Legislative protection of significant sites and heritage agreements

Parker/Western Australia/Ammon [2006] NNTTA 65

Sumner DP, 2 June 2006

Issue
The issues before the National Native Title Tribunal summarised here were whether:
- a proposed future act was an act attracting the expedited procedure under s. 32(4) of the *Nati*ve Title Act 1993 (Cwlth) (the NTA); and
- a Regional Standard Heritage Agreement should be taken into consideration.

Background
The area that was to be subject to the proposed exploration licence dealt with in this matter overlapped three registered claimant applications made, respectively, on behalf of the Martu Idja Banyjima (MIB) People, the Innawonga and Bunjima People and the Nyiyaparli People. The native title party authorised by MIB claimants lodged an objection to inclusion of the statement in the s. 29 notice that the expedited procedure applied to the grant of an exploration licence: see ss. 29(7), 32 and 237.

The grantee party raised the existence of a Regional Standard Heritage Agreement (RSHA) executed by the Pilbara Native Title Service on behalf of the native title party on 27 January 2005. The terms of RSHA included agreement by the native title party not to object to the inclusion of a statement in a s. 29 notice that the government party considered the proposed future act was one that attracted the expedited procedure. The RSHA provided that a native title party would withdraw an existing objection within seven days of the agreement, not lodge any further objections to the grant and enter into any further agreement necessary to perfect the grant. The Innawonga and Bunjima People and the Nyiyaparli People were both parties to the RSHA.

Counsel for the native title party advised the Tribunal that he was not aware of the RSHA when he lodged the expedited procedure objection application and that his clients had not authorised the execution of the RSHA.

Preliminary issue - status of the RSHA
The presiding member held:
- even if the RSHA was a valid agreement, the Tribunal had no power to make a summary determination that the expedited procedure is attracted on the basis of the RSHA;
- where the validity of an RSHA is disputed, the Tribunal is obliged to conduct an inquiry into the objection and make a determination based on s. 237 factors—at [9].

The Tribunal noted the fact that the grantee party entered into a RSHA was a relevant factor when considering the grantee party's intentions for the purposes of s. 237(b).

Ministerial authorisation pursuant to the Mining Act

The grantee party indicated it intended exploring for iron ore. The native title party noted this required ministerial authorisation and endorsement of the licence pursuant to s. 111 of the *Mining Act 1978* (WA) (Mining Act) and argued that this involved a separate future act.

The Tribunal rejected this contention for (among others) the following reasons:

- the nature of an exploration licence had been dealt with in *Walley v Western Australia* (2002) 169 FLR 437; [2002] NNTTA 24 (*Walley*) at [24] to [35];
- there was no evidence to show that iron ore exploration was significantly different to exploration for other minerals;
- the full extent of the rights conferred by an exploration licence is found in s. 66 of the Mining Act and authorisation under s. 111 does not expand those rights;
- the future act which affects native title is the grant of an exploration licence—at [11].

Legislative protection of sites of significance

Among other things, a future act is an act attracting 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'—see s. 237(b). The major issue in this matter was whether this limb of s. 237 was satisfied, taking into account the state regime in relation to site protection and other matters.

The native title party contended that a particular site (called *Barimunya*) was an important site that was unlikely to be adequately protected under the *Aboriginal Heritage Act 1972* (WA) (AHA) and gave evidence to refute the presumption of regularity usually relied on by the Tribunal that the grantee party would comply with all applicable law and regulations—at [31] and [49] to [54].

The government party contended that the Tribunal was bound by the decision in *Little v Western Australia* [2001] FCA 1706 (*Little)* to find that the chance of interference with the site in question was remote, given the protective effect of the AHA. It was noted that, while the Tribunal was entitled to give considerable weight to the government party's site protection regime, this did not mean that, in all cases, that regime would be adequate to make the s. 237(b) interference unlikely —at [34] to [35].

The Tribunal outlined the predictive approach which applies to all three limbs of s. 237 and adopted the findings in earlier decisions on the regulatory regime in West Australian relevant to site protection, including in *Little* at [69] to [70] and [72] and *Walley* at [50] to [51].

The site in question was found to be a site of particular significance in accordance with the MIB People's traditions. The grantee advised it would comply with all legal obligations, endeavour to avoid Aboriginal sites and, in the event of any need for disturbance, approval to do so would be sought pursuant to s. 18 of the AHA. The Tribunal noted that:

> [T]he possibility that a s 18 application may be made is not ... decisive ... in leading to a conclusion that there will be interference with sites of particular significance ... . Its importance in deciding whether there is a real risk of interference with sites of particular significance will depend under the predictive assessment approach on all the circumstances. If the evidence were to be that exploration could not be carried out without avoiding sites or that a s 18 application was virtually inevitable then these circumstances would need to be given greater weight. It would still, however, need to be considered in the context of the number of sites, the consultative mechanism in place with the native title party through a heritage survey or otherwise and the attitude of the grantee party to site protection—at [47].

Apart from the presumption of regularity, the Tribunal was satisfied the grantee party would comply with its legal obligations and therefore interference was unlikely because (among other things):

- the existence of the site was well known and it had been the subject of earlier site surveys;
- the most important part of the site area delineated by the Department of Indigenous Affairs (DIA) was within the area covered by the Innawonga and Bunjima Peoples' registered claims and any exploration would be the subject of a site survey conducted pursuant to the RSHA —at [42], [45] to [48].

Extent of Aboriginal site

The grantee party disagreed with the native title party's depiction of the extent of the relevant site. To resolve this issue, the Tribunal noted the AHA applies to:

- any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- any place which, in the opinion of the committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the state;
- any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed—see s. 5 of the AHA.

The Tribunal held:

- there is nothing in the AHA or the related regulations which qualifies the Aboriginal sites covered by s. 5 of that Act and requires a site to be defined by geospatial references;

- geospatial boundaries are given to sites by administrators and may include a large buffer zone around the actual site;
- for an offence under s. 17 of the AHA to be committed, there must be interference with a site as defined;
- the boundaries designated on map provided by the DIA, derived from the Register of Aboriginal Sites, do not necessarily reflect the true boundaries of the site;
- if the proposed licence is granted and it is proposed to explore in an area that could constitute the site in question, then it will be necessary for a heritage survey to be carried out to ascertain the precise boundaries—at [59] to [61] and [66].

Decision

The Tribunal determined that the grant of the proposed exploration licence was an act attracting the expedited procedure.