No arbitral power if no registered claim or determination

Miriuwung Gajerrong #1 (Native Title Prescribed Body Corporation) Aboriginal Corporation/Western Australia/Seaward Holdings Pty [2006] NNTTA 74

Sumner DP, 13 June 2006

Issues

The issues in this National Native Title Tribunal inquiry were 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);
- business activities were included within the scope of social and community activities for the purposes of s. 237(a);
- the Tribunal could take into account proposed exploration activities over an area that was not the subject of a either a registered claimant application or a determination recognising the existence of native title.

Background

The State of Western Australia (the government party) issued two notices under s. 29 of the NTA, each of which related the proposed grant of an exploration licence in the East Kimberley region. Both notices related to the same grantee party and included a statement that the government party considered the proposed grants attracted the expedited procedure-see s. 29(7).

The native title party, at the time consisting of the registered native title claimant in relation to a claimant application made on behalf of the Miriuwung Gajerrong People, lodged two expedited procedure objection applications in response, in November 2004 and February 2005 respectively.

In May 2004, after the objections were lodged, the Federal Court made determination by consent that native title existed over certain areas, some of which overlapped the proposed licences. In August 2005, the Miriuwung Gajerrong #1 (Native Title Prescribed Body Corporation) Aboriginal Corporation was registered on the National Native Title Register as the registered native title body corporate and so, pursuant to s. 30(1)(c), became the native title party in the future act inquiry in place of the registered native title claimants.

The first of the proposed licences overlapped around 6% of the area where native title existed. The second overlapped over 60% of that area. Each licence was considered separately.

The first licence

In relation to the first proposed licence, as noted earlier, there was a very limited overlap between the area it was to cover and the area where native title existed, i.e. about 6%. Therefore, it was noted that:

> The question which arises is whether the Tribunal can take into account the interference and disturbance referred to in s 237 where the exploration activities take place over an area which is not the subject of a registered claim or determination of native title—at [50].

Exploration activity over the whole of the licence area was considered before considering the implication of the small overlap, with the Tribunal noting that, in relation to both ss. 237(a) and (b), there was a real risk of direct interference if there were no negotiations between the parties—at [51] and [57].

However, there was no direct evidence in relation to the overlap area and so the Tribunal held there was not likely to be interference from exploration activities in the overlap area—at [59] to [60] and [73].

First licence-area not subject to claim or determination

If the Tribunal was not entitled to have regard to interference of the kind referred to in s. 237 that occurred outside of the overlap area, then it appeared the expedited procedure would apply to the grant of the first licence.

Therefore, the Tribunal sought submissions as to the effect (if any) on its power (or 'jurisdiction') in relation to proposed exploration activities over the area that was not the subject of either a registered claimant application or the determination recognising the existence of native title, i.e. more that 93% the proposed area of the first licence. The native title party provided submissions which were considered by the Tribunal—at [60] to [62].

After consideration of the statutory scheme, it was found (among other things) that:

> A native title party [for the purposes of a s. 237 inquiry] is ... either a registered native title claimant or a registered native title body corporate 'in relation to any of the land or waters that will be affected by the act' ... . It is a native title party who may object to the expedited procedure (ss 32(4), 75) or make an application for a future act determination (ss 35, 75). It is apparent that if there is no native title party in relation to any of the land or waters affected by the act then the right to negotiate provisions do not apply to the tenement (see s 30(4)).
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> On the other hand, a registered native title claimant or registered native title body corporate becomes a native title party as long as the area of the registered claim or determined native title rights and interests overlap the proposed tenement to 'any' extent. That is the present case as there is a registered native title body corporate in relation to 6.36 per cent of the proposed tenement area. The existence of this overlap means that a native title party exists with a right to object to the expedited procedure and the Tribunal has jurisdiction to conduct an inquiry into the objection. However, ... the right to object does not mean that, on the balance of the tenement area, the Tribunal is required to assume that registered native title rights and interests exist or to in effect make a decision that they exist. To require the Tribunal to make an assumption or a decision of this kind in the absence of a registered claim or determination over the area is ... contrary to the

> right to negotiate scheme. The right to negotiate is based on the existence of a registered native title claimant or registered native title body corporate. The key concept present throughout the provisions is the existence of registered native title rights and interests which involves entries on either the National Native Title Register (determined rights) or the Register of Native Title Claims (claimed rights) (s 30(3))—at [67] to [68], referring to *Andrews v Northern Territory* [2002] NNTTA 170 ; (2002) 170 FLR 138; *Anaconda Nickel Ltd v Western Australia* [2000] NNTTA 366; (2000) 165 FLR 116; *Mineralogy Pty Ltd v National Native Title Tribunal* [1997] FCA 1404; (1997) 150 ALR 467.

In regard to s. 237(a) and (b), it was noted (among other things) that:

- consideration of social or community activities and sites outside a proposed tenement area may be appropriate but there must be a 'connection, relationship or nexus' between the 'offsite' activities or sites and the issues to be considered under s. 237, referring to *Silver v Northern Territory* at [33] to [34];
- the Tribunal does not have a broad mandate to assume or decide that there are native title holders in relation to a proposed tenement area when there is no registered claim or determination made over it—at [70] and [72] to [73].

The High Court case of *Yanner v Eaton* (1999) 201 CLR 351 was considered, where s. 211 of the NTA was found to be available as a defence to a prosecution under the *Fauna Conservation Act 1974* (Qld) in relation to an area where it appeared there was neither a registered claim nor a determination recognising the existence of native title. Section 211 permits 'native title holders' to do certain activities for certain purposes in the exercise or enjoyment of their native title rights and interests.

The question was whether this decision was authority for the proposition that the Tribunal could assess evidence and make findings in relation to the existence of native title rights and interests where there is no registered claim or determination of native title in relation to the relevant areas. It was found that:

> [T]his course of action is not open to the Tribunal in proceedings involving the right to negotiate where Parliament has provided for a specific procedure for the issue of who are native title holders to be determined ... . The right to negotiate provisions of the Act are a discrete part of the Act which gives [registered native title] claimants and determined holders of native title certain rights if specific procedures are followed. If for some reason they are not followed, it is not for the Tribunal to consider evidence (however complex or simple that might be) and decide that persons are native title holders for the purposes of the right to negotiate and s 237—at [74].

Expedited procedure applied to grant of first exploration licence

The Tribunal determined that the grant of the first licence was a future act that attracted the expedited procedure.

Second licence

As noted above, 60% of the area that would be subject to the grant of the second licence was also subject to the determination recognising the existence of native title. The Woolah Aboriginal community was located nine kilometres south-west of the second licence and Mandangala (Glen Hill) Aboriginal community was within it and was also within the area where native title existed.

Interference with the carrying on of the community or social activities
The first limb of s. 237 provides that a future act is an act attracting the expedited procedure if it is 'not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders ... of native title in relation to the land or waters concerned': s. 237(a).

As there was an established community of some size in a central position and sufficient evidence of community and social activities within the area of the second proposed licence which overlapped the area where native title existed, it was found that:

- the Aboriginal community engaged in a broad range of social and community activities at a high intensity;
- the relevant pastoral leases were under Aboriginal control and it was unlikely the social and community activities had been subject to access restrictions for hunting and gathering activities;
- therefore, there was a likelihood of direct interference with the carrying on of the community or social activities of the native title holders—at [36], [37] and [47].

Social or community activities under s. 237(a) do not include business activities
The native title party contended that present and future business activities, including tourism, a plant nursery, a worm farm and in relation to a pastoral lease, were activities of a social or community kind that were likely to be directly interfered with by the grant of the second exploration licence.

The Tribunal noted that:

- an inquiry in relation to s. 237(a) is directed at the likelihood of interference of activities which are a manifestation of registered native title rights and interests, referring to *Silver v Northern Territory* (2002) 169 FLR 1; [2002] NNTTA 18 at [58] and *Ward v Northern Territory* (2002) 169 FLR 303; [2002] NNTTA 104 at [59];
- on that basis, the business activities referred to could not be said to arise out of native title rights and interests and are only related to them in incidental ways, in that the owners of the businesses are native title holders;
- the word 'social', in the context of s. 237(a) does not, in its ordinary use, encompass business or commercial activity—at [31] to [34].

Likelihood of interference with sites of particular significance
The second limb of s. 237 provides that a future act is an act that attracts the expedited procedure if it is 'not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders ... of the native title in relation to the land or waters concerned': s. 237(b).

The evidence in relation to the second licence was sufficient to indicate there were a number of sites of particular significance to the native title holders. A search of the Register of Aboriginal Sites revealed five registered sites within, or overlapping, the second proposed licence along with four 'protected areas' under s. 19 of the *Aboriginal Heritage Act 1972* (WA) AHA. The government party relied upon the

provisions of ss. 5, 17 and 18 of the AHA as a regulatory regime that protected sites of significance.

The Tribunal noted that attempts at reaching an agreement over heritage protection had failed and that the grantee party had provided no evidence as to its intentions. The matter was, therefore, determined on the basis that the rights given under the Mining Act would be exercised to the full—at [39] to [45], referring to *Smith v Western Australia* (2000) 163 FLR 32; [2000] NNTTA 239 at [34] to [35].

It was found that:

- given the number of sites identified, the area was relatively site rich;
- as a consequence, there was a real risk of direct interference, inadvertent or otherwise, unless negotiations under s. 31 of the NTA took place and either agreement was reached or an arbitral inquiry held to explore the effect of the grant of the second licence on the registered native title rights and interests;
- the determination recognising the existence of native title related to more that 60% of the proposed licence area and, on the evidence, within that part of the proposed licence area there sites they were likely to be interfered with—at [46] to [47].

Second licence did not attract the expedited procedure

On the basis of the findings summarised above in relation to ss. 237(1)(a) and (b), it was found that the proposed grant of the second exploration licence was not a future act that attracted the expedited procedure and so the right to negotiate applied. In the light of this finding, it was not necessary to consider s. 237(c)—at [48] to [49].