Heritage agreements – relevance to the expedited procedure

Champion/Western Australia/Vosperton Resources Pty Ltd [2005] NNTTA 1

Sumner DP, 1 February 2005

Issue
What relevance is a heritage agreement to an inquiry into whether or not an act attracts the expedited procedure?

Background
The Central West Goldfields People (NTP) objected to the expedited procedure being applied to the grant of E26/108 which overlapped their registered native title claim area. The proposed tenement also overlapped the areas claimed by two registered and two unregistered native title parties. The grantee had entered into a Regional Standard Heritage Agreement (RSHA), which had been agreed between the government party, the Goldfields Land and Sea Council and peak bodies to provide appropriate protection of Aboriginal heritage. The RSHA related to only one registered native title party. The NTP had provided the grantee party with an alternative heritage agreement, which the grantee party initially did not agree to execute. The grantee party stated it was, however, willing to enter an RSHA with the NTP—at [5] to [10].

Regional heritage agreements and s. 237(b)
The Tribunal discussed the heritage protection agreements and the evidence of the government party on the Department of Industry and Resources (DoIR) procedure in relation to RSHA or alternative heritage agreements and the expedition of applications for exploration and prospecting licences. DoIR only required one RSHA to be executed even where there is more than one registered claim over the area—at [19] to [22].

In regard to the heritage agreements the Tribunal held as follows:

- the existence of an RSHA executed by a grantee does not form a basis for finding in every case that the expedited procedure is attracted even if s. 237(b) is the only matter in issue—at [29] and [49];
- the existence of an RSHA is not irrelevant to a s. 237 inquiry. (See the discussion of Leonne Velickovic; Widji People/Westex Resources Pty Ltd/Western Australia, [2004] NNTTA 13 Mr Dan O'Dea, 4 March 2004)—at [47] to [50];
- the proposed government condition on the grant—that within 90 days of the grant, if the NTP requests in writing that the grantee execute an RSHA, the grantee will do so within 30 days of the request—can be taken into account as one of the relevant factors in determining s. 237(b)—at [24] and [33];

- the Tribunal's task in relation to s. 237(b) will be to assess the evidence regarding whether there are sites of significance in the area and whether the regulatory regime is sufficient to make interference with them unlikely—at [34];
- in making a predictive assessment in relation to s. 237(b), the Tribunal can have regard to a grantee's attitude to entering an RSHA and other evidence of the grantee party directed toward Aboriginal heritage—at [30], [34] and [49];
- what weight will be given to the execution of an RSHA will depend on the circumstances in each case—at [31];
- it is not the role of the Tribunal to endorse one heritage agreement over another—at [46];
- there is no statutory or legal obligation on a grantee party to fund or facilitate an Aboriginal heritage survey and the fact that a grantee party refuses to sign a heritage agreement does not automatically mean that the expedited procedure is not attracted because interference with sites of significance would be likely—at [48].

In regard to other issues raised, the Tribunal said the following:
- there was no basis to dismiss the objection under s. 147(a) on the ground that it was frivolous and vexatious;
- the government submission that to find the expedited procedure was not attracted was a waste of time and resources contrary to s. 109, was misconceived.
- the government submitted that if the Tribunal found the expedited procedure did not apply and the s. 31 negotiations did not result in agreement, it was unlikely that the native title party would receive any better outcome pursuant to a Tribunal determination than what the RSHA could provide;
- section 109 operates in the procedural sense and not in relation to the substantive and specifically defined issue;
- to follow this submission would in itself not be consistent with s. 109, as depriving the NTP of the right to negotiate would not be fair or just;
- although the objection application is based primarily on s. 237(b), the contentions relate to three limbs of s. 237;
- the Tribunal must consider the evidence tendered and not make pre-emptive determinations—at [36] to [45].

Finding on the evidence
The Tribunal findings in relation to s. 237(a) were that there was evidence of prior mining and pastoral activity and no evidence of a prior detrimental effect on community and social activities in the area. Evidence that traditional punishment will probably be levelled against the traditional owners if there is damage to special places was not supported by any evidence of traditional punishment having been administered, despite years of exploration activity in the area—at [62] to [64] and [66].

The Tribunal findings in relation to s. 237(b) was that it prepared to infer on the evidence that the women's sites associated with the Milyura Dreaming are likely to be sites of particular significance—at [73].

The Tribunal noted the 'Guidelines for Consultation with Indigenous People by Mineral Explorers' (July 2004), distributed by the Tenure and Native Title Branch of the Department of Industry and Resources to all applicants for mining and exploration tenements. The guidelines summarise provisions of the relevant legislation and clarify the government policy with respect to the protection of Aboriginal heritage, and the consultation and survey process. Sites of particular significance are unlikely to be interfered with because of the regulatory regime in place and the NTP can insist on a heritage survey under the terms of the government party's proposed condition. The Tribunal, having perused both heritage agreements, could see no reason to suggest that Aboriginal heritage would be protected more effectively by one than the other—at [66], [69] to [72] and [74].

In regard s. 237(c) the Tribunal had regard to a number of factors and found there is not likely to be a major disturbance to land.

Decision
The Tribunal determined that the grant was an act attracting the expedited procedure.