Expedited procedure does not apply

Wurrunmurra/Western Australia/Wrasse [2005] NNTTA 90

Deputy President Sumner, 2 December 2005

Issue
The issue in this Tribunal inquiry was whether the proposed grant of exploration licence under the *Mining Act 1978* (WA) (Mining Act) was a future act attracting the expedited procedure: see ss. 29(7) and 237 of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The proposed exploration licence was located near Fitzroy Crossing in the Kimberley region of Western Australia. The State of Western Australia had issued an s. 29 notice which included a statement that it was of the view that the expedited procedure applied to the proposed grant. For the expedited procedure to apply to the grant of the licence, three criteria found in s. 237 of the NTA must be satisfied.

There were seven Aboriginal communities within 10 kilometres of the area of the proposed grant, which includes Geikie Gorge and Brooking Gorge Conservation Park. There were some earlier mining tenements in the area. A petroleum exploration licence overlapped a large portion of the area. There were six sites registered under the *Aboriginal Heritage Act 1972* (WA).

Affidavit evidence given by elders of the Bunuba and Gooniyandi claim groups deposed to the regular community use of the area for camping, collecting, hunting and fishing, as well as historical and current ceremonial uses.

Likelihood of interference with community or social activities - s. 237(a)
The Tribunal considered earlier decisions where it had been held that prior mining and pastoral activities may be taken into account in assessing whether an additional grant is likely to further affect the community or social activities of the native title parties in the area concerned, referring to s. 237(a), *Smith v Western Australia* (2001) 108 FCR 442 at [26] to [28] and *Walley v Western Australia* (2002) 169 FLR 437 at [12] to [21].

Despite restrictions which may have been caused by these earlier activities, the Tribunal was of the view that the native title parties in this matter still carried on a broad range of social and community activities with a high level of intensity in the area concerned—at [22].

The Tribunal had regard that the fact that the native title parties' access to an area would be limited and temporary while exploration is taking place and that, depending on the nature and extent of the community or social activities and because of the relatively limited exploration activity, the Tribunal has often found in other cases that it was not likely there would be direct interference with the native

title parties' activities in any but an insubstantial way. However, the substantial activities deposed to in this matter were such that the Tribunal held there was likely to be direct interference by the grant of the proposed licence—at [22].

The Tribunal also noted it could not have regard to evidence of spiritual and emotional distress and consequent interference with community and social activities as these were outside the scope of s. 237(a): see Freddie/Western Australia/Adelaide Prospecting Pty Ltd [2003] NNTTA 120. However, in this matter, the evidence of interference with actual physical activities was sufficient to uphold the objection—at [24].

Likelihood of interference with sites - s. 237(b)
The Tribunal found the native title parties' evidence corroborated the sites registered with the Department of Indigenous Affairs as sites of particular significance. The Tribunal was satisfied that the area was relatively rich in Aboriginal sites—at [25] to [32].

The government party submitted that the provisions of the *Aboriginal Heritage Act 1972* (WA) made it unlikely that there would be interference with any areas or sites of particular significance. As the grantee party had not submitted any evidence of its intentions, the matter was determined on the basis that the rights under the Mining Act will be exercised to the full extent—at [33], referring to *Western Australia v Smith* (2000) 163 FLR 32 at [50] to [51]. On the Tribunal's approach to 'site rich' areas, see *Ward v Northern Territory* (2002) 169 FLR 303 at [82].

The Tribunal found there was real risk of interference, even if inadvertent, unless there were s. 31 negotiations between the parties and agreement is reached about the doing of the act, or the issues are fully explored in an arbitral inquiry—at [34].

Decision
The Tribunal held the grant of the proposed exploration licence was not an act attracting the expedited procedure and noted its findings were consistent with findings of the Tribunal in some other objection applications in the Kimberley region—at [35] to [37].