Relevance of cultural heritage legislation to interference with sites and uranium exploration to major disturbance

Freddie/Western Australia/Globe Uranium Ltd [2007] NNTTA 37

Sumner DP, 14 May 2007

Issue

The issues before the National Native Title Tribunal summarised here were whether:

- the *Aboriginal Heritage Act 1972* (WA) (AHA) provided protection for sites of particular significance for the purposes of s. 237(b);
- the fact that exploration for uranium was proposed made any difference to consideration of s. 237(c).

Background

The native title party lodged an expedited procedure objection application pursuant to s. 75 of the *Native Title Act 1993* (Cwlth) in relation to the proposed grant of an exploration licence over an area of north east of Wiluna in Western Australia.

The Tribunal noted recent amendments to both the *Mining Act 1978* (WA) and the standard conditions attached to an exploration licence, particularly s. 63(aa), which introduced a requirement that ground disturbing work will not be permitted unless a programme of work had been approved by a prescribed officer i.e. an environmental officer in the Western Australian Department of Industry and Resources—at [8] to [12].

AHA and s. 237(b) of the NTA

Paragraph 237(b) provides that:

> A future act is an ***act attracting the expedited procedure*** if ... the act 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.

The Tribunal was satisfied that the evidence established that the *Tjukurrpa* (Dreaming track) passed through the proposed licence area and was a site of 'particular significance' for the purposes of s. 237(b).

The native title party contended the AHA and its regulatory scheme were insufficient to make interference with sites of particular significance unlikely and that the AHA was irrelevant to the Tribunal's inquiry in relation to s. 237(b) —at [46] to [48].

The Tribunal referred to a number of cases that confirmed the relevance of provisions of the AHA to s. 237(b)—at [49] to [53] and [60], referring *Walley v Western Australia* (2002) 169 FLR 437; [2002] NNTTA 24 at [22] and [50] to [51]; *Champion v Western Australia* (2005) 190 FLR 362; [2005] NNTTA 1 (*Champion*) at [15] to [35]; [68] to [72]; *Parker/Western Australia/Ammon* [2006] NNTTA 65 (*Maitland Parker*) at [32] to [41]and *Little v Western Australia* [2001] FCA 1706.

The native title party further contended that the AHA could not be relied upon to limit the likelihood of interference with sites for the purposes of s. 237(b) because:

- Ministerial approval under s. 18 of the AHA (consent to interfere with a site) may be a future act;
- if the government did not give notice of such an act, then Ministerial consent under s. 18 would be an invalid future act;
- since no notice is, in fact, given of proposed consents under s. 18, it must be presumed that the government party does not consider them to be future acts;
- as such, the protective provisions of the AHA do not protect area and sites the subject of s. 237(b).

The government party contended that, if consent under s. 18 of the AHA was a future act, then it was one to which subdivision M applied, in which case there were no procedural rights for a native title holder because none were afforded to an 'ordinary title holder'—see ss. 24MD(6A) and 253.

The Tribunal was persuaded by the government party's argument but did not reach a conclusion on the point because:

- there was nothing before the Tribunal to suggest that, for the purposes of the predictive assessment required by s. 237(b), interference as a result of consent given under s. 18 of the AHA was likely to occur; and
- even if consent given under s. 18 of the AHA was a future act, it was separate from the future act with which the Tribunal's inquiry was concerned, which was the proposed grant of an exploration licence under the Mining Act.

The Tribunal decided that:

- the approach to s. 237(b) in previous inquiries would be followed; and
- on the evidence, there was nothing to suggest the regulatory scheme under the AHA would be ineffective;
- therefore, it was unlikely that there would be interference with the dreaming track in question— at [60] and [64] to [67].

Uranium exploration and s. 237(c)

Paragraph 237(c) provides that:

> A future act is an ***act attracting the expedited procedure*** if ... the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

The native title party contended that:

- there were no regulations or guidelines directly relevant to exploration for uranium, which included the increased risk of radioactive contamination;
- radioactive contamination continuing for a long period of time (i.e. over 10,000 years) would constitute a major disturbance for the purposes of s. 237(c)—at [18].

The grantee party:
- provided a sample of the *Radiation Safety Manual* (RSM) and stated it abided by the RSM when exploring for calcrete hosted uranium;
- asserted the *Uranium Guidelines* will be complied with;
- contended that uranium exploration is heavily regulated, referring to *Mining Act*, the *Mines Safety and Inspection Act 1994* (WA), codes of practice, the RSM and the *Uranium Guidelines*;
- noted its own compliance with best practices and its undertakings as to how exploration will be conducted—at [19] to [21].

The Tribunal summarised the government party's contentions, noting that condition 4 of the standard conditions of grant required a Radiation Management Plan (RMP) if there was a likelihood of encountering radioactive material. Affidavit evidence deposed to a RMP needing to demonstrate adequate measures to control the exposure of radioactive materials generated through mining operations and that any such exposure must be below the dose level set by the *Mines Safety and Inspection Regulations 1995* (WA) and, in any case, kept as low as reasonably practicable—at [23] to [25].

The Tribunal found that:
- it was satisfied that the grantee party was aware of its responsibilities to ensure the exploration for uranium is carried out with the minimum of health risks to the public and to its employees;
- there was no evidence to suggest the government's regulatory scheme would be ineffective in relation to exploration for uranium;
- apart from the native title party's contentions in regard to the special circumstances of uranium exploration, there was nothing in this matter to suggest the proposed exploration was likely to cause a major disturbance for the purposes of s. 237(c);
- the existence of the government's contradictory policy of allowing uranium exploration and not uranium mining was not relevant;
- a number of additional factors, including that there were no Aboriginal communities in the area of the proposed grant, the land rehabilitation requirements and undertakings, and that there were no topographical or environmental factors which would cause the general community to think exploration would cause a major disturbance, led to the conclusion that exploration for uranium was not likely to cause a major disturbance—at [32], [70] to [83] and [85] to [86].

Determination

Having also found that s. 237(a) was also satisfied, the Tribunal determined that the grant of the exploration licence was a future act that attracted the expedited procedure—at [87].