Expedited procedure – site protection

Parker v Western Australia [2008] FCAFC 23

Moore, Branson and Tamberlin JJ, 7 March 2008

Issue

This decision deals with an appeal to the Full Court of Federal Court against the judgment in *Parker v Western Australia* [2007] FCA 1027 (*Parker No 1*, summarised in *Native Title Hot Spots* Issue 26). The main issue was whether the primary judge was right to find that the National Native Title Tribunal's determination that the expedited procedure was attracted to the grant of an exploration licence over a site of particular significance was not affected by any error of law. In separate judgments, the Full Court concluded that the appeal should be dismissed with costs.

Background

Maitland Parker, on behalf of the Martu Idja Banyjima People (the MIB People), appealed against the judgment in *Parker No 1*, in which Justice Siopis upheld the Tribunal's decision in respect of s. 237(b) i.e. that the grant of a particular exploration licence under the *Mining Act 1978* (WA) was not likely to interfere with a site of particular significance called the *Barimunya* site. There was no dispute that the *Barimunya* site was of particular significance to the MIB People in accordance with their traditional laws and customs, as the Tribunal had found.

Issues raised on appeal

The first issue raised on appeal was whether the primary judge made an error of law in holding that the Tribunal had made a finding as to whether or not there was a real risk of interference with the *Barimunya* site, pursuant to s. 237(b). This, in turn, raised two points, according to Justice Tamberlin:

- whether the Tribunal failed to consider the particular significance of the *Barimunya* site and what might comprise interference with it in accordance with the MIB People's traditional laws and customs;
- assuming the Tribunal did take into account the particular significance of that site, whether its determination was so unreasonable as to warrant the conclusion that the determination should be set aside—at [64].

The second issue was whether the primary judge should have found the Tribunal had failed to fulfil its obligation under s. 162(2) to state in its reasons the findings of fact upon which its determination was based—at [65].

Decision

In three separate judgments, the Full Court held that there was no error of law in the primary judge's findings and so the appeal should be dismissed with costs—at [19], [55] and [79].

Justice Moore held (among other things) that:

- subsection 162(2) refers to 'any findings of fact' upon which the Tribunal's determination is based, which is language 'of wide import';

- the Tribunal was obliged to set out any findings of fact it made which led to its determination of the matters covered by the inquiry (in this instance, whether or not the expedited procedure was attracted to the future act in question);
- a statutory obligation 'to reveal fully the found facts upon which the decision is based is understandable given the significance of a decision that a future act attracts the expedited procedure';
- the Tribunal's ultimate finding had to be whether the act 'was not likely to interfere' in one of the ways identified in s. 237, which involved (among other things) 'determining what is likely to occur in the future' and was 'a matter of speculative though informed appraisal and not fact finding';
- a finding for the purposes of s. 237(b) that there was not a real risk of interference is not a finding of fact and is not a matter to which the obligation created by s. 162(2) applies;
- the inference drawn by the primary judge that the Tribunal made a finding about what would constitute interference with the *Barimunya* site was an inference that was available from the material before the Tribunal and from its reasons;
- while it was equally possible that such an inference might not have been drawn, an appellate court should not interfere if the primary judge drew one of two equally available inferences;
- as the inference drawn was an 'equally available inference', there was no error of law in the primary judge's conclusion—at [6] to [8], [14] and [17] to [18], referring to *Sidhu v Holmes* [2000] FCA 1653.

Justice Branson (among other things) found that:

- it was clear that the Tribunal appreciated it was bound to take into account whether there was a real risk of interference with the *Barimunya* site 'otherwise' than by conduct that breached the *Aboriginal Heritage Act 1972* (WA) (AHA);
- it was also clear that the Tribunal appreciated the significance of s. 18 of the AHA, pursuant to which application can be made for permission to damage or destroy a site;
- it was not shown that the Tribunal misunderstood the law;
- the appellant's 'real complaint' was that the Tribunal gave too much, or too little, weight to the relevant AHA provisions;
- it is for the Tribunal to determine the weight to be given to matters such as the regime found in the AHA in making necessary findings of fact;
- therefore, it was not open to the appellant to ask the court to 'exercise afresh' the power given to the Tribunal to make the necessary factual findings;
- the Tribunal's reasons revealed that it was concerned not to publish information that was 'confidential to the native title party';
- the Tribunal recorded its finding that the *Barimunya* site was a site of particular significance to the native title party before identifying nine factors it took into account in finding that it was unlikely that there would be interference with that site;
- the factors identified by the Tribunal supported the inference that it did not overlook confidential evidence that presumably made it plain that merely walking on the site could constitute interference with it;
- subsection 162(2) does not require the Tribunal to record every aspect of the evidence and other material before it upon which it placed reliance in making its determination;
- the distinction between facts in issue, particulars and evidence is more difficult in Tribunal proceedings than other proceedings;

- the likely intention of the legislature in enacting s. 162(2) was to require the Tribunal to set out findings of fact that were critical to its determination because this would enable a dissatisfied party to understand that decision and form a view on its lawfulness and also facilitate review by the court pursuant to s. 169 of the NTA;
- by identifying the uncontested evidence upon which it found that the site was of particular significance to the native title party, the Tribunal enabled the parties and the court to know the factual basis of it finding;
- it was to be inferred that the Tribunal was satisfied that the nine factors identified in its reasons 'rendered it unlikely that the grant of the exploration licence would result in any person walking on the *Barimunya* site without being accompanied by an elder'—at [35] to [39], [48] to [50] and [53] to [54], referring to *Little v Western Australia* [2001] FCA 1706, *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 and *Curragh Queensland Mining Limited v Daniel* (1994) 34 FCR 212.

Tamberlin J held (among other things) that:

- the Tribunal's reasons made it apparent that it was aware of the 'great sensitivity and importance' of the *Barimunya* site;
- it was important to bear in mind that the primary question for the Tribunal, essentially one of fact and degree, was whether the requisite extent of likely interference to the site by the proposed future act existed;
- on a fair reading of the Tribunal's reasons, it was apparent its conclusion was that, while weight would be given to the existence of the regime found in the AHA, its mandate was to determine whether interference was likely to occur within the meaning of s. 237(b);
- as the significance of the *Barimunya* site was not contested, the Tribunal did not consider there was a need to furnish further details of the site;
- the Tribunal gave weight to 'the not unreasonable premise that the parties would…abide by legal and contractual obligations ... and ... would attempt to avoid disturbance to important sites';
- the Tribunal correctly formulated the question for determination, surveyed the evidence before it, considered the AHA provisions and made the necessary findings of fact without any error of law;
- having taken this 'correct and comprehensive approach, the Tribunal cannot be said to have failed to deal properly with this matter' and the proposition that the finding of the Tribunal was 'so unreasonable as to amount to an error of law' was 'untenable' because the determination made by the Tribunal was 'clearly open to it';
- the relevant express finding of fact on which the Tribunal based its ultimate determination that the expedited procedure was attracted to the grant of the exploration licence was that it was unlikely that there would be interference with the *Barimunya* site;
- it was clear that the Tribunal made this finding of fact having regard to the detailed evidence given by the native title party, which explained the sensitivity of the *Barimunya* site and outlined the range of activities which were considered likely to interfere with the site;
- as a result, the primary judge made no error in concluding that the Tribunal had properly made a finding as to whether there was a real risk of interference with the *Barimunya* site, as required by s. 237(b);
- while the Tribunal did not spell out some evidence in detail because of its 'highly confidential nature', its reasons for decision sufficiently demonstrated that the evidence was taken into

account and so the 'essential' findings of fact were 'sufficiently stated' for the purposes of s. 162(2)—at [66] to [73] and [75].

His Honour was of the view that:

> In giving reasons, it may be appropriate for the Tribunal to refrain from reciting or even referring specifically to detailed evidence disclosed in confidence. It is a question of striking a reasonable balance... . While a more detailed discussion of the evidence and findings could arguably have been engaged in by the Tribunal in this case, it cannot be said that the approach taken amounts to an error of law because, given that the specific detailed evidence was accepted without contradiction and was referred to expressly in the reasoning of the Tribunal, the factual basis for the finding was made known to the parties who had access to the relevant evidentiary material, albeit on a confidential basis—at [76].

Comment

There is some discussion in the reasons for judgment as to the nature of an appeal under s. 169 of the NTA which is not summarised here—see [9] to [12] and [23] to [31].