Expedited procedure –major disturbance under s. 237(c)

Little/Oriole Resources Ltd/Western Australia [2004] NNTTA 37

Deputy President Franklyn, 3 June 2004

Issue
The question here was: What evidence is required to make out the likelihood of a 'major disturbance' for the purposes of s. 237(c) in an objection to the application of the expedited procedure?

Background
The government party proposed to grant a miscellaneous licence for mine site accommodation (the proposed licence) under the *Mining Act 1978*(WA) (the Mining Act). In the relevant s. 29 notice, it was stated that the expedited procedure applied to the grant of the licence.

Deputy President Franklyn noted that:

- information provided by the government party revealed 'a considerable history of exploration and mining in and around the area of the proposed licence'; and
- there was no evidence of an Aboriginal community in the vicinity and no sites registered under the *Aboriginal Heritage Act 1972* (WA) (AHA)—at [16] to [18]

Native title party
The native title party objected to the application of the expedited procedure on the grounds that there was no compliance with s. 237(c), i.e. the act of granting the proposed licence was 'likely to involve major disturbance to any land or waters concerned or to create rights whose [sic] exercise is likely to involve major disturbance to any land or waters concerned'.

The native title party contended that:

- the grant of the proposed licence would permit the grantee to construct mine site accommodation and associated facilities over the whole of the area of the licence (some 120ha); and
- as such facilities can occupy an extensive area and involve the erection of buildings likely to remain in place for the duration of the mine, the likelihood of major disturbance was an inevitable consequence.

The native title party referred to two earlier Tribunal decisions: *Wonyabong v Western Australia* (1996) 134 FLR 462; [1996] NNTTA 40 and *Nyungah People v Western Australia* (1996) 132 FLR 54; [1996] NNTTA 16. Deputy President Franklyn reviewed both those determinations and the relevant Federal Court authorities—at [19] to [20].

The Tribunal noted the absence of evidence from the native title party of:

- the views or concerns of the Aboriginal community; and
- the effects of any previous tenements or any traditional use of or customs relating to the land the subject of the proposed licence—at [26].

The grantee party

The grantee party submitted that:

- it was intended that the proposed licence would be used to support existing infrastructure associated with existing mining campsites, including a possible power line easement and access tracks for construction of protective fire breaks and rubbish disposal, as required by various state laws;
- as there was no proposed construction of any further substantive infrastructure or other works within the boundaries of the licence, other than those referred to above, it was not possible to generalise regarding the extent of likely disturbance at a particular mine, as each project is unique; and
- the decision of the native title party not to submit anthropological, archaeological or ethnographic evidence in support of the objection application represented a fundamental flaw in the construction of their contentions and rendered the arguments advanced purely academic

Major disturbance

The Tribunal noted that the question of whether there was a likelihood of major disturbance is to be determined from the viewpoint of the general community but taking into account the views and concerns of the local community as disclosed by the evidence—at [25], referring to *Dann v Western Australia* (1997) 144 ALR 1; [1997] FCA 332.

The native title party contended that the grant of the proposed licence would:

> [C]reate rights whose exercise is likely to involve a major disturbance to the land and will give rise to activities which will constitute a major disturbance by the standards of the whole Australian community and in the eyes of the Aboriginal community as a whole.

The Deputy President was of the view that:

> [R]eference to a major disturbance giving rise to a major disturbance adds nothing and is unhelpful. If it is intended to refer to authorised activities which are not likely to cause major disturbance to the land or waters but which may cause disturbance to people by way of perception, in my opinion it is not the subject of s.237(c)—at [25].

Determination

It was noted that the grant of the proposed licence would:

- increase 'very considerably' the areas available for mine site accommodation and associated facilities i.e. from the present limit of 8.75ha to 120ha; and
- permit the grantee to do such things as were specified in the licence over that enlarged area.

Therefore, it was accepted that the grant would create rights, the exercise of which may involve major disturbance. However, the Deputy President was of the view that:

> [The assertions made by the native title party]...in the absence of supporting evidence, do not establish the matters asserted. It is of some significance that there is no evidence to suggest that the construction and use of the existing mining camp, accommodation and associated facilities ... or any thing else done under its authority, are considered by the Aboriginal people to be a "major disturbance" or that they have any concerns whatever about the same. The evidence produced by the State reveals the proposed Licence to be within an area where there has been, and is, considerable mining and exploration activity. ...
>
> On the available evidence I am satisfied that the Australian community as a whole, in the absence of any evidence of the concerns (if any) and views of the Aboriginal people in the locality, would consider the grant of the Licence and the exercise of the rights created thereby to be no more than another aspect of the conduct of the Mining and Exploration Industry in an area, presently and over many years the subject of considerable mining and exploration activity and that whilst the exercise of such rights will result in or involve disturbance to the land, in all of the circumstances it is not likely to involve "major" disturbance or to create rights whose exercise is likely to involve major disturbance in the ordinary meaning of that expression—at [26] to [27].

Therefore, Deputy President Franklyn determined that the grant of the proposed licence was an act attracting the expedited procedure i.e. the right to negotiate did not apply—at [28].

Appeal

The native title party has filed an appeal in the Federal Court against the Tribunal's decision in this matter—see s. 169.