Major disturbance under s. 237(c)—appeal

Little v Oriole Resources Pty Ltd [2005] FCA 506

Nicholson J, 29 April 2005

Issue

This case is about the interpretation of s. 237(c), one of the criteria for determining whether or not a future act attracts the expedited procedure. It revolves around questions of 'major disturbance'. The National Native Title Tribunal had previously decided, pursuant to s. 32(4), that the grant of a miscellaneous licence under the *Mining Act 1978* (WA) was an act attracting the expedited procedure. This case deals with an 'appeal' under s. 169 against that determination. Further background and the Tribunal's determination can be found in Little/Oriole Resources Ltd/Western Australia [2004] NNTTA 37, summarised in *Native Title Hot Spots* Issue 10.

Background

The State of Western Australia issued a s. 29 notice that included a statement that it considered the grant of a miscellaneous licence for 'mine site accommodation and associated facilities' (the new licence) was a future act that attracted the expedited procedure and, therefore, not one to which the right to negotiate applied. The licence, if granted, would cover approximately 120 hectares.

The native title party objected under s. 32(4) to the inclusion of the statement that the act attracted the expedited procedure, relying solely on s. 237(c) to support that objection, which provides that a future act is an act attracting the expedited procedure if it 'is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned'.

Before the Tribunal, the beneficial owner of Oriole Resources (the grantee party) said that:

- mine site accommodation infrastructure was already in place in an area wholly within a previously granted licence (the current licence) which covered an area of 8.75 hectares;
- the area covered by the current licence was wholly within the area covered by the new licence; and
- the only construction it intended to do on the new licence area was power line easements and access tracks for firebreaks and rubbish disposal.

It was not disputed by the parties that the new licence would give Oriole Resources the legal right to extend the mining camp infrastructure throughout a much larger area than under the current licence.

Tribunal's determination

On the available evidence, the Tribunal was satisfied that:

> [T]he 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 [27].

Therefore, the Tribunal determined that the expedited procedure was attracted.

The appeal

Nine grounds of 'appeal' were raised. The court dealt with them under five headings, each of which is summarised below. None of the nine grounds were made out. As his Honour noted:

> It is important that it be understood that the grounds of appeal are required by s 169 of the NT Act to bring to this Court a question of law. It is only if the Tribunal is in error of law that this Court can interfere with the conclusion which it reached. It is for the Tribunal to find the facts and to weigh those facts as found. In the absence of error of law, it is not for this Court to substitute its view for the view of the Tribunal, provided the Tribunal did not fall into error of law and in particular took into account relevant considerations and did not take into account irrelevant considerations—at [60].

Note that, in hearing a s. 169 application, the Federal Court exercises its original jurisdiction: *Hicks v Western Australia* [2002] FCA 1490 at [12] per French J.

Failure to take a relevant consideration into account

The first ground of appeal was that the Tribunal made an error of law in failing to take into account a relevant consideration, namely the Tribunal's own finding that the grant of the new licence may create rights 'whose exercise was likely to involve major disturbance to the land or waters concerned'. The relevant part of s. 237 provides that:

> A future act is an act attracting the expedited procedure if...(c) the act is not likely to involve major disturbance to any land or waters concerned [first limb] or create rights whose exercise is likely to involve major disturbance to any land or waters concerned [second limb].

The applicant accepted that the Tribunal should have considered the rights created in the context of any applicable regulations or conditions minimising issues of disturbance to the land or waters concerned but submitted that:

- the second limb of s. 237(c) attaches the predictive element to the creation of rights, but not to the exercise of them, and requires reference only to rights that, if exercised , are likely to involve major disturbance;
- there is an element of predictive assessment associated with the second limb but that assessment applies only to the issue of the creation of rights rather than their exercise;

- the new licence would create rights to build a mining camp and the exercise of rights of that kind must necessarily be likely to cause a major disturbance, even when subject to such regulations or conditions and the Tribunal was bound to make a finding to that effect—see [18] to [19].

The state submitted (among other things) that:
- under either limb of s. 237(c), a predictive assessment must be undertaken, having regard to the rights which are created at the time of the grant;
- there is work left for the second limb to do in respect of future acts which may involve the subsequent creation of rights as, for example, an act constituted by the grant of an exploration licence which contains within it a right to the grant of a miscellaneous licence—at [24].

Justice R.D. Nicholson reviewed the Tribunal's determination and the relevant authorities. In particular, it was noted that the Tribunal's approach to the application of s. 237(c) in this matter was the same as it took in *Western Australian v Smith* (2000)163 FLR 32, an approach that was not put in issue on appeal: see *Smith v Western Australia* (2001) 108 FCR 442 (Smith).

Nicholson J held that this ground of appeal was not made out, referring to Smith at [23], where French J said of s. 237:

> The Tribunal is … required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237. That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement.

Little v Western Australia [2001] FCA 1706 at [69], which is to the same effect, is also cited. The court concluded that the state was correct in its view as to the application of the second limb of s. 237(c).

Error in interpretation of 'major disturbance'

The applicants argued that the construction of a mining camp would involve a 'major disturbance' as referred to in the first limb of s. 237(c) because (among other things):
- the grant of a new licence would create rights to build mine site accommodation and associated infrastructure throughout the licence area, which must raise a likelihood that the whole of the licence area would be so used;
- such activities are likely to cause a disturbance to the land and waters concerned that would be considered 'major' by the standards of the general community;
- in the absence of any evidence of intention, the Tribunal is at liberty to assume that a grantee will fully exercise the rights conferred by the tenement, referring to *Silver v Northern Territory* (2002) 169 FLR 1 at [30] to [32].

His Honour noted that:
- the word 'major' is an adjective of degree and the Tribunal must make a value judgement that was 'contextual', i.e. the extent of interference and the proximity

of its causal connection to the future act proposed should not be considered in isolation;
- the Tribunal's function was to consider all the relevant evidence placed before it and then to determine whether any disturbance to land or waters can be properly characterised as 'major'—at [32] to [34] referring to *Dann v Western Australia* (1997) 74 FCR 391 (*Dann*) at 395 and 401; Smith at [27] .

These authorities supported the conclusion reached in relation to the first appeal ground, i.e. the application of the first limb of s. 237(c) requires examination not only of the rights created by the future act but also 'a predictive assessment in relation to those rights and all the circumstances of the matter'—at [35].

His Honour noted that:
- the Tribunal was required to have regard to the rights created and, in this case, noted that the grant of the new licence would create rights 'whose exercise may involve major disturbance';
- therefore, it was clear 'beyond reasonable doubt' that the Tribunal had regard to the rights which were created;
- however, the Tribunal also made the predictive assessment in the circumstances of the particular case as it was required to do—at [36].

In these circumstances, the court found that:

> The Tribunal would have fallen into error of law if, having reached the view that the Licence authorised the construction of a mining camp, it did not make a predictive assessment as to whether it was likely to involve major disturbance. That necessarily required it to go to the evidence and not simply to the dictionary definition of 'mining camp' … . If the Tribunal approached the first limb in that way it would necessarily be isolated from relevant evidence and would fall into error or law by failing to have regard to that evidence—at [37].

Therefore, his Honour found that this ground of appeal was not made out.

Wrong test and irrelevant considerations taken into account: history of mining and exploration

The applicants argued that the Tribunal erred in:
- relying on the history of mining and exploration in the context of the views of the Australian community and because it led to an assumption being made that further mining and exploration would not amount to a major disturbance;
- not taking into account the lack of any evidence of actual past use of the area concerned and because, in any case, past activity was irrelevant (but note his Honour found that there was evidence of actual use of the area);
- not establishing that all the past or present tenements concerned related to the area covered by the new licence.

Nicholson J found that:
- the Tribunal did not err in having regard to the history of mining and exploration in the general area of the land and waters concerned;

- it was appropriate for the Tribunal, in the course of making the required predictive assessment, to have regard to the context of the act where evidence was provided; and
- it was not an error of law in that regard or in regard to forming a view in relation to the Australian community—at [44].

No error in having regard to absence of the views of local Aboriginal people
His Honour found that the Tribunal:
- did not err in having regard to the absence of the views of local Aboriginal people;
- clearly understood that, as a result of the decision in *Dann* (which it cited) the views and concerns of the local Aboriginal community was a relevant consideration;
- proceeded to have regard to all evidence properly before it—at [45] to [53].

Unreasonableness
The applicants submitted that the Tribunal's determination was manifestly unreasonable or so unreasonable that no reasonable tribunal could have arrived at it, citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234 (*Wednesbury*). Although the English courts now use a 'proportionality review in preference to *Wednesbury* unreasonableness', the applicants relied on the latter because 'there has been no acceptance by the High Court…or the Federal Court of the English developments'—at [54].

The court found that:
- the applicants sought to rerun all the arguments addressed under the other grounds under this ground;
- it was patent from the consideration of the other grounds of appeal that there was no irrationality or illogicality in the way in which the Tribunal reached its decision;
- the case the applicants sought to rerun was fundamentally based on the assumption that the rights created must carry the day in the application of s. 237(c), a matter which was found not to be the law;
- the *Wednesbury* unreasonableness principle is confined to cases involving the exercise of a statutory discretion and, as this case did not involve the exercise of a statutory discretion, the principle was incapable of raising a question of law as required by s. 169—at [58] to [59].

Decision
The appeal was dismissed—at [61].