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Contents

Page

RECENT CASES 2

New Cases – Tribunal alert service 2

ILUA registration decision reviewed 2

Murray v Registrar [2002] FCA 1598 2

Costs 7

Murray v Registrar [2003] FCA 45 7

The Ngalakan People v Northern Territory of Australia [2003] FCA 23 8

Representation 8

Rubibi v State of Western Australia [2003] FCA 62 8

FUTURE ACT APPLICATIONS 10

Objection to the application of the expedited procedure 10

Billy Coolibah and Ors on behalf of the Gurdanji and Garawa Peoples/Ashton Exploration Australia Pty Limited/ Northern Territory 10

Gabriel Hazelbane and Ors on behalf of the Warai and Angwinmil Peoples and Gabriel Hazelbane and Ors on behalf of the Wagiman, Warai and Jawoyn Peoples/Imperial Granite and Minerals Pty Ltd/ Northern Territory 11

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples and April Bright & Ors on behalf of the Mak Mak Maranunggu and Werat Groups/Falconbridge (Australia) Pty Ltd/Northern Territory 12

Robert Patrick Markham and Ors on behalf of Wagiman, Dagoman and Jaywon Peoples 12

Queensland future act decision 12

RAG Australia Coal P/L v Barada Barna Kabalbara & Yetimarla [2203] QLRT 7 12

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Recent Cases

New cases – Tribunal alert service

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ILUA registration decision reviewed

Murray v Registrar [2002] FCA 1598

per Marshall J, 20 December 2002

Issues

This decision deals with an application under s. 5 of the *Administrative Decisions Judicial Review Act 1977* (Cwlth) (AD(JR) Act) seeking judicial review of a decision to register an indigenous land use agreement (ILUA) made by one of the Native Title Registrar's delegates. This is the first time a delegate's decision to register an ILUA has been challenged. As at 17 February 2003, 67 ILUAs were registered.

Background

The parties to this area agreement (as defined in s. 24CA to s. 24CE of the NTA) were Ms Carolyn Briggs on behalf of the Boonerwung People and Blairgowrie Safe Boat Harbour Ltd (the Blairgowrie). The agreement deals with the building of a safe harbour on Crown land and waters in Victoria over which there was no native title claim. Under the agreement (amongst other things), consent was given for the doing of any future acts that might be, or have been, involved in the construction of the harbour.

Certified and uncertified area agreements

The making of an area agreement must be authorised in accordance with s. 251A of the NTA. The application for registration of the agreement must either include a statement addressing compliance with s. 251A or have been certified by all the representative Aboriginal/Torres Strait Islander bodies for the agreement area – see s. 24CG.

Uncertified area agreement

In this case, the application for registration was not certified. Therefore, there had to be a statement in the application for registration to the effect that:

- **all** reasonable efforts have been made to ensure that **all** persons who hold or **may hold** native title in relation to the agreement area **have been identified** – s.24CG(3)(b)(i);
- all persons **so identified** have authorised the making of the agreement – s. 24CG(3)(b)(ii) and s. 251A; and
- **all** representative bodies for agreement area have been consulted as part of the process of identifying those persons – s. 24CG(3)(b)(i).

The grounds on which the Registrar should be satisfied that these requirements have been met must also be set out briefly – s. 24CG(3)(b).

Native title group must be a party

Subsection 24CD(1) provides that all persons in the 'native title group' must be a party to the agreement. The 'native title group' in this case was to consist of 'one or more' of the following:

- any person who claims to hold native title in relation to the area;
- any representative body for that area – s. 24CD(3).

Notice of application for registration

Following the delegate's decision that the area agreement complied with the requirements of s. 24CB to s. 24CE (see s. 24CA), notice was given to (amongst others) Mirimbiak National Aboriginal Corporation, the representative Aboriginal/Torres Strait Islander body (representative body) for the area concerned, as required under s. 24CH(1)(a)(iii).

Conditions for registration

At the close of the notice period, the delegate had to consider whether the two conditions for registration of an uncertified area agreement were met. The first condition was met i.e. no native title claim had been filed over the agreement area within the notice period – see s. 24CL(1) and s. 24CL(2) of the NTA.

The second condition is that the delegate considers that the requirements found in s. 24CG(3)(b) (relating to the authorisation of the agreement) 'have been met' – s 24CL(3). (The requirements of s. 24CG(3)(b) are referred to below as the identification and authorisation process.)

In considering this matter, the delegate must take into account:

- the statements made in the application for registration; and
- any information given to the delegate by any representative body or by any other body or person – s. 24CL(4)(a) and s. 24CL(b)

(Any other matter or thing may also be taken into account, but it need not be – s. 24CL(4).) If both of these conditions are met, then the agreement must be registered. However, if they are not, then the delegate **must not** register the agreement – s. 24CL(1).

Challenge to authorisation and party status

During the notice period, the principal legal officer of Mirimbiak, who was acting for a group of Aboriginal people living in Tasmania (the Tasmanian group), gave the delegate information relevant to the second condition. The thrust of the submission was that the Tasmanian group should have been:

- consulted about the agreement and authorised it; and
- parties to it because they were part of the 'native title group'.

Procedural fairness

Mirimbiak sought copies of the agreement and provided some genealogical material in relation to the Tasmanian group to the delegate on a confidential basis. The delegate was not prepared to release a copy of the ILUA both because it was not relevant to the second condition for registration and on confidentiality grounds.

The delegate suggested a process for dealing with the issues raised by Mirimbiak, which included Mirimbiak making submissions as to why the ILUA should not be registered and Ms Briggs being granted a right of reply. Mirimbiak and its clients were provided with the material that went to the identification and authorisation process on a confidential basis. Similarly, the genealogies and other information from Mirimbiak were provided to Ms Briggs on a confidential basis. A letter was also sent to Ms Briggs outlining in some detail the matters that needed to be addressed to assist the delegate in deciding whether or not the second condition for registration had been met. The procedure adopted and some of this correspondence is set out in detail at [13] to [31] of the judgment.

Delegate's decision

As required by s. 24CL(4), the delegate considered the issues raised and provided further information and assistance. At the end of the process, she decided that the second condition was met and registered the agreement – see [31]. The application for judicial review was then filed in the Federal Court.

Grounds for review

The decision to register the agreement was challenged on the bases that:

- not all of the 'native title group' were parties to the agreement – s. 24CD(1) and s. 24CD(3);
- the native title representative body for the agreement area had not been notified that the ILUA was to be made, as required under s. 24CD(7);
- there was a reasonable apprehension that the delegate was biased; and
- the delegate had made several errors of law.

No requirement to provide copy of agreement

His Honour Justice Marshall found that:

- that the delegate had provided cogent reasons as to why the ILUA should not be made public;
- in any event, the failure to provide the ILUA does not bear upon the decision to register;
- the delegate was not obliged to show the ILUA to the party challenging its registration;
- no material disadvantage flowed from the late provision of the agreement – at [68] and [77].

It was noted that s. 24CH(2), which sets out the matters to be included in the notice of the application to register, does not refer to the ILUA itself.

Meaning of 'native title group'

Mirimbiak submitted that the agreement should not have been registered as it did not comply with the requirement under s. 24CD(1) that all persons in the native title group must be parties to the agreement because:

- the Tasmanian group were people that claim to hold native title in that area;
- the definition of 'all' persons should be read strictly with s. 24CD(3) i.e. the native title group should consist of 'any person who claims to hold native title' in relation to the agreement area.

The delegate was satisfied that the requirement in s. 24CD(1) that 'all persons in the native title group… must be parties' had been met because one of the parties to the agreement claimed to hold native title. This was based on the delegate's interpretation of the relevant definition of 'native title claim group' found in s. 24CD(3) i.e. that group 'consists of **one or more** of the following':

- any person who claims to hold native title in relation to the agreement area;
- any representative body for the area.

His Honour agreed with submissions made on behalf of Ms Briggs that:

- the purpose of the ILUA provisions is to promote agreements; and
- subsection 24CD(3) should be read so as to enable 'any one person who claims to hold native title to begin… and carry forward the process of negotiating an ILUA' – at [44] and [48].

The implication in the judgment is that requirements of s. 23CD have to be read in conjunction with the requirement that anyone proposing to make an area agreement must:

- use all reasonable efforts to identify all those persons who hold or may hold native title to the agreement; and
- get the authority of those persons to make the agreement: s. 24CG(3) and s. 251A.

It is pursuant to that authority that the 'native title group' can then enter into the agreement and seek to have it registered, the effect of which will be (among other things) that the native title holders for the agreement area, who have authorised the making of the agreement, are bound by it 'in the same way' as the 'native title group' that is a party to the agreement: see s. 24EA(1)(b).

At [46], Marshall J also referred to the Explanatory Memorandum to the Native Title Amendment Bill 1997 where what became subsection 24CD(3) is discussed in the following terms:

> If [as in this case] there are not any registered native title claimants or registered native title bodies corporate in relation to land or waters in the area, the native title group [for an area agreement] is **any** person who claims to hold native title in relation to the land or waters covered by the agreement **and/or** any representative… body for the area – at [7.14] and [7.15] of the EM, emphasis added.

His Honour concluded that, in these circumstances, s. 23CD(1) was satisfied provided at least one person claiming to hold native title (in this case, Ms Briggs) was a party to the area agreement – at [48]. That conclusion was 'fortified' by the potential difficulties that may be placed in the path of registering these agreements if the alternative view was taken (i.e. that *every* person identified as a person who holds or 'may' hold native title in the agreement area must be a party to the agreement).

No representative body at the relevant time

Subsection 24CD(7) requires that if none of the representative bodies for the agreement area is a party, then the native title group must inform at least one of those bodies of its intention to enter the agreement. The application for registration must be accompanied by a written statement that this has been done: see the Native title (Indigenous Land Use Agreements) Regulations 1999. It was submitted that no such notice was given. The application for registration stated that Mirimbiak had been told of the intention to enter the agreement at a meeting in April 2000. The agreement was entered into in September 2000.

Mirimbiak is now a recognised representative body but this was not the case in September 2000. At that time, Mirimbiak was funded under s. 203FE to perform the functions of such a body. It was held that this did not convert it into a recognised representative body at the relevant time. Nor were there any other recognised representative bodies for the agreement area at that time. Therefore, s. 24CD(7) was not relevant to the delegate's decision as to whether or not the agreement was an area agreement as defined in s. 24CA. In these circumstances, the question of whether or not, as a matter of fact, Mirimbiak was informed in April 2000 did not need to be determined – at [53] and [55].

Marshall J also said that, if he was wrong about that point, then there was nothing in the NTA to indicate that a failure to comply with s. 24CD(7) should lead to the 'invalidity of the agreement': at [54] referring to *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93]. With respect, compliance with s. 24CD(7) does not go to the validity of the agreement. Rather, it is one of the requirements that must be met before the agreement can be said to be an indigenous land use agreement: see s. 24CA.

No error of law

The court found that there was nothing before the court to show that the delegate had:

- taken irrelevant considerations into account; or
- failed to take relevant considerations into account – at [82] to [86].

The submission that the delegate made an error of law by relying upon the opinion of Ms Briggs as to whether or not the Tasmanian group were 'persons claiming to hold native title' was also rejected. Marshall J noted that the delegate decided that, by the date on which the agreement was signed, Ms Briggs and her group had come to the view that the Tasmanian group were not people who 'may hold native title' in relation to the agreement area. This led them to conclude that the authority of the Tasmanian group was not required. In all the circumstances, the delegate found that it was reasonable for them to hold that view.

His Honour found that the submissions made on behalf of Ms Briggs, which his Honour accepted and which included the following, 'comprehensively' answered the submission:

> [The delegate] independently made this crucial finding herself… That finding does not… depend on any view as to the proper interpretation of [s.] 24CG(3(b). It is simply a finding of fact regarding the reasonableness of the steps taken and the view formed by [Ms Briggs and those she represents] – at [76].

His Honour held that the delegate had reached a considered view and that this matter was dealt with 'comprehensively' in her reasons for the decision – see [72]. The delegate did not rely upon the 'subjective and unsupported statements' of Ms Briggs:

> [The delegate] was entitled to act upon information provided to her and [to] either accept or reject it as appropriate whilst exercising her discretion in a proper way and/or making appropriate findings of jurisdictional fact – at [73].

Further, the delegate's view that 'all persons who may hold native title' in s. 23CG(3)(b)(i) was a reference to people 'who at least are able to make out a prima facie case that they hold native title, within the meaning of s. 223' of the NTA demonstrated no error of law. This was not a misstatement of the test. Rather, it was an observation that 'a person should not necessarily be regarded as someone who may hold native title simply because they say they do' – at [75].

The submission that the delegate incorrectly applied s. 24CG(3)(b) by inquiring into the events that happened after the agreement was made was also rejected.

Role of the delegate

It was submitted that the delegate had purported to exercise judicial power in the process of making her decision. The basis for the allegation was that, in finding that s. 24GC(3)(b) was met, the delegate formed the view that the Tasmanian group were not people who may hold native title, which is a matter reserved for the Federal Court. His Honour found that, in making the decision, the delegate:

> [D]etermined facts and applied concepts, as defined in the Act, and came to a certain view. In doing so…[she] did not exercise judicial power. Her decision in no sense involved a binding consideration of the legal rights and obligations of the Tasmanian group – [95].

The registration of an ILUA does not involve the exercise of judicial power. It does not involve determining the pre-existing rights or obligations arising from the operation of the law on past events. Rather, upon registration, an ILUA creates new rights and obligations – at [100].

When making the decision, the Registrar's delegate may have to assess factual and legal matters but this does not necessarily involve any exercise of judicial power. The Registrar exercises administrative power and has an administrative function – at [100].

Apprehension of bias not shown

It was alleged that the proactive approach by the delegate in specifying the matters to be addressed by Ms Briggs in relation to the identification and authorisation process constituted a reasonable apprehension of bias. The allegation was that 'a reasonable bystander would have entertained a reasonable fear that [the delegate] was incapable of bringing an unprejudiced mind to the decision' – at [56]. (Reliance was also placed upon some internal correspondence that did not involve the delegate. This was found to have no relevance to the question of reasonable apprehension of bias) – at [65].

Marshall J found that:

- the reasonable person should be one who is reasonably informed;
- a reasonably informed person would realise that the delegate was entitled to request further information when an application for registration of an ILUA is made if she was not satisfied with the material provided;
- the delegate is an administrator, not a judge in a court. The processes adopted by a delegate will, therefore, be less formal. (His

Honour actually refers to the Tribunal but, in this context, it is the Registrar – and the Registrar's delegates – who must make the decision and not the Tribunal. See s. 253 for a definition of each); and

- in these circumstances, the delegate was entitled to be more interventionist (noting that s. 24CI and s. 24CF empower the Tribunal to assist with certain aspects of the ILUA process if it is requested to do so) – at [67].

In coming to this view it was also noted that the reasons for decision to register the ILUA were 'long and deliberative and carefully set out the grounds upon which the delegate acted to register the ILUA' – at [69].

Conclusion

The application for review was dismissed and orders made for the filing of submissions as to costs.

Appeal

This decision is now subject to an appeal brought by Ms Murray against his Honour's findings in relation to the proper construction of s. 24CD(1) i.e. in circumstances where there are no registered native title claimants and no registered native title bodies corporate for the agreement area, this section is satisfied if at least one person claiming to hold native title is a party to the agreement.

Costs

Murray v Registrar [2003] FCA 45

per Marshall J, 6 February 2003

Issue

Should the applicant pay the respondents' costs in relation to the case summarised above?

Background

Ms Murray was unsuccessful in her application under the AD(JR) Act for judicial review of a decision to register an indigenous land use agreement (ILUA). Blairgowrie Safe Boat Harbour Limited (Blairgowrie) was a party to the ILUA and the second respondent in the review proceedings. In the review proceedings, Blairgowrie's joinder application (based on the company's interests in maintaining the registration of the ILUA) had been unsuccessfully opposed by Ms Murray in circumstances where the Registrar did not propose to take any active role, other than providing evidence going to the circumstances of registration i.e. there would be no other contradictor.

It was not in dispute that:

- the ordinary rule is that costs should follow the event and a successful party should receive its costs unless special circumstances justify some other order;
- an order for costs is discretionary and that discretion must be exercised judicially – at [7].

Although the review application was not brought under the NTA, His Honour Justice Marshall noted that it involved 'a consideration of the meaning of important provisions in that legislation concerning the entering into and registration of ILUAs' and was the 'first one of its kind' – at [8].

Marshall J considered that the provisions of the NTA, specifically those concerning the registration of ILUAs, were central to the review proceedings. Therefore, it was 'appropriate' to take into account the 'legislative intention' that matters which raise the correct interpretation of the NTA may be considered 'in a different context from what would otherwise ordinarily apply' – at [9]. Section 85A of the NTA provides that each party is to bear their own costs, unless the court is satisfied that any unreasonable act or omission by one party has caused another party to incur costs.

In relation to the review proceedings, Marshall J was of the view that, having regard to the public interest in determining the correct construction of the ILUA provisions, it was in the interests of justice that no order for costs should be made against Ms Murray, other than that Blairgowrie should have its costs in respect of the joinder application. His Honour

considered that opposition to that application was unreasonable, given that:

- Blairgowrie had an obvious interest in the outcome of proceedings; and
- when the joinder application was opposed, there was no other contradictor – at [10].

The Ngalakan People v Northern Territory of Australia [2003] FCA 23

per O'Loughlin J, 28 January 2003

Issue

This decision relates to an application for an order for costs made on behalf of the Ngalakan People. It relates to further argument by the Northern Territory and the native title holders heard by the Honourable Justice O'Loughlin in proceedings in which a determination of native title in favour of the Ngalakan People was made.

Background

The area the subject of the determination is situated on the southern bank of the Roper River, approximately 320 km south east of Katherine. The further argument before O'Loughlin J related to the width of the areas that had been excluded from the claim as roads over which the public had a right of way, whether or not gazetted streets had extinguished native title and whether or not the determined native title rights and interests were held on an exclusive basis.

The first two issues were resolved by his Honour in terms more favourable to the Territory than to the native title holders. The native title holders were successful in relation to the third point.

Subsection 85A(1) provides that, unless the Federal Court orders otherwise, each party to a proceeding must bear their own costs. One of the grounds upon which the court can depart from this it where it is satisfied that any unreasonable act or omission by one party has caused another party to incur costs: s. 85A(2).

Decision

The court ordered that each party pay its own costs, as this followed the 'spirit' of s. 85(1) of the NTA. It was noted that:

> [N]ative title is something new and the law is still grappling with it. The respondent, not unreasonably, required the applicants to prove their entitlement to native title and resisted… a claim for exclusivity... [T]he applicants pursued their claim… with acceptable vigour – at [16].

Representation

Rubibi v State of Western Australia [2003] FCA 62

Merkyl J, 10 February 2003

Issue

Should leave be given for a group to be represented by a person who was not legally trained?

Background

A group of Aboriginal respondents, known as the Walman Yawuru, made application under s. 85 NTA for leave to have a non-legally trained person represent them in proceedings before the Federal Court for a determination of native title. The group had been legally represented previously but were no longer able to pay legal fees.

Section 85 provides that a party may appear in person or may be represented by a barrister, a solicitor or, with the leave of the Federal Court, another person.

Leave to be represented by a non-legally qualified person had been granted previously under s. 85 in *Rubibi Community v State of Western Australia* (2001) 112 FCR 409, which involved a number of the parties to these proceedings. The court found the grant of leave in that case was 'of assistance to the court and served the interests of justice' – at [7].

The court noted that, while the power to grant such leave should be exercised sparingly, there are particular benefits in having one person represent a claimant group, particularly in cases where 'the nominated representative may be inadequately but nonetheless better qualified to represent the group members than the group members themselves' – at [11].

Decision

Leave was granted, subject to the followings conditions:

- the representation was confined to matters that the Walman Yawuru respondents had an interest in contesting;
- as the nominated representative was female, if male gender restricted evidence is to be given, then either male Walman Yawuru or such other male persons to whom the court grant leaved, will represent the respondents in relation to that evidence;
- the court may at any time, either of its own motion or upon application by any party, revoke or vary these conditions; and
- the grant of leave is not to be used as a basis for varying any time fixed for the taking of interlocutory steps in the matter – at [13].

Future act applications

The determinations made by the Tribunal that are summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA i.e. objections to the application of the expedited procedure and future act applications. Significant Tribunal determinations are also reported in the Federal Law Reports. The full text of all Tribunal determinations is available at http://www.nntt.gov.au/futureact. For further information about right to negotiate proceedings, see the *Guide to Future Act decisions* at http://www.nntt.gov.au/futureact/Info.html.

A summary of a recent future act decision made by the Queensland Land and Resources Tribunal is also included. The full decision is available in the Queensland Tribunal's web site at http://www.lrt.qld.gov.au.

Objection to the application of the expedited procedure

Billy Coolibah and Ors on behalf of the Gurdanji and Garawa Peoples/Ashton Exploration Australia Pty Limited/ Northern Territory

NNTT DO01/57, Prof. D. Williamson QC, 21 October 2002

Issue

The Northern Territory had issued a s. 29 notice which included a statement that it was of the view that the expedited procedure applied to the proposed grant. For a future act to attract the right to negotiate, it must satisfy the three criteria found in s. 237 of the NTA. Amongst other things, the Tribunal gave consideration to the second criterion i.e. was the proposed grant 'likely' to interfere with areas or sites of particular significance? – see s. 237(b) of the NTA.

Background

Ashton Exploration Australia Pty Ltd (the grantee party):

- put into evidence the Community Relations Policy and the Environmental Policy of its parent company, Rio Tinto Exploration Pty Ltd (Rio Tinto); and
- filed an affidavit stating that the Northern Land Council (the native title party's representative) and Rio Tinto had entered into a Memorandum of Understanding (MOU), which set out a co-operative approach to the development of mining and exploration projects and dealt with the recognition of, and respect for, the native title party's rights and responsibilities.

Annexed to the MOU was a model agreement that dealt with a wide range of matters, including co-operation, consultation, cultural clearances and protection of sacred sites and objects. The Tribunal understood that the grantee party had adopted policies and arrangements similar to those of the parent company – see [39] to [45].

Decision

The Tribunal rejected the 'precautionary principle' that the mere possibility of interference should be taken into account. The proper test is 'likely' to interfere with areas or sites of particular significance. Contextual risk evaluation for s. 237(b) should include:

- the regulatory regime in the Territory;
- sacred site legislation;
- prior and current lawful activities in the area; and
- the intentions of the grantee party, including the MOU – at [96].

The Tribunal held that, in the circumstances, it was extremely likely appropriate consultation would take place to avoid the risk of

interference with areas or sites of particular significance. On the evidence, the Tribunal found there was no real chance or risk that the proposed act would interfere with an area or site of particular significance – at [100].

Gabriel Hazelbane and Ors on behalf of the Warai and Angwinmil Peoples and Gabriel Hazelbane and Ors on behalf of the Wagiman, Warai and Jawoyn Peoples/Imperial Granite and Minerals Pty Ltd/ Northern Territory

NNTT DO02/45 and DO02/46, Prof. D.Williamson QC, 24 December 2002

Issue

The government party made application for the summary dismissal of DO02/45 for 'want of primary, relevant evidence'.

Background

Two native title parties (registered native title claimants) lodged a single Form 4 objection application and relied upon the same evidence in support of the objection to the proposed grant of that an exploration licence which covered land in both their claims. The government party contended one of the applications, DO02/45, should be dismissed for want of any primary relevant evidence i.e. there was no evidence relating directly to the portion of the proposed licence area that fell within the claim area of the objectors in DO02/45.

In response, the native title party argued that:

- the Tribunal's powers to dismiss an objection application are limited to s. 147, s. 148 and s. 149 of the NTA;
- the objection application was not frivolous or vexatious; and
- the affidavit material provided in DO02/46 was primary relevant evidence.

Both parties relied upon aspects of an earlier Tribunal decision: *Andy Andrews and Ors/ Exploration and Resource Development Pty Ltd/Northern Territory*, NNTT DO01/123, 124 and 125.

The Tribunal decided that:

- the objectors were not obliged to provide evidence relating to every part of the licence area, as this would be unduly onerous and impractical and, in any case, is not required by the NTA;
- it is normal for evidence to be directed to particular areas within a proposed licence area and, depending upon the nature of the matter in question, its effect may be assessed in context of the licence area as a whole;
- it was sufficient that both objectors could adopt and rely upon the affidavit evidence, even though it was confined to the area within one of the objections;
- it is necessary that an objector have standing as a native title holder with respect to some part of the proposed licence area but it is not necessary that the evidence relied upon by the objector relates to that particular part;
- the proposed future act is one and indivisible and the area with which the s. 29 notice is concerned is also one and indivisible;
- each objector is entitled to rely on any credible evidence that arguably shows that, in some respect, the act fails to attract the expedited procedure when judged by the s. 237 criteria – at [36];
- there was some direct, specific and credible evidence put forward by the objectors in DO02/46 and adopted by the objectors in DO02/45 – at [33] to [35].

Decision

The government party's application for summary dismissal of DO02/45 for want of primary relevant evidence was dismissed.

Kathleen Parry & Ors on behalf of the Wagiman, Ngangiwumeri, Malak Malak, and Kamu Peoples and April Bright & Ors on behalf of the Mak Mak Maranunggu and Werat Groups/Falconbridge (Australia) Pty Ltd/Northern Territory

NNTT DO02/48 and DO02/49, Mr J. Sosso, 22 November 2002.

Issue

Is the expedited procedure an exception to the right to negotiate?

Background

The native title party submitted that the expedited procedure should be interpreted as an exception to the right to negotiate and read down in the context of the legislative scheme of the NTA. The government party referred to the decision of Carr J in *Ward v Western Australia* (1996) 69 FCR 208 at 231 rejecting a similar argument.

Decision

The Tribunal concurred with the decision of Carr J that it is not correct to view the expedited procedure as a limited exception or as somehow extraordinary. The Tribunal found that Parliament had provided for two sets of circumstances with two different procedures that are to apply, depending upon the factual circumstances. In undertaking a predictive risk assessment, the Tribunal does, in appropriate circumstances, give the objectors the benefit of the doubt. However, there is no basis for assuming that the expedited procedure is exceptional and assessing the s 237 criteria in such a manner – at [55].

Robert Patrick Markham and Ors on behalf of Wagiman, Dagoman and Jaywon Peoples

NNTT DO02/51 and DO02/52, Hon C.J. Sumner, 29 November 2002.

Use of land claim report

The Tribunal held a Land Claim Report can be received into evidence but the use to which it may be put will vary with the circumstances. Reasonably current findings of activities carried out by traditional owners who are also registered native title claimants over the specific area of the proposed grant may be able to be formally adopted under s. 146(b) of the NTA or be given weight as evidence. In other cases, Land Claim Reports may be of less weight or completely irrelevant – at [44] to [47].

Queensland future act decision

RAG Australia Coal P/L v Barada Barna Kabalbara & Yetimarla [2003] QLRT 7

per Koppenol P and Kingham DP, 30 January 2003

Issue

Should the Queensland Land and Resources Tribunal grant a stay of proceedings and declaratory relief sought by the Barada Barna Kabalbara and Yetimarla People, the Wiri People #3, the Wiri People #4 and the Breeba People (the native title parties)?

Background

The principal proceedings were five mining lease applications by RAG Australia Coal P/L and Thiess Investments P/L. An objection had been lodged in respect of one of the mining lease applications by a party other than the native title parties. The native title parties did not lodge objections to any of the mining lease applications.

At the hearing of the mining lease applications and the objection (scheduled for late March 2003), the Tribunal will also be required to

make a native title issues decision under s. 675 of the *Mineral Resources Act 1989* (Qld) (MRA). Such hearing is referred to as a 'combined hearing' under s. 671 of the MRA.

Application for stay

The application sought a stay of proceedings until:

- the mining registrar complied with s. 252A (the issue of certificate of public notice) and s. 265 (mining registrar to fix hearing a date) of the MRA;
- the State of Queensland complied with Chapter 5 of the *Environmental Protection Act 1994 (Qld)* (EPA), which relates to environmental authorities for mining activities; and
- the Tribunal made an order under s. 220 of the EPA, which relates to orders for an objections decision hearing in respect of an objection to an environmental authority (mining lease) application (the objections decision hearing).

The thrust of the native title parties' submissions was that Parliament intended that the combined hearing under the MRA should occur concurrently with an objections decision hearing under the EPA. The tribunal noted that the relief sought by way of staying the principal proceedings pending compliance with the relevant statutory provisions was apparently intended to facilitate the objective of a concurrent hearing.

Statutory compliance

In relation to the alleged non-compliance with statutory requirements by the mining registrar and the state, the tribunal took the view that it was properly seized of the applications for mining leases and native title issues decisions and that a preliminary determination of such questions (which were ones of mixed fact and law) was not appropriate.

The tribunal noted:

- that the native title parties could seek judicial review of the relevant decision or make relevant submissions at the combined hearing; and
- the difficulties associated with (and in many cases, inadvisability of) hearing preliminary questions, especially those of mixed fact and law, referring to *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 358.

Concurrent hearing

The tribunal noted that it did not have jurisdiction to convene an objections decision hearing under s. 220 of the EPA as it had not received a referral notice under s. 219. (A referral notice can only be filed if a relevant objection has been made and is current as at the close of the objection period to the application. No such objection had been made.)

Section 220 of the EPA requires the tribunal to ensure that, 'as much as practicable', the objections decision hearing under the EPA happens as closely as possible to hearings under the MRA for each relevant mining tenement. Having regard to the wording of that section, the Minister's second reading speech for the *Environmental Protection and Other Legislation Amendment Act 2000* Bill and other relevant provisions of the EPA and MRA, the tribunal did not accept that there a legislative intent was demonstrated that required there to be one single concurrent hearing of the tenure, native title and environmental issues for the mining lease applications.

Disadvantage or prejudice

The native title parties submitted that they would be disadvantaged at the combined hearing of the tenure and native title issues if they did not have access to the environmental authority documentation. The tribunal rejected this submission on the bases that:

- subsection 677(1) of the MRA does not require the tribunal to take into account the environmental impact of the proposed mining lease;

- even if the native title parties had lodged an objection to the proposed mining leases, s. 668(8) of the MRA provides that that objection may only relate to their registered native title rights and interests;
- the relevant provisions of the MRA do not refer to environmental issues because the EPA (at s. 216 and s. 217) makes express provision for objections to environmental authority applications or draft environmental authorities;
- the native title parties will have the opportunity to object to the applications for environmental authorities under the relevant EPA provisions and the tribunal is required to consider each current objection in making the objections decision; and
- section 306A of the EPA provides that if there is any inconsistency between a native title issues condition (imposed or made under a native title issues decision) and a condition of an environmental authority (mining activities), then the native title conditions prevail to the extent of the inconsistency.

Application for declaration

The native title parties also sought a declaration that the references to 'native title rights and interests' in relation to compensation trust decisions in Part 18 of the MRA are references to registered native title rights and interests that are not yet determined by the Federal Court.

All parties accepted that it was registered rights and interests that were involved prior to any Federal Court determination that native title exists. The declaration was, therefore, refused on the basis that there was no one presently existing who had a true interest to oppose the declaration sought and that the declaration would produce no foreseeable consequences for the parties.

Decision

The applications for a stay of proceedings and for declaratory relief were refused. Costs were reserved.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
A wide range of information is also available online at www.nntt.gov.au

Native Title Hot Spots is prepared by the Legal Services unit of the National Native Title Tribunal.