been filed, there would have been compliance with the order even though, as an amended application, it might not have been such as to be able to proceed successfully to determination—at [17].

Decision

The appeal was allowed and the order of Justice Dowsett of 19 June 2006 refusing an extension of time for compliance with the self-executing order was set aside, with the court being of the view that, given the form of the order, the nearly successful attempt at compliance, the fact that the appellants had in court an updated, signed amended application and the undesirability of seeing rights of the appellants lost, time should be extended to allow an amended application to be filed—at [19].

Meaning of hearing 'in private'

SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 49

Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ, 5 October 2006

Issue

The issue in this case was what the expression 'in private' meant, in the context of holding a hearing 'in private'?

Relevance to NTA

The question raised in this appeal to the High Court was the interpretation of s. 429 of the *Migration Act 1958* (Cwlth) (Migration Act), which provides that: 'The hearing of an application for review by the Tribunal must be in private'.

Although the statutory context is somewhat different, the findings in this case may be of relevance to the interpretation of:

- section 136E of the *Native Title Act* 1993 (Cwlth) (NTA), which provides that mediation conferences held by the National Native Title Tribunal pursuant to s. 136(1) must be held 'in private, unless the presiding member directs otherwise and no party objects';
- section 154 of the NTA, which provides that the presiding Tribunal member may direct that a hearing (or part of it) for the purposes of an inquiry conducted under s. 139 is to be held 'in private' in certain circumstances;
- section 91 of the NTA, which provides that an assessor presiding over a conference held pursuant to s. 88 may, in appropriate circumstances, direct that the conference, or part of it, be held 'in private'.

Background

In this case, 'people with whom the appellant was making common cause' were present while the appellant gave evidence before the Refugee Review Tribunal (RRT). The argument put on behalf of the appellant was that privacy demanded that only the presiding RRT member, necessary officers of the RRT, the applicant and the applicant's agent or agents should be present when the applicant is giving evidence.

The Full Court of the High Court rejected this submission, finding that:

- this was 'an unduly narrow and inflexible interpretation of s 429' of the Migration Act;
- the concept of privacy 'is imprecise, and is not to be equated either with secrecy or isolation';
- 'public' and 'private' are words that are used in contrast but they do not cover the entire range of possibilities;
- since the requirement of privacy is for the benefit of an applicant, the RRT may not allow 'anyone' to be present but people required for the functioning of the RRT (including interpreters, security officers, necessary administrative staff and witnesses) are clearly contemplated by the statute, 'although privacy may require the exclusion of witnesses when they are not giving evidence'—at [21], [23] and [25].

It was noted that:

> A hearing would not be in private if, for example, a Tribunal member decided to invite a group of his or her acquaintances to be present. In such a case the hearing would not be open to the general public, but the applicant's entitlement to privacy would be disregarded.… The group of onlookers… would, vis-à-vis an applicant, properly be regarded as members of the public, but the hearing would not be open to the public because ordinary members of the public, other than members of the group of onlookers specially invited to be present, would be excluded—at [23].

Friend or supporter allowed

Subject to any powers of the RRT, their Honours said:

- it was consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing not only agents of an applicant but also the people that an applicant wanted to be present (e.g. an applicant's girlfriend or boyfriend) since: 'A meeting between A and B does not cease to be private if, by mutual consent, one is accompanied by a friend or supporter';
- there may be cases where the RRT would feel a need to impose some requirement of confidentiality upon an applicant's friend or supporter but that issue did not arise in this case—at [26] and [26].

Concurrent hearings

It was noted that s. 429 of the Migration Act does not necessarily prevent hearings of applications wholly or partly concurrently if that course was:

- dictated by the objectives stated in s. 420 of the Migration Act, which concerns the RRT's way of operating and is expressed similarly to s. 109 of the NTA;
- consistent with procedural fairness—at [27].

Their Honours said it was not difficult to think of cases, such as those involving separate applications by members of the one family, where that could be appropriate. In some circumstances, s. 429 may present an obstacle to that course but not in the circumstances of this case—at [27].

Decision

The appeal was dismissed with costs, with the court finding that, in the circumstances, the presence of the other applicants while the appellant was giving evidence did not mean the hearing was not 'in private' for the purposes of s. 429 as:

- this was consistent with the purpose of the provision and the proceedings were not open to the public;
- the other applicants present were witnesses upon whose evidence the appellant intended to rely and their presence at the hearing of his application was necessary at least for the purpose of enabling them to give evidence in his support;
- the appellant also knew that his evidence was to be used in support of their claims—at [29] and [31].

Right to negotiate—transitional provisions

***Koara People v Western Australia* [2006] FCA 66; (2006) 226 ALR 705**

Nicholson J, 9 February 2006

Issue

The issue in this case was whether the right to negotiate applied in relation to notices given under s. 29 of the 'old Act' in circumstances where the relevant claimant application had been amended to combine it with a number of other claimant

applications after the commencement of the amendments i.e. under the 'new Act'. 'Old Act' is a reference to the *Native Title Act* 1993 (Cwlth) (NTA) as it stood prior to the 1998 amendments and 'new Act' means the NTA as amended by the *Native Title Amendment Act 1998* (Cwlth) (Amendment Act). The answer to the question was not academic since 234 tenement applications would be affected by the outcome of this case.

Background

The Koara People relied on s. 39B(1A) of the *Judiciary Act 1903* (Cwlth) and sought:

- a declaration that, at all material times, there were registered native title claimants within the meaning of NTA with respect to the old Act s. 29 notices that affected any of the 'pre-combination' applications made on their behalf; and
- permanent injunctions restraining the State of Western Australia from doing the future acts described in those notices unless or until one of the requirements under s. 28 of NTA was satisfied.

Six claimant applications were made on behalf of the Koara People under the old Act in the period 23 December 1994 to 10 August 1995 in the Goldfields region of Western Australia. Each was registered on the Register of Native Title Claims prior to 27 June 1996.

On 20 November 1998, s. 29 notices were issued under the new Act that affected areas covered by one or more of the pre-combination claims. As a result, sub-item 11(3) of Schedule 5 to the Amendment Act (the transitional provisions) applied, which meant that the Native Title Registrar was required to use 'best endeavours' to finish considering the applications under s. 190A of the new Act (i.e. apply the new 'registration test') by the end of a prescribed four month period.

Sub-item 11(8) of the transitional provisions relevantly provides that, in considering the claims made in the six applications in accordance with sub-item 11(3), the Registrar was required to:

- have regard to any information provided by the applicant after the application was made in addition to having regard to information in accordance with subsection 190A(3) of the new Act;
- apply section 190A of the new Act as if the conditions in ss. 190B and 190C requiring that the application contain or be accompanied by certain information or other things or be certified or have other things done in relation to it also allowed those things to be provided done by the applicant or another person after the application is made; and
- advise the applicant that the Registrar is considering the claim and allow the applicant a reasonable opportunity to provide any further things or have any things done in relation to the application.

If the claims did not satisfy all of the conditions in sections 190B and 190C of the new Act, then the Registrar was required, among other things, to remove the details of the claims from the Register—see sub-item 11(9)(a).

Pre-27 June 1996 claims

Sub-item 11(11) of the transitional provisions relevantly provides that, if the claimant application was made before 27 June 1996 (as was the case with the Koara People's applications) and the Registrar removes the details of the claim from the Register under sub-item 11(9), then the new 'right to negotiate' provisions (including as modified by the transitional provisions) or the old 'right to negotiate' provisions, as the case requires, apply in relation to any old Act s. 29 notices 'as if the details of the claim had not been removed from the Register'.

In other words, if sub-item 11(11) applies, then the right to negotiate is preserved in relation to future acts covered by old Act s. 29 notices despite the fact that the relevant claim is no longer registered. The reason for 27 June 1996 being the 'cut-off' date is that this is the date on which the Commonwealth Attorney-General introduced the *Native Title Amendment Bill 1996* into the House of Representatives i.e. the date at which it because clear there was an intention to introduce the registration test.

Amended to combine

In January 1999, the Federal Court made orders to combine the six Koara applications in accordance with s. 64(2) of the new Act. The Federal Court Registrar then referred the amended application (i.e. the combined application as further amended

in February 1999) to the Native Title Registrar (the Registrar) pursuant to s. 64(4), which gave rise to a second obligation to apply the test i.e. under ss. 190A(1) of the new Act.

In March 1999, the combined application was found to satisfy the registration test but that decision was later set aside on review and the matter remitted to the Registrar—see *Western Australia v Native Title Registrar* [1999] FCA 1594. The combined application was retested, and the Registrar decided it could not be accepted for registration. An application for review of that decision was dismissed. Consequently, the combined application was not accepted for registration and all six pre-combination applications were removed from the Register of Native Title Claims in August 2003.

In these proceedings, the Koara people sought a declaration that the right to negotiate was preserved by operation of sub-item 11(11) in relation to the pre-combination applications for all notices issued under s. 29 of the old Act that affected the area covered by the pre-combination applications.

The source of the Registrar's obligation to apply the test was in dispute. The Koara People said the obligation arose under sub-item 11(3)of the transitional provisions. The State of Western Australia contended the obligation arose under ss. 64(4) and 190A(1) of the new Act and that sub-item 11(11) had no operation i.e. upon amendment of the applications under the new Act, the obligation to test under sub-item 11(3) was supplanted by the obligation arising under s. 190A(1)—at [7], [24] to [25] and [30] to [31].

The Bullen decision

The Koara People submitted (among other things) that there was an identity of legal issues between their situation and French J's decision in *Bullen v Western Australia* (1999) 96 FCR 473; [1999] FCA 1490 (*Bullen*). The state contended that *Bullen* was wrongly decided and should not be followed. *Bullen* was a case where the facts were similar. The main difference was that, while the application considered in *Bullen* had also been amended under the new Act, there was no amendment to combine as was the case in this matter.

French J considered the source of the Registrar's obligation to apply the test:

> The issue of the new Act s 29 notices gave rise to an obligation on the Registrar under Item 11(3), to consider the claim under s 190A of the new Act…It is a condition of the existence of the obligation that "no such notice has previously been given in relation to an act affecting any of the land or waters covered by the claim". This derives from par (c) of Item 11(3). The "such notice" referred to here is "a notice...given under section 29 of the new Act...". So when the Registrar proceeded to consider the application in this case under s 190A it was a consideration mandated by Item 11(3)—*Bullen* at [39].

As in this matter, the state argued in *Bullen* that sub-item 11(3) did not apply if the application was amended under the new Act on the basis that, post-amendment, the Registrar's obligation to apply the registration test arose under ss. 64(4) and 190A(1)—*Bullen* at [40].

After framing the issue of the application of Item 11 as a 'narrow question of construction', French J went on to find that:

> Where the Native Title Registrar is required to consider a claim under s 190A of the new Act by virtue of the issue of new s 29 notices and the operation of subitem 11(3) and the application is amended before that consideration is concluded, is his removal of the details of the claim from the Register, where the claim fails to pass the registration test, still able to be described as removal "under subitem (9)"? If it is, then the condition for the operation of subitem 11(11) which is imposed by par (b) of that subitem is satisfied. Paragraph (a) is also satisfied as the application was made before 27 June 1996.
>
> The obligation imposed by sub-item 11(3) to consider the application under s 190A in this case is the relevant obligation. The obligation to consider the application under s 190A by virtue of amendment under s 64(4) is subsumed by it. On this construction it is open to amend an application in order to meet the requirements of the new registration test when it is to be

applied because of the issue of new s 29 notices without losing the protection of the transitional provisions—*Bullen* at [42] to [43].

The state's contentions

The state contended, among other things, that:

- in *Bullen*, French J had overlooked sub-item 11(8);
- rather than amending the old Act applications to address the registration test, the applicant should have relied on the 'huge liberty' that sub-item provides and instead provided further information to bring their application 'up to standard';
- as sub-item 11(8) provided an opportunity to update the application without amendment, French J was wrong in taking the view that, if no step was taken to amend the claim, it would fail the registration test—at [32], [41] and [45].

Findings on the transitional provisions

Nicholson J found (among other things):

- French J's reasoning in *Bullen* was not clearly or plainly wrong and there was an identity of legal issues between this case and *Bullen*;
- the pre-combination Koara applications were not 'qualitatively different' from the combined application because the amendment to combine was made in order to satisfy the new Act requirements rather than change the nature of the claim and so this was not a reason to distinguish the reasoning in *Bullen*;
- French J's decision took the language of the transitional provisions at face value whereas the state's arguments required a 'great deal of subtle understanding of a range of provisions and do not represent either the immediately apparent intention of the statutory language';
- the interpretation accepted in *Bullen* 'does not result in the giving of carte blanche to applicants who cannot pass the registration test to have the right to negotiate' because sub-item 11(11) only applies to claimant applications made before 27 June 1996 and only in relation to s. 29 notices given under the old Act—at [54] to [56] and [58] to [59].

Decision

Orders were made:

- declaring that there were, at all material times, registered native title claimants with respect to any s. 29 notices issued prior to the commencement of the new Act that affected any area covered by the pre-combination Koara applications; and
- permanently restraining the state from granting any of the interests mentioned in those notices unless or until one of the requirements of s. 28 of the new Act was satisfied.

Right to negotiate applications

Negotiation in good faith—unregistered areas not relevant

***Dann/Western Australia/Empire Oil Company (WA) Limited* [2006] NNTTA 153**

Sosso M, 24 November 2006

Issues

In these right to negotiation proceedings, the native title party contended that the National Native Title Tribunal was not empowered to make a future act determination because the grantee party had not negotiated in good faith as required by s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA). The main issue addressed which is summarised here is whether the grantee party was required to agree to a proposed cultural heritage agreement applying to areas that were not subject the relevant registered claimant application.

Background

The grantee party lodged a future act determination application pursuant to ss. 35 and 75 of the NTA in relation to the grant of a proposed exploration permit under the *Petroleum Act 1967* (WA) (the proposed tenement). The native title party had earlier unsuccessfully challenged the validity of the s. 29 notice: see *Dann/Western Australia/Empire Oil (WA) Limited,* [2006] NNTTA 126, summarised in *Native Title Hot Spots* Issue 21.

The Tribunal reviewed the accounts of negotiations over, among other things, the terms of a heritage agreement. There were a number of Tribunal convened mediations over a period of months in late 2005 and early 2006. Ultimately, once issues relating to compensation were resolved, the remaining issue was the area over which heritage surveys would be required.

The native title party's main contentions were summarised by the Tribunal as an allegation that 'by constantly shifting the goal posts, by failing to disclose allegedly critical contractual changes and by engaging in intransigent and unreasonable negotiation conduct, [the grantee party] has manifestly failed to negotiate in good faith'—at [23] to [43], [56] to [57] and [66].

Scope of good faith negotiations

The Tribunal outlined the legal principles in evaluating whether negotiations in good faith have taken place and:

- confirmed that s. 32(1) does not limit the scope of negotiations but, rather, creates an opportunity for dialogue, referring to *Walley v Western Australia* [1999] FCA 3; (1999) 87 FCR 565; and
- noted that s. 31(2) relieves a negotiation party from having to negotiate about matters unrelated to the effect of the proposed tenement on the native title party's registered native title rights and interests—at [52] and [76].

The Tribunal held:

- as the native title party's registered claimant application specifically excluded certain areas, there were no registered native title rights and interests in relation to those areas and no 'legislative nexus' imposing an obligation to negotiate in good faith in respect of those areas outside the claimed area;
- it was open to the native title party to seek protection for a greater area but a refusal by the other parties to negotiate heritage protocols for areas where there were no registered rights and interests did not amount to a failure to negotiate in good faith;
- the evidence did not support a finding of dishonesty on the part of the grantee;
- it was not open to the Tribunal to decide whether or not there had been negotiations in good faith on the basis of the Tribunal's view of the reasonableness of the substantive offers;
- rather, the Tribunal was required to determine if there has been a genuine attempt to reach agreement—at [76] to [78] and [82], referring to *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 321.

Decision

The grantee party was found to have negotiated in good faith, as required by s. 31(1)(b), and so the Tribunal was empowered to inquire into, and make a s. 38 determination, in relation to the grant of the proposed tenement—at [85].

Non-compliance with Tribunal directions—dismissal by springing order

***Velickovic/Western Australia/Saunders* [2006] NNTTA 76**

DP Sumner,15 June 2006

Issue

The issue addressed here was whether it was appropriate for the National Native Title Tribunal to impose springing orders whereby expedited procedure objection applications would stand dismissed if there was non-compliance with Tribunal directions.

Background

The Tribunal wrote to all the parties giving notice of the proposed dates for compliance with directions. Given the native title party's history of non-compliance with Tribunal directions in other matters, submissions were also sought on whether a springing order dismissing the objections for non-compliance with directions pursuant to s. 148(a) of the *Native Title Act 1993* (Cwlth) (NTA) should be made. There was no submission by the native title party.

The Tribunal:

- referred to the native title party's pattern of non-compliance with directions in recent years which had resulted in the dismissal of previous objection applications;
- was satisfied that a springing order was justified in this case—at [19] to [21], referring to *Teelow v Page* [2001] NNTTA 107; (2001) 166 FLR 266 at [10] to [18] and *Dixon v Northern Territory* [2002] NNTTA 48; (2002) 169 FLR 103 at [24] to [25].

It was noted that:

- any future right to negotiate applications made by the native title party would be subject to springing orders when the Tribunal made directions in the relevant matter;
- it was still open for the native title party to make submissions on the issue of springing orders—at [21] to [22].

Decision

The expedited procedure application was dismissed pursuant to s. 148(b) NTA—at [23].

No arbitral power if no registered claim or determination

***Miriuwung Gajerrong #1 (Native Title Prescribed Body Corporation) Aboriginal Corporation/Western Australia/Seaward Holdings Pty* [2006] NNTTA 74**

Sumner DP, 13 June 2006

Issues

The issues in this National Native Title Tribunal inquiry were whether:

- the proposed grant of exploration licence under the *Mining Act 1978* (WA) (Mining Act) was a future act attracting the expedited procedure: see ss. 29(7) and 237 of the *Native Title Act 1993* (Cwlth) (NTA);
- business activities were included within the scope of social and community activities for the purposes of s. 237(a);
- the Tribunal could take into account proposed exploration activities over an area that was not the subject of a either a registered claimant application or a determination recognising the existence of native title.

Background

The State of Western Australia (the government party) issued two notices under s. 29 of the NTA, each of which related the proposed grant of an exploration licence in the East Kimberley region. Both notices related to the same grantee party and included a statement that the government party considered the proposed grants attracted the expedited procedure—see s. 29(7).

The native title party, at the time consisting of the registered native title claimant in relation to a claimant application made on behalf of the Miriuwung Gajerrong People, lodged two expedited procedure objection applications in response, in November 2004 and February 2005 respectively.

In May 2004, after the objections were lodged, the Federal Court made determination by consent that native title existed over certain areas, some of which overlapped the proposed licences. In August 2005, the Miriuwung Gajerrong #1 (Native Title Prescribed Body Corporation) Aboriginal Corporation was registered on the National Native Title Register as the registered native title body

corporate and so, pursuant to s. 30(1)(c), became the native title party in the future act inquiry in place of the registered native title claimants.

The first of the proposed licences overlapped around 6% of the area where native title existed. The second overlapped over 60% of that area. Each licence was considered separately.

The first licence

In relation to the first proposed licence, as noted earlier, there was a very limited overlap between the area it was to cover and the area where native title existed i.e. about 6%. Therefore, it was noted that:

> The question which arises is whether the Tribunal can take into account the interference and disturbance referred to in s 237 where the exploration activities take place over an area which is not the subject of a registered claim or determination of native title—at [50].

Exploration activity over the whole of the licence area was considered before considering the implication of the small overlap, with the Tribunal noting that, in relation to both ss. 237(a) and (b), there was a real risk of direct interference if there were no negotiations between the parties—at [51] and [57].

However, there was no direct evidence in relation to the overlap area and so the Tribunal held there was not likely to be interference from exploration activities in the overlap area—at [59] to [60] and [73].

First licence—area not subject to claim or determination

If the Tribunal was not entitled to have regard to interference of the kind referred to in s. 237 that occurred outside of the overlap area, then it appeared the expedited procedure would apply to the grant of the first licence.

Therefore, the Tribunal sought submissions as to the effect (if any) on its power (or 'jurisdiction') in relation to proposed exploration activities over the area that was not the subject of either a registered claimant application or the determination recognising the existence of native title i.e. more that 93% the proposed area of the first licence. The native title party provided submissions which were considered by the Tribunal—at [60] to [62].

After consideration of the statutory scheme, it was found (among other things) that:

> A native title party [for the purposes of a s. 237 inquiry] is…either a registered native title claimant or a registered native title body corporate 'in relation to any of the land or waters that will be affected by the act'…It is a native title party who may object to the expedited procedure (ss 32(4), 75) or make an application for a future act determination (ss 35, 75). It is apparent that if there is no native title party in relation to any of the land or waters affected by the act then the right to negotiate provisions do not apply to the tenement (see s 30(4)).
>
> On the other hand, a registered native title claimant or registered native title body corporate becomes a native title party as long as the area of the registered claim or determined native title rights and interests overlap the proposed tenement to 'any' extent. That is the present case as there is a registered native title body corporate in relation to 6.36 per cent of the proposed tenement area. The existence of this overlap means that a native title party exists with a right to object to the expedited procedure and the Tribunal has jurisdiction to conduct an inquiry into the objection. However,…the right to object does not mean that, on the balance of the tenement area, the Tribunal is required to assume that registered native title rights and interests exist or to in effect make a decision that they exist. To require the Tribunal to make an assumption or a decision of this kind in the absence of a registered claim or determination over the area is…contrary to the right to negotiate scheme. The right to negotiate is based on the existence of a registered native title claimant or registered native title body corporate. The key concept present throughout the provisions is the existence of registered native title rights and interests which involves entries on either the National Native Title Register (determined rights) or the Register of Native Title Claims (claimed rights) (s 30(3))—at [67] to [68], referring to *Andrews v Northern Territory* [2002] NNTTA 170; (2002) 170 FLR 138; *Anaconda Nickel Ltd v Western Australia* [2000] NNTTA 366;

(2000) 165 FLR 116; *Mineralogy Pty Ltd v National Native Title Tribunal* [1997] FCA 1404; (1997) 150 ALR 467.

In regard to s. 237(a) and (b), it was noted (among other things) that:

- consideration of social or community activities and sites outside a proposed tenement area may be appropriate but there must be a 'connection, relationship or nexus' between the 'offsite' activities or sites and the issues to be considered under s. 237, referring to *Silver v Northern Territory* at [33] to [34];
- the Tribunal does not have a broad mandate to assume or decide that there are native title holders in relation to a proposed tenement area when there is no registered claim or determination made over it—at [70] and [72] to [73].

The High Court case of *Yanner v Eaton* [1999] HCA 53: 201 CLR 351 was considered, where s. 211 of the NTA was found to be available as a defence to a prosecution under the *Fauna Conservation Act 1974* (Qld) in relation to an area where it appeared there was neither a registered claim nor a determination recognising the existence of native title. Section 211 permits 'native title holders' to do certain activities for certain purposes in the exercise or enjoyment of their native title rights and interests.

The question was whether this decision was authority for the proposition that the Tribunal could assess evidence and make findings in relation to the existence of native title rights and interests where there is no registered claim or determination of native title in relation to the relevant areas. It was found that:

> [T]his course of action is not open to the Tribunal in proceedings involving the right to negotiate where Parliament has provided for a specific procedure for the issue of who are native title holders to be determined…The right to negotiate provisions of the Act are a discrete part of the Act which gives [registered native title] claimants and determined holders of native title certain rights if specific procedures are followed. If for some reason they are not followed, it is not for the Tribunal to consider evidence (however complex or simple that might be) and decide that persons are native title holders for the purposes of the right to negotiate and s 237—at [74].

Expedited procedure applied to grant of first exploration licence

The Tribunal determined that the grant of the first licence was a future act that attracted the expedited procedure.

Second licence

As noted above, 60% of the area that would be subject to the grant of the second licence was also subject to the determination recognising the existence of native title. The Woolah Aboriginal community was located nine kilometres south-west of the second licence and Mandangala (Glen Hill) Aboriginal community lay within it and was also within the area where native title existed.

Interference with the carrying on of the community or social activities

The first limb of s. 237 provides that a future act is an act attracting the expedited procedure if it is 'not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders…of native title in relation to the land or waters concerned': s. 237(a).

As there was an established community of some size in a central position and sufficient evidence of community and social activities within the area of the second proposed licence which overlapped the area where native title existed, it was found that:

- the Aboriginal community engaged in a broad range of social and community activities at a high intensity;
- the relevant pastoral leases were under Aboriginal control and it was unlikely the social and community activities had been subject to access restrictions for hunting and gathering activities;
- therefore, there was a likelihood of direct interference with the carrying on of the community or social activities of the native title holders—at [36], [37] and [47].

Social or community activities under s. 237(a) do not include business activities

The native title party contended that present and future business activities, including tourism, a plant nursery, a worm farm and in relation to a pastoral lease, were activities of a social or community kind that were likely to be directly interfered with by the grant of the second exploration licence.

The Tribunal noted that:

- an inquiry in relation to s. 237(a) is directed at the likelihood of interference of activities which are a manifestation of registered native title rights and interests, referring to *Silver v Northern Territory* [2002] NNTTA 18; (2002) 169 FLR 1 at [58] and *Ward v Northern Territory* [2002] NNTTA 104; (2002) 169 FLR 303 at [59];
- on that basis, the business activities referred to could not be said to arise out of native title rights and interests and are only related to them in incidental ways, in that the owners of the businesses are native title holders;
- the word 'social', in the context of s. 237(a) does not, in its ordinary use, encompass business or commercial activity—at [31] to [34].

Likelihood of interference with sites of particular significance

The second limb of s. 237 provides that a future act is an act that attracts the expedited procedure if it is 'not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders…of the native title in relation to the land or waters concerned': s. 237(b).

The evidence in relation to the second licence was sufficient to indicate there were a number of sites of particular significance to the native title holders. A search of the Register of Aboriginal Sites revealed five registered sites within, or overlapping, the second proposed licence, along with four 'protected areas' under s. 19 of the *Aboriginal Heritage Act 1972* (WA) (AHA). The government party relied upon the provisions of ss. 5, 17 and 18 of the AHA as a regulatory regime that protected sites of significance.

The Tribunal noted that attempts at reaching an agreement over heritage protection had failed and that the grantee party had provided no evidence as to its intentions. The matter was, therefore, determined on the basis that the rights given under the Mining Act would be exercised to the full—at [39] to [45], referring to *Smith v Western Australia* [2000] NNTTA 239; (2000) 163 FLR 32 at [34] to [35].

It was found that:

- given the number of sites identified, the area was relatively site rich;
- as a consequence, there was a real risk of direct interference, inadvertent or otherwise, unless negotiations under s. 31 of the NTA took place and either agreement was reached or an arbitral inquiry held to explore the effect of the grant of the second licence on the registered native title rights and interests;
- the determination recognising the existence of native title related to more that 60% of the proposed licence area and, on the evidence, within that part of the proposed licence area there sites they were likely to be interfered with—at [46] to [47].

Second licence did not attract the expedited procedure

On the basis of the findings summarised above in relation to ss. 237(1)(a) and (b), it was found that the proposed grant of the second exploration licence was not a future act that attracted the expedited procedure and so the right to negotiate applied. In the light of this finding, it was not necessary to consider s. 237(c)—at [48] to [49].

Legislative protection of significant sites and heritage agreements

Parker/Western Australia/Ammon [2006] NNTTA 65

Sumner DP, 2 June 2006

Issue

The issues before the National Native Title Tribunal summarised here were whether:

- a proposed future act was an act attracting the expedited procedure under s. 32(4) of the *Native Title Act 1993* (Cwlth) (the NTA); and
- a Regional Standard Heritage Agreement should be taken into consideration.

Background

The area that was to be subject to the proposed exploration licence dealt with in this matter overlapped three registered claimant applications made, respectively, on behalf of the Martu People, the Innawonga and Bunjima People and the Nyiyaparli People. The native title party authorised by the Martu People lodged an objection to inclusion of the statement in the s. 29 notice that the expedited procedure applied to the grant of an exploration licence: see ss. 29(7), 32 and 237.

The grantee party raised the existence of a Regional Standard Heritage Agreement (RSHA) executed by the Pilbara Native Title Service on behalf of the native title party on 27 January 2005. The terms of RSHA included agreement by the native title party not to object to the inclusion of a statement in a s. 29 notice that the government party considered the proposed future act was one that attracted the expedited procedure. The RSHA provided that a native title party would withdraw an existing objection within seven days of the agreement, not lodge any further objections to the grant and enter into any further agreement necessary to perfect the grant. The Innawonga and Bunjima People and the Nyiyaparli People were both parties to the RSHA.

Counsel for the native title party advised the Tribunal that he was not aware of the RSHA when he lodged the expedited procedure objection application and that his clients had not authorised the execution of the RSHA.

Preliminary issue—status of the RSHA

The presiding member held:

- even if the RSHA was a valid agreement, the Tribunal had no power to make a summary determination that the expedited procedure is attracted on the basis of the RSHA;
- where the validity of an RSHA is disputed, the Tribunal is obliged to conduct an inquiry into the objection and make a determination based on s. 237 factors—at [9].

The Tribunal noted the fact that the grantee entered into a RSHA was a relevant factor when considering the grantee's intentions for the purposes of s. 237(b).

Ministerial authorisation pursuant to the Mining Act

The grantee party indicated it intended exploring for iron ore. The native title party noted this required ministerial authorisation and endorsement of the licence pursuant to s. 111 of the *Mining Act 1978* (WA) (Mining Act) and argued that this involved a separate future act.

The Tribunal rejected this contention for (among others) the following reasons:

- the nature of an exploration licence had been dealt with in *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 (*Walley*) at [24] to [35];
- there was no evidence to show that iron ore exploration was significantly different to exploration for other minerals;
- the full extent of the rights conferred by an exploration licence is found in s. 66 of the Mining Act and authorisation under s. 111 does not expand those rights;
- the future act which affects native title is the grant of an exploration licence—at [11].

Legislative protection of sites of significance

Among other things, a future act is an act attracting the expedited procedure if it is 'not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders…of the native title in relation to the land or waters concerned'—see s. 237(b). The major issue in this matter was whether this limb of s. 237 was satisfied, taking into account the state regime in relation to site protection and other matters.

The native title party contended that a particular site (called *Barimunya*) was an important site that was unlikely to be adequately protected under the *Aboriginal Heritage Act 1972* (WA) (AHA) and gave evidence to refute the presumption of regularity usually relied on by the Tribunal that the grantee party would comply with all applicable law and regulations—at [31] and [49] to [54].

The government party contended that the Tribunal was bound by the decision in *Little v Western Australia* [2001] FCA 1706 *(Little)* to find that the chance of interference with the site in question was

remote, given the protective effect of the AHA. It was noted that, while the Tribunal was entitled to give considerable weight to the government party's site protection regime, this did not mean that, in all cases, that regime would be adequate to make the s. 237(b) interference unlikely —at [34] to [35].

The Tribunal outlined the predictive approach which applies to all three limbs of s. 237 and adopted the findings in earlier decisions on the regulatory regime in West Australian relevant to site protection, including *Little* at [69] to [70] and [72] and *Walley* at [50] to [51].

The site in question was found to be a site of particular significance in accordance with the Martu People's traditions. The grantee advised it would comply with all legal obligations, endeavour to avoid Aboriginal sites and, in the event of any need for disturbance, approval to do so would be sought pursuant to s. 18 of the AHA. The Tribunal noted that:

> [T]he possibility that a s 18 application may be made is not…decisive…in leading to a conclusion that there will be interference with sites of particular significance…Its importance in deciding whether there is a real risk of interference with sites of particular significance will depend under the predictive assessment approach on all the circumstances. If the evidence were to be that exploration could not be carried out without avoiding sites or that a s 18 application was virtually inevitable then these circumstances would need to be given greater weight. It would still, however, need to be considered in the context of the number of sites, the consultative mechanism in place with the native title party through a heritage survey or otherwise and the attitude of the grantee party to site protection—at [47].

Apart from the presumption of regularity, the Tribunal was satisfied the grantee party would comply with its legal obligations and therefore interference was unlikely because (among other things):

- the existence of the site was well known and it had been the subject of earlier site surveys;
- the most important part of the site area delineated by the Department of Indigenous Affairs (DIA) was within the area covered by the Innawonga and Bunjima Peoples' registered claims and any exploration would be the subject of a site survey conducted pursuant to the RSHA—at [42], [45] to [48].

Extent of Aboriginal site

The grantee party disagreed with the native title party's depiction of the extent of the relevant site. To resolve this issue, the Tribunal noted the AHA applies to:

- any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- any place which, in the opinion of the committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the state;
- any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed—see s. 5 of the AHA.

The Tribunal held:

- there is nothing in the AHA or the related regulations which qualifies the Aboriginal sites covered by s. 5 of that Act and requires a site to be defined by geospatial references;
- geospatial boundaries are given to sites by administrators and may include a large buffer zone around the actual site;
- for an offence under s. 17 of the AHA to be committed, there must be interference with a site as defined;
- the boundaries designated on map provided by the DIA, derived from the Register of Aboriginal Sites, do not necessarily reflect the true boundaries of the site;
- if the proposed licence is granted and it is proposed to explore in an area that could constitute the site in question, then it will be

necessary for a heritage survey to be carried out to ascertain the precise boundaries—at [59] to [61] and [66].

Decision

The Tribunal determined that the grant of the proposed exploration licence was an act attracting the expedited procedure.