Expedited procedure — Aboriginal reserve land in WA

Cheinmora/Heron Resources Ltd/Western Australia [2005] NNTTA 99

Member O'Dea, 22 December 2005

Issue

The issue arising in this matter which is summarised here is whether the expedited procedure applied to the grant of an exploration licence under the *Mining Act 1978* (WA) (Mining Act) over reserve land vested in the Aboriginal Lands Trust (ALT).

Background

The government party contended (among other things) that two proposed exploration licences were acts attracting the expedited procedure: see ss. 29(7) and 237 of the *Native Title Act 1993* (Cwlth) (NTA). The area covered by the first of the proposed licences was entirely within a reserve vested in the ALT under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) for the use and benefit of Aboriginal inhabitants (the Balanggarra reserve). Thirty-eight percent of the area covered by the second proposed licence fell within the Balanggarra reserve. The remainder fell wholly within an area subject to a pastoral lease. The Tribunal's determination in relation to that area is not summarised here.

The government party submitted that:

- subsection 24(7) of the Mining Act provides that mining (which includes exploring for mineral) is subject to the written consent of the Minister for State Development, and, before that consent is given, the minister must consult with the Minister for Indigenous Affairs, who administers the ALT;
- upon receipt of such a request from the minister for Indigenous Affairs, the ALT seeks the advice of the relevant affected Aboriginal community;
- if that community has reached an agreement with the relevant mining company, they will advise the ALT to recommend to the minister that he advise the Minister of State Development to give consent pursuant to s. 24(7) of the Mining Act;
- pursuant to s. 31 AAPA Act and reg. 8 of AAPA Regulations , the grantee party must obtain a permit from the minister for Indigenous affairs before accessing land subject to Part III of the AAPA Act;
- in practice, the Minister for Indigenous Affairs requires an agreement between the relevant Aboriginal community and the grantee party before such access can be granted, with the agreement forming the basis for any conditions to be attached to that permit;
- while the Minister for Indigenous Affairs has a discretion to grant permission for access, if their decision differs from the views expressed to the Minister by the ALT, the Minister must provide reasons to the ALT and lay them before both Houses of Parliament as soon as practicable: see AAPA reg. 8(3)—at [10].

The process for consultation with the relevant Aboriginal community was explained in affidavits lodged in support of the native title party's objection i.e. there was a memorandum of understanding (MOU) between the ALT, the Department of Indigenous Affairs (DIA) and the Kimberley Land Council (the representative body for the area concerned). Under the MOU, DIA contacted the grantee party and suggested they consult directly with the KLC to obtain the consent to the grant of an entry permit to the reserve in question. The KLC noted that, in practice, the Minister for Indigenous Affairs had never granted access to the Ballengarra reserve without ALT consent and a signed heritage protection agreement (HPA).

The Tribunal noted (among other things):

- previous findings that the regulatory regime applicable to reserves subject to Part III of the AAPA Act is such that an exploration licence is unlikely to cause the interference or disturbance referred to in s. 237 of the Act;
- the relevant provision of the HPA which, for the purposes of the MOU, constitute consent;
- that, under the HPA, the grantee party's work programme must be submitted to the native title party and be assessed by the relevant Aboriginal community;
- in this case, the relevant community included a 'significant' number of those who are members of the native title claimant group in the claimant application brought by the native title party—at [21] to [23].

Determination in relation to Aboriginal reserve land

The Tribunal found that:

- it was likely that exploration on the reserve would be permitted only if an appropriate agreement with the native title party is in place;
- permission to enter the reserve would not be granted by the native title party unless the issues of concern have been satisfactorily dealt with and appropriate conditions imposed;
- the Minister for State Development was unlikely to consent to mining until the Minister for Indigenous Affairs had authorised access to the exploration licence area;
- due to the existence of this regulatory regime, it was not likely that any of the three limbs of s. 237 would be offended in relation to the grant of the tenements in so far as they affected the reserve.

Therefore, it was determined that the expedited procedure applied—at [24].