Objection under *Mining Act*–registered native title claimants should be heard

BHP Billiton Minerals Pty Ltd v Martu Idja Banjima People [2010] WAMW 1

Warden Calder SM, 10 July 2010

Issue

The case concerned an objection by the Martu Idja Banjima People (MIB) to applications for the grant of 22 mining leases under the *Mining Act 1978* (WA) (Mining Act). The applicant submitted MIB should not be heard on the objections or, if MIB was heard, that there should be limits on evidence. It was decided MIB should be heard on all of the issues raised by the objection.

Background

Application for the grant of the mining leases was made by BHP Billiton Minerals Pty Ltd and others (BHP). All of the proposed tenements affected land subject to exploration licences (ELs) held by BHP. Accordingly, s. 67(1) of the Mining Act applied, i.e. subject to the Mining Act and any conditions imposed on those ELs, while the licences continued in force, BHP had:

> [T]he right to apply for, and subject to section 75(9) to have granted pursuant to section 75(7), one or more mining leases or one or more general purpose leases or both in respect of any part or parts of the land the subject of the exploration licence[s].

The registered native title claimant in a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) on MIB's behalf objected to the grant of the leases. The main grounds of objection related to Aboriginal heritage, the environment and the effect of the proposed grants on MIB's registered native title rights and interests—at [1].

Submissions

Among other things, s. 111A(1) of the Mining Act provides that the relevant minister may either terminate an application for a mining tenement before it is dealt with by the mining registrar or warden or refuse the application if the minister is satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted.

MIB submitted it was in the public interest, as contemplated in s. 111A, that all of BHP's applications be refused or, alternatively, that the mining leases should only be granted if they were subject to conditions relating to assessment, monitoring, management and mitigation of mining impacts. The objection was based on the alleged adverse effects of mining operations that had already impacted on, and would in the future impact on, the exercise of MIB's registered native title rights and interests. Further, according to MIB, BHP had no definite plans to mine the land, no plan to assess, monitor, manage or mitigate impacts of future mining and associated activities on the land and the applications were lodged merely to take advantage of the provisions of the Mining Act applying at the time, which did not require that an application be accompanied by a mining proposal or a statement with a mineralisation report, as is now the case.

BHP argued that the MIB should not be heard because none of the grounds of objection were sufficient to give rise to the minister being required to consider exercising the discretion under s. 111A to terminate or refuse the applications. BHP suggested two alternatives:

- the warden should recommend the review by the minister of submissions by both parties; or
- if there was a hearing of the objections, it should be limited so that experts reports provided by MIB were excluded.

Warden Calder noted three preliminary issues to be resolved before the primary issue of whether the MIB, as objectors, should be heard was determined:

- whether BHP was correct in saying s. 75(7) of the Mining Act left no discretion to refuse a mining lease application other than in cases where the minister was satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted (the public interest matters);
- whether any of MIB's grounds of objection could (if established) satisfy the minister as to the public interest matters;
- if the objections did require ministerial consideration as to whether to exercise the s. 111A discretion, whether the warden should hear MIB or must simply refer to the objections in requisite report to the minister without given the objector the opportunity to be heard—at [9] to [11].

Objectors should be heard

It was found (among other things) that the intention of s. 111A was that:

> [I]n an appropriate case a relevant public interest will prevail over the private interests that the applicant has in becoming the holder of a mining tenement over the ground the subject of the mining lease application— at [12].

The objective behind s. 75(7) was said to be to encourage expenditure, discovery and 'ultimate exploitation of the mineral resources' by giving an applicant for a mining lease a priority for the benefit of both the tenement holder and the State of Western Australia generally. However, it was noted that the exclusive right of the holder of an exploration licence to apply for the grant of a mining lease under s. 67(1)(a) of the Mining Act was expressly subject to the Mining Act and to s. 75(9), which states that s. 75(7) does not apply to an application for a lease over certain reserved lands—at [13] to [14].

It was also noted that:

> Subsection 75(4) ... requires ... a hearing of an application for the grant of a mining lease that has been objected to. There is no express limitation upon the scope or subject matter of the hearing the Warden is to conduct—at [15].

After considering the relevant case law, Warden Calder decided:

> [T]he objectors should be heard as to whether or not it was the intention of Parliament that in no circumstances but those which attract the provisions of s. 111A could the Minister refuse to grant an application where the initial formal application requirement have been complied with—at [18].

Minister may be required to consider exercising s. 111A discretion
Warden Calder rejected BHP's submission that it was not open to the warden or the minister 'to take into account any existing cumulative impact of mining activities in other parts of the objectors' native title claim area' or 'any potential additional cumulative impact that may flow from the grant of the ... leases'. In any case, BHP had not identified 'when where or how any mining activities will be undertaken'. This made it 'virtually impossible for MIB to be specific as to either places or effects of mining activities'. In the circumstances of this case, the absence of particularity could not 'effectively be allowed to result in an objector [who was also a registered native title claimant] ... being unable to object ... or ... endeavour to rely' on s. 111A or deny the objector an opportunity to present evidence or submissions—at [21] to [22].

After considering the case law relevant to s. 111A, Warden Calder concluded that:

> What the MIB, [sic] want to have undertaken by both the Warden and the Minister is a weighing of benefits and detriments to both the applicant and the objector. In my opinion that would not be adequately achieved by denying an opportunity to be heard in these proceedings—at [27].

It was found that the provisions of the *Environmental Protection Act 1986* (WA) and the *Aboriginal Heritage Act 1972* (WA) were not 'of themselves sufficient to ensure so adequate a protection of the actual and potential rights ... of the objector as would justify' a conclusion that the minister was not required 'to turn his mind to the exercise of his discretion' under s. 111A of the Mining Act. Nor did the fact that the NTA deals with the rights and interests of registered native title claimants lead to a conclusion that those rights and interests may not require the minister 'to give consideration to the exercise of the ... discretion under' s. 111A. The Warden was satisfied that, prima facie, the objections had the capacity to require the minister to give, or to justify the minister giving, consideration to the exercise of the discretion under s. 111A—at [28] to [29].

Evidence should not be limited
Warden Calder then considered whether or not the objector's evidence should be limited. It was decided that, given the lack of particularity provided by BHP in respect of its future plans, it was potentially procedurally unfair to do so in the manner BHP suggested. Nothing had been put before the court to justify any limitation—at [31].

Section 33 not considered
It was not necessary to determine whether or not MIB should be treated as if they were owners or occupiers of private land for the purposes of s. 33(2) of the Mining Act, and so entitled to be heard in relation to the applications on that footing, because it had been established that the MIB had standing to be heard on other grounds—at [32].

Decision
It was determined that MIB should be heard in respect of all of the issues raised by MIB in the proposed amended grounds of objection.