Seven Star Investments Group Pty Ltd/Western Australia/Freddie [2011] NNTTA 53

DP Sumner, 24 March 2011

Issue

In this case, the National Native Title Tribunal determined pursuant to s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) that a future act (the grant of an exploration licence) must not be done. The grantee party's prior conduct and evidence that its proposed exploration methods were non-scientific (i.e. that special mystical knowledge would be used to look for an anomaly) were central to the decision. This is the first time the Tribunal has made such a determination in relation to exploration.

Background

In January 2008, notice was given under s. 29 of an intention to issue the licence. It included a statement that the government party considered the expedited procedure applied to the future act covered by the notice. Central Desert Native Title Services Limited (CDNTS), the native title party's representative, sent the grantee party an Exploration and Prospecting Agreement (EPA), indicating the native title party would withdraw its objection to application of the expedited procedure if the grantee party signed the EPA. Negotiations did not result in the execution of the EPA and the Tribunal dismissed the native title party's objection in September 2008. However, pursuant to s. 32(7), the government party withdrew its statement that it considered the act attracted the expedited procedure, thereby activating the right to negotiate process. On 30 May 2010, the grantee party made an application pursuant to s. 35 for a future act determination under s. 38.

The government party proposed the parties engage in mediation. However, CDNTS declined to participate because:

- the right to negotiate process had just commenced (a view the Tribunal saw as 'unnecessarily technical' given the expedited procedure negotiations were 'directly related to the grant of the proposed licence');
- as a result of the grantee party's behaviour throughout the expedited procedure process, it wished to mediate with the State alone;
- it wanted mediation to include consideration of whether the state was obliged to ensure the grantee party was 'a fit and proper entity with which to negotiate and ultimately to which a mineral tenement should be granted'—at [88].

The grantee party subsequently executed the EPA but included an additional clause. The native title party resolved not to execute the amended EPA.

Grantee party's prior conduct

The native title party put correspondence from the grantee party into evidence to support its contention that the grantee party's previous conduct was insulting and hostile to CDNTS. The grantee party removed Charles Ghaneson as a director because it was Mr Ghaneson who was in conflict with the CDNTS. Mr Ghaneson apologised in writing to CDNTS. However, in contemporaneous proceedings before the Federal Court, Mr Ghaneson continued to make

insulting remarks about CDNTS—at [74] to [80] and [106] to [108] and see *Freddy v Western Australia* [2010] FCA 1158 (summarised in *Native Title Hot Spots* Issue 34).

Section 39 criteria
The Tribunal (as it must) considered each criterion in s. 39 before making its determination.

Effect on enjoyment of registered native title rights and interests and on native title party's way of life, culture and traditions—ss. 39(1)(a)(i) and (ii)
The native title party contended the grantee party's failure to understand the native title party's cultural obligations had a significant effect on both the enjoyment of native title rights and interests and on the way of life culture and traditions of the native title party. The evidence indicated that the effect (if any) of the proposed exploration on the enjoyment of the native title party's native title rights and interests 'is not on its own an obstacle to a determination that the act may be done'—at [42].

However, in relation s. 39(1)(a)(ii), Deputy President Sumner found that:

> [I]f the grant is made in circumstances where the grantee party continues to behave in the manner it has to date, then the conflict between SSIG and CDNTS is likely to continue and have some effect on the native title party's tradition of looking after country. This is something to which I am entitled to give some weight—at [45].

Effect on development of social, cultural and economic structures—s. 39(1)(a)(iii)
The grantee party said the native title party would, among other things, benefit because 'unknown sites may possibly be discovered during the conduct of heritage surveys'. The Tribunal found expenditure on exploration 'would only be of minimal indirect benefit' and it was not clear how 'locating of sites would contribute to the development' of the relevant structures. The findings under ss. 39(1)(a)(i) and (ii) were repeated in relation to whether there would be 'any adverse effect on the cultural structures of the native title party'—at [46] to [48].

Freedom of access, freedom to carry out rites, ceremonies or other activities of cultural significance—s. *39(1)(a)(iv)*
There was limited evidence that the native title party accessed or carried out any rites, ceremonies or other activities of cultural significance over the relevant area. Further, the grantee party's contentions that on-site exploration would be 'limited in time and to a small area' were accepted. However, for the reasons given earlier:

> [T]he continuing conduct by the grantee party of the kind exhibited to date will have some effect on the native title party's freedom to carry out its activities of cultural significance including looking after sites of importance to them—at [49].

Sites of particular significance—s. *39(1)(a)(v)*
There was evidence that the area was within 'a network of … significant *tjukurrpa* (dreaming) sites'. The fact that the grantee party was willing to conduct a heritage survey, coupled with the Western Australian regulatory regime 'would have been adequate to deal with this criterion and minimise the possibility of there being interference to areas or sites of particular significance' were it not for the grantee party's prior negotiating behaviour—at [52] to [54].

Interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land— s. 39(1)(b)
It was found regard could be had to the fact that 'the native title party does not want the [particular] grantee party involved in the use of the land' and that it was 'a matter to which some weight can be given if justified on the evidence'—at [56].

Economic or other significance—s. 39(1)(c)
Among other things, the native title party contended it was likely there would be a negative economic impact on the nation or the state:

> [B]y tying up an exploration area for up to 10 years by a company that has: no expertise in exploration; insufficient funding to properly explore for mineralisation; and an exploration strategy based solely on 'astrological' and 'mystical' activity, thus depriving other exploration companies from the opportunity of exploring the area—at [61].

However, the Tribunal accepted 'some limited economic benefit would be brought to the local area through expenditure on exploration activities'—at [63].

Not in the public interest—s. 39(1)(e)
Deputy President Sumner was satisfied the proposed exploration methods involved 'to a significant extent' locating drilling sites 'according to Mr Ghaneson's alleged special mystical knowledge'. Therefore, it was found that 'to an important extent' the grantee party's exploration activities 'will rely on the views of Mr Ghaneson, some of which involve what I can only describe as a non-scientific approach to exploration'. It was found that: 'Overall … taking account of the matters dealt with under s 39(1)(f) … the public interest is *not* served by the grant of the proposed licence' to the grantee party—at [71] to [72] (emphasis added).

Any other relevant matter - 39(1)(f)
The native title party contended the Tribunal must take into account the grantee party's prior conduct under s. 39(2)(f). It states that, in making a determination under s. 38, the Tribunal 'must take into account … any other matter that the … [Tribunal] considers relevant'. The native title party's evidence of intimidating remarks, threats of violence and inappropriate disrespectful remarks directed towards both the native title party and CDNTS was examined and regard was had to statements on the record from the grantee party, or persons acting for it, and the conduct of prior negotiations. It was found the grantee party's prior conduct must be taken into account under s. 39(1)(f)—[74] to [108].

Decision
After weighing all of the relevant factors, including the native title party's wishes 'in opposing the grant being made to this particular grantee party', the Tribunal found that, in this 'unique case', the grant of the tenement was not in the public interest because:

- the 'irretrievable breakdown in relations' between CDNTS and the grantee party meant there was 'real potential for further serious disputations and conflict in the future which will impact on the capacity of CDNTS to act for the Wiluna claimants and on the claimant's capacity to carry out their cultural obligations'; and
- the proposed exploration methodology has no rational or scientific basis—at [117] and [119].