Expedited procedure – appeal against Tribunal's decision on site protection

Parker v Western Australia [2007] FCA 1027

Siopis J, 6 July 2007

Issues

This decision deals with an appeal to the Federal Court under s. 169 of the *Native Title Act 1993* (Cwlth) (NTA) against a decision of the National Native Title Tribunal (Tribunal) that a future act attracted the expedited procedure. The issue in this case relates solely to the Tribunal's decision in respect of s. 237(b), i.e. that the future act in question was not likely to interfere with areas or sites of particular significance to the native title party.

Background

The future act in question was the grant of an exploration licence in north-west Western Australia near BHP Billiton's Yandi mine. The Martu Idja Banyjima People (the native title party) had a registered native title claim which, to some extent, overlapped the area of the proposed exploration licence.

As noted earlier, the issue in this appeal related only to the Tribunal's decision in respect of s. 237(b), i.e. in this case, that the grant of the licence was not likely to interfere with a site of particular significance to the native title party called the *Barimunya* site. The evidence relied upon by the native title party before the Tribunal consisted of:

- two affidavits sworn by members of the native title party, both of which annexed a witness statement setting out the reasons why the *Barimunya* site has special significance to the native title party;
- a letter from an anthropologist dealing with the cultural heritage significance of the *Barimunya* site;
- a copy of BHP Billiton's 'Aboriginal Heritage Induction Handbook' (BHP Billiton's handbook) which referred to the *Barimunya* site.

Justice Siopis noted that the Tribunal:

- made a direction under s. 155 that the affidavits and anthropologist's letter, as well as the statement of contentions of the native title parties, were not to be disclosed;
- explained in its reasons that it only referred to those documents to the extent necessary to explain the decision and did not include material which should, according to customary laws and traditions, remain confidential—at [6] to [8].

The native title party said that:

- the potential interference with the *Barimunya* site was a major concern when BHP Billiton developed the nearby Yandi mine;

- members of the claim group conducted heritage surveys with BHP Billiton to map a boundary for the *Barimunya* site and it was agreed with BHP Billiton that none of their employees or contractors would go onto the site i.e. it would be a 'no go' area—at [7].

Tribunal's decision

The court summarised Tribunal's findings as being that:

- the *Barimunya* site was a site of particular significance to the native title party in accordance with the traditions of the native title claim group it represented;
- it was necessary to apply a predictive assessment to whether the proposed future act was likely to give rise to the proscribed interference, which involved taking into account the grantee party's intention in relation to the protection of Aboriginal sites;
- section 17 of the *Aboriginal Heritage Act 1972* (WA) (the AHA) provided that specified conduct in respect of an Aboriginal site, such as damaging or in any way altering it, was an offence;
- section 18 of the AHA provided a means to obtain an exemption from the provisions of s. 17 in prescribed circumstances;
- the grantee party said that it would comply with its legal obligations under the AHA and would attempt to avoid Aboriginal sites but, in the event there was a need to disturb a site, it would make an application pursuant to s. 18 of the AHA;
- the existence of the statutory protective regime found in the AHA, and the expressed intention on the part of the grantee party to operate within that regime, was not decisive of the question of whether it was not likely there would be a proscribed interference under s. 237(b) of the NTA because each case must be considered on its particular facts;
- that said, the Tribunal was entitled to have regard, and give considerable weight, to the government party's site protection regime under the AHA—at [9] to [13].

It was also noted that the Tribunal had regard to the following factors in deciding that interference with the *Barimunya* site was unlikely:

- the existence of the site was well known and it had been the subject of earlier site surveys (including some conducted for BHP Billiton);
- parts of the buffer zone (and possibly the actual site) were currently the subject of a heritage survey;
- the most important part of the delineated site area was also within the area covered by the Innawonga and Bunjima Peoples' registered claim and any exploration would be the subject of a site survey conducted by them pursuant to a Regional Standard Heritage Agreement (RSHA);
- while the grantee party had made application for a mining lease, which appeared to be at least partially over the delineated site and suggested the possibility of future mining in the area, the future act with which the Tribunal was concerned was an exploration licence only;
- any proposal to mine would involve a separate future act that would be subject to the right to negotiate provisions of the NTA and would not involve the expedited procedure;

- before any decision would be made to grant the exploration licence, the views of the traditional owners, including members of the native title party and Innawonga and Bunjima claim groups, would be known;
- the evidence showed that the agreement of the traditional owners with BHP Billiton, which preceded the development of the Yandi mine, recognised the significance of this area and restricted access to it by employees of BHP Billiton;
- the native title party was not opposed to exploration per se but was not satisfied with the type and cost of a proposed site survey;
- the government party's conditions on the licence would provide the option for the native title party to enter into a RSHA;
- the grantee party was currently carrying out surveys with the native title party and other native title claimants, with other groups having indicated that work programs will not interfere with sites—at [15].

The appeal

The native title party appealed pursuant to s. 169 on the grounds that the Tribunal failed to consider whether the grant of the exploration licence was not likely to interfere with the *Barimunya* site or area. It was submitted that the Tribunal failed to consider:

- whether there was a real risk of interference with the site or area otherwise than by conduct in breach of s. 17 of the AHA and/or conduct approved under s. 18 of the AHA;
- whether low impact exploration, as defined in the RSHA, would constitute interference with the *Barimunya* site or area;
- the particular significance of the *Barimunya* site or area to the native title party and what might comprise interference with that site in accordance with relevant traditional laws and customs in assessing whether or not there was a real risk of interference with that site or area—at [17].

His Honour dismissed the first ground, saying the Tribunal:

- distinguished between the protection that might be afforded to an Aboriginal site by the statutory protective regime under the AHA and the application of the predictive assessment required under s. 237(b) of the NTA; and
- noted that neither the existence of the statutory protective regime nor the expressed intention of a grantee party to give effect to that regime was conclusive of the question under s. 237(b) as to whether the grant of the exploration licence was not likely to interfere with the *Barimunya* site—at [18].

Siopis J dismissed the remaining two grounds, finding that:

- in its application of the requisite predictive assessment, the Tribunal took into account that even walking on the site in the absence of appropriate senior Aboriginal people would constitute interference with the site;
- even though the Tribunal did not refer to the confidential evidence, there were sufficient indicia in its reasoning to show it had recognised the requisite degree of exclusion necessary to prevent 'interference' and satisfied itself that such interference was not likely—at [20] to [25].

Decision
The appeal was dismissed with costs—at [27].