Future act determination — no submissions from native title party

Gulliver Productions Pty Ltd/Hunter/Western Australia [2004] NNTTA 105

Franklyn DP, 11 November 2004

Issue

In the two matters summarised below, the Tribunal considered whether it could proceed to make a s. 38 determination under the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where the native title parties had not made any submissions in relation to the matters in s. 39 which the Tribunal 'must take into account' when making such a determination. Both concerned the grant of petroleum exploration permits. In both cases, the Tribunal determined that the future act could be done.

Background

This future act determination application concerned land the subject of claimant applications by the Karajarri People, the Nyangumarta People and the Rubibi People. It also covered part of the area where the Karajarri People had been determined to hold exclusive native title rights and interests (the exclusive possession determination) but it made clear that rights to minerals and petroleum were not included—see *Nangkiriny v Western Australia* [(2002) 117 FCR 6; [2002] FCA 660.

On 8 September 2004, the Federal Court made a finding that the Karajarri People had non-exclusive native title rights and interests over the remaining area covered by their claimant application: see *Nangkiriny v Western Australia* [2004] FCA 1156, summarised in *Native Title Hot Spots* Issue 11.

On 19 April 2002, the grantee party lodged an application for a future act determination pursuant to s. 35 of the NTA, alleging inability to reach agreement with the native title parties, despite a lengthy period of negotiations. The Tribunal had earlier made a determination that the grantee party had negotiated in good faith.

Agreement was eventually reached between the negotiation parties over all but the area that was subject to the exclusive possession determination—at [6] and [20] to [24].

In November 2003, the Kimberley Land Council, representing the Karajarri People, informed the Tribunal that the Karajarri People would not lodge contentions as directed in respect to the exclusive possession determination area. However, it expressed the view that the activities of the grantee party would necessarily impact on the Karajarri determined rights to possession, occupation, use and enjoyment of the land and waters to the exclusion of all others, particularly in relation to:

- the right to maintain and protect important places and areas of significance to the Karajarri People under their traditional laws and customs on the land and waters;
- the right to control access to, and activities conducted by others on the land and waters including the right to give permission to other to enter and conduct activities on the land and waters on such conditions as the Karajarri People see fit; and
- the right to make decisions about the use and enjoyment of the land and waters.

It proposed that certain conditions should be imposed on the grant of the permit, including the grantee party entering into a native title heritage protection agreement. The Tribunal advised the parties that it would not impose any such conditions as a result of the request. Whether any conditions could or should be imposed would depend on the evidence and submissions—at [9], [15], [19] and [23].

In the absence of consent in relation to the exclusive possession determination area, the Tribunal proposed that it was appropriate to deal with the s. 35 application as:

> [A] non-consent application in respect of the whole of the Karajarri land over which the grant of the exploration permit was sought' and all of the parties' representatives agreed—at [22].

The state and the grantee both made submissions and the state also provided information as to the land tenure, mining and petroleum tenements and recorded Aboriginal sites within the area of the relevant area.

The Tribunal was satisfied that the issue could be determined by considering, without holding a hearing, the documents and other material lodged with, or provided to, the Tribunal—at [36].

The Tribunal noted that both the Nyangumarta and Rubibi native title parties had entered into agreements with the state and the grantee party pursuant to which the grant of the exploration permit may be made. Neither of them lodged any submissions or had otherwise expressed concern as to the effect of the grant on the matters and things referred to in s 39(1) of the NTA:

> There was no evidence as to how any of the land the subject of the permit area is enjoyed by them, of their respective ways of life, culture and traditions, the development of social, cultural and economic structure, the carrying out of rites, ceremonies or other activities of cultural significance or of any area or site of particular significance—at [37].

It was noted that the agreements were entered into after a long period of negotiation throughout which each had legal representation—at [37].

The Tribunal took into account the submissions of the state and the grantee in respect of the matters referred to in s. 39(1)(c)(e) and (f) and found that the grant would have minimal effect on them:

> Taking into account the above matters, the respective registered native title rights and interests of the Nyangumarta and Rubibi people and the determination as to the rights and interests of the holders of "other rights and interests" in the two Karajarri determinations, I am satisfied that the effect of the grant of the permit in respect of the

> matters referred to in s 39(1) and (2) will be minimal and such as not to require any conditions on a determination that the act may be done—at [37].

The Tribunal noted that, while some of the native title rights and interests over Karajarri land were exclusive, the determination recognised that persons holding rights, such as mining rights, are entitled to exercise their rights. In the non-exclusive determination area, there were pastoral leases. The effect of the determination was that the rights of those pastoral lease holders prevailed over the native title rights of the Karajarri People to the extent of any inconsistency—at [38].

The Tribunal concluded:

> As the information provided by the State reveals, petroleum permits and other mining tenements have been granted within the areas where the Karajarri were recognised as having native title ... . Thus the native title holders of those lands would be conscious of any effect these grants would have in respect of the matters referred to in s 39(a) and (b)...I have taken into account all of the matters referred to in s 39 ... and the submissions of the State and the Grantee. I also have taken into account that the Karajarri Native Title Party makes no claim for compensation ... . The fact that no submissions have been made by the Karajarri ... in response to the directions ... together with the matters set out above leads me to the conclusion that the Karajarri ... accept that the grant of the permit will not have any significant adverse effect upon the matters referred to in s 39(1)(a)(b) and (c)—at [38].