Straits Exploration v The Kokatha Uwankara Native Title Claimants

[2010] SAERDC 55

Tilmouth J, 28 September 2010

Issue

The issue before the Environment, Resources and Development Court of South Australia (ERD Court) was whether, in proceedings involving a native title question, the court must be constituted by at least one native title commissioner. It was found this is not required.

Background

This matter concerned an application for a declaration that exploratory mining operations may be conducted on land in the Lake Torrens area made pursuant to s. 63S of the *Mining Act 1971* (SA). The section provides that, if an agreement between the proponent and the native title parties is not reached within the relevant period, any party to the negotiations or the relevant Minister may apply to the ERD Court for a determination. A preliminary issue arose concerning the constitution of the court.

Constitution of the Court

Section 15 of the *Environment, Resources and Development Court Act* 1993 (SA) (the ERDC Act) provides for the constitution of the court and, read 'in isolation' seemed 'clear enough', i.e. it provides for an administrative discretion to be exercised by the senior judge to determine the constitution of the court in any given matter, which may consist of a judge, magistrate or commissioner sitting alone—at [7].

However, s. 15(13) of the ERDC Act states that:

> Where other provisions of this Act or the provisions of a relevant Act deal with the manner in which the Court is to be constituted for the purposes of proceedings or any other business under a relevant Act, this section applies subject to those provisions.

Judge Tilmouth took this to mean that:

> [W]hen any particular statute … vests particular jurisdiction in the ERD Court, but is silent on the constitution, it takes the ERD Court as it finds it under the ERD Act. On the other hand, when the statute … deals with questions of the constitution, that statute prevails over s 15 … to the extent provided for—at [9].

Section 7 of the *Native Title (South Australia) Act 1994* (NTSAA) provides that the court must 'make use of the expert assistance of native title commissioners' appointed under the ERDC Act in proceedings involving a 'native title question'. There was no doubt in this case that s. 7 applied. After examining other provisions dealing with the role of commissioners in South Australian courts, Tilmouth J held that:

> Had Parliament intended that native title commissioners must sit in the ERD Court in applications like the present, it could quite easily have done so in the legislation conferring the jurisdiction ... as it has so often in other instances. ... . The legislature has on the contrary consciously chosen a less prescriptive model, one requiring only that the court must make use of the expert assistance from a native title commissioner—at [17].

Section 7 of the NTSAA was 'no more than facultative', i.e. 'it is an aid to the court informing "itself as it thinks fit"... rather than constitutional or jurisdictional in nature'—at [18].

Decision

It was found that the ERD Court may sit without a native title commissioner when hearing and determining an application brought before it under s. 63S of the *Mining Act 1971* (SA)—at [19].

Postscript – substantive decision

The substantive decision in this matter was handed down on 14 January 2011 and is now subject to appeal: see *Straits Exploration v The Kokatha Uwankara Native Title Claimants* [2011] SASCFC 9 summarised in *Native Title Hot Spots* Issue 34.