Notification under s. 29—validity challenged

Dann/Western Australia/Empire Oil Company (WA) Ltd [2006] NNTTA 126

Member Sosso, 25 August 2006

Issue

The issue before the National Native Title Tribunal was whether it was empowered to conduct an inquiry under s. 139(b) of the *Native Title Act 1993* (Cwlth) (NTA) in relation to a future act determination application if a native title party challenged the validity of a notice given under s. 29(3).

Background

The native title party raised three main issues that potentially constituted a 'jurisdictional' challenge:

- whether the notice contained a 'clear description' of the area that may be affected by the act in accordance with the Native Title (Notices) Determination 1998 (notices determination);
- whether the notice was published in a print size that was at least as large as that used for most of the editorial content of the relevant newspaper, as required by the notices determination; and
- whether the notice complied with the requirement in s. 29(4)(b) that it contain a statement to the effect that persons have until three months after the notification day to take certain steps to become native title parties in relation to the notice.

Member Sosso found a jurisdictional issue was raised:

> There is a clear line of authority that the notification requirements mandated by section 29 are central to the effective operation of the right to negotiate. If there has not been proper notification of the proposed future act putative native title parties are potentially deprived of the valuable right to negotiate—at [18].

Therefore, the Tribunal had a duty to 'make due inquiry about whether it has that jurisdiction or authority', even where the challenge involves complex issues of fact or law or where it will necessarily delay proceedings—at [19], referring to *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 and *Anaconda Nickel v Western Australia* (2000) 165 FLR 116 at 133.

Satisfying notice requirements

The Tribunal considered what was necessary in order to satisfy the notice requirements, referring to the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) for the propositions that:

- an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect;

- the proper approach to determine if a public notice is invalid is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done;
- in determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'—at [23].

The Tribunal rejected the government party's contention that s. 109 (which provides that the Tribunal is not 'bound by technicalities') assisted with determining whether strict compliance with the notice provisions was necessary: 'The issue here is not the manner in which the Tribunal should operate when making a future act determination, but if the Tribunal has any legal basis for doing so'—at [27].

The government party's submission regarding s. 25C of the *Acts Interpretation Act 1901* (Cwlth) was found to be irrelevant because:

> Section 25C has not been drafted to deal with situations where a clearly described form has not been prescribed but there are merely directions, albeit quite detailed directions, on the manner of completing a notice—at [28].

Clear description of the area

The first issue in contention is whether the section 29 notice complied with clause 6(5)(a) of the notices determination by including 'a clear description of the area that may be affected by the [doing of the future] act.' Member Sosso found (among other things) that:

- public notification of a proposed future act is intended to alert prospective native title holders and a failure to comply with the notification requirements prescribed in the notices determination potentially can result in such persons being deprived of the valuable right to negotiate;
- in accordance with the test promulgated in *Project Blue Sky* , consideration must be given to the place of the relevant provisions in the wider statutory scheme and the legislation must be construed, *prima facie* , to give effect to harmonious goals;
- whether there is a 'clear description' must be decided on a case-by-case basis as a question of fact and degree based on a common sense approach;
- the key issue was whether the public notice provided putative native title claimants with sufficient material to enable them to make an informed decision about whether or not to respond to the notice—at [37], [53] to [56] and see [45], [48], [49] and [51].

The phrase 'clear description' is not defined in either the NTA or the notices determination. Member Sosso referred to Justice Kiefel's decision in *Harris v Great Barrier Reef Marine Park Authority* (1999) 165 ALR 234 and the Native Title (Indigenous Land Use Agreements) Regulations 1999, which require 'a complete description of the agreement area', before finding that:

> A clear description ... is either a written description solely, or a written description supplemented by a map, which alerts the reader of a proposed future act and the area of that proposed act ... . The public notice must contain sufficient information to inform the reader of the general locality of the proposed future act. In this case the government party has provided the public with information as to the area of the proposed tenement in

> terms of square kilometres, the local government body within which the area is located and a locality description which combines in general parlance the approximate location of the area ... and a boundary box description utilizing longitude and latitude measures—at [71] and [79] and see also [82].

The Tribunal concluded that the government party had provided a 'clear description' of the proposed tenement—at [82].

Print size

The native title party submitted that the public notice did not comply with clause 9 of the Notices Determination, which required it to be 'published in a print size at least as large as that used for most of the editorial content of the publication'. Member Sosso concluded that the 'editorial content' of a publication included: '[A]ll material which is included in an issue by the editor excluding material which is published on the payment of a fee by a third person or entity'—at [87].

The government party was found to have failed to comply with clause 9 but this did not invalidate the notice because 'the extent of the failure to comply with the requirements of clause 9 in this case is, at most, marginal'—at [92] to [99].

Compliance with section 29(4) — the incorrect date issue

The native title party submitted that the public notice did not comply with s. 29(4)(b), which requires that the notice must 'contain a statement ... that ... persons have until 3 months after the notification day to ... become native title parties'. The 'notification day' in this case was 15 December 2004. The notice went on to state that: 'The three month period closes on 16 March 2005 '.

Member Sosso accepted that, 'for the purposes of resolving this issue ... the closing date in the notice was incorrect'. However, it was not necessary to deal with the submission because (among other things) a closing date was 'additional information ... provided on a purely voluntary basis ... and falls outside the requirements of either the Act or the Notices Determination'—at [104] to [106].

Decision

Member Sosso found the s. 29(3) notice considered in this matter:

- provided a clear description of the area that may be affected by the grant of the proposed tenement;
- was not published in a print size at least as large as that used for most of the editorial content of that edition but the degree of non-compliance was so minor that it did not invalidate the notice;
- was not invalidated by the voluntary inclusion of an incorrect closing date—at [107].

Therefore, Member Sosso determined the Tribunal was empowered to consider the future act determination application made by the government party—at [107].