

***Straits Exploration v The Kokatha Uwankara Native Title Claimants* [2011] SAERDC 2**

Tilmouth J, 14 January 2011

Issue

Straits Exploration (Australia) Pty Ltd and Kelaray Pty Ltd (joint venturers) applied for a determination under Part 9B of the *Mining Act 1971* (SA) (Mining Act) permitting mining operations in relation to native title land subject to an exploration licence held by Kelaray Pty Ltd. The Environment, Resources and Development Court of South Australia (ERD Court) determined those operations may not be conducted. It is the first time the ERD Court has refused to allow exploration to proceed. The refusal was essentially because of the importance of the area to the Kokatha people and the court's dim view of the behaviour of one of the joint venturers in its dealings with the Kokatha people.

Appeal proceedings

Straits are appealing this decision—see *Straits Exploration v The Kokatha Uwankara Native Title Claimants* [2011] SASFC 9, summarised in *Native Title Hot Spots* Issue 34.

Alternative right to negotiate regime in South Australia

In South Australia, pursuant to ministerial determinations made in 1995 under s. 43 of the *Native Title Act 1993* (Cwlth) and the *Environment, Resources and Development Court Act 1993* (SA), the ERD Court is the arbitral body for right to negotiate applications involving mining tenements other than gas and petroleum tenements. The Mining Act contains provisions dealing the right to negotiate in relation to accessing 'native title land', defined as 'land in respect of which native title exists or might exist'. Under Part 9B of the Mining Act, the exploration licence holder wanting to conduct exploration activities on native title land decides whether those activities will 'affect native title' and, if so, gives notice in under s. 63M of the Mining Act to native title parties. Any registered native title claimant at the time notice is given is a native title party, as is any applicant for a claim that is registered within two months of the date of the notice. The licence holder must negotiate in good faith 'and accordingly explore the possibility of reaching an agreement' with the native title parties for at least four months. If no agreement is reached, s. 63S provides that any party to the negotiations or the relevant minister may apply to the ERD Court for a determination that either mining operations may not be conducted on the native title land or that those operations may be conducted subject to conditions determined by the ERD Court. The criteria utilised by the ERD Court in making its determination are similar to those found in s. 39 of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The joint venturer's proposed mining operations consisted of a drilling program and the construction of camp facilities and storage areas. The Kokatha people (who had a claim entered on the Register of Native Title Claims over the relevant area at all relevant times) were opposed to the conduct of these operations because the area that would be affected was of 'enormous religious significance' to both them and the wider Western Desert People—at [11] and [12].

Straits applied to the Minerals and Energy Resources Department for approval to carry out exploration operations, which was given in September 2007. Drilling commenced in October 2007. However, none of the arrangements relied upon in its application to the Minister was found to be an agreement for the purposes of Part 9B of the Mining Act. Further, Straits had on file correspondence dating back to 2004 that stated that:

Lake Torrens is a highly significant area to the Kokatha people and the report from a previous clearance undertaken by the Kokatha in this area indicates that the Kokatha have excluded Lake Torrens and its surrounds from exploration.

On 9 December 2007, a heritage survey was conducted by Dr Neil Draper and members of the Kokatha over four potential drill sites and related access tracks near Andamooka Island. His report noted the Kokatha were not involved in previous cultural heritage surveys over the area and emphasised that Andamooka Island was a place of high cultural significance to them. The covering e-mail in which Dr Draper sent his report to Straits stated that none of the four proposed sites were cleared for drilling because of the impact this would have on the site. Despite this, Straits continued drilling until 25 February 2008. Further, Straits did not conduct any searches of the state's register of sites until prompted to do so during these proceedings.

In late 2009, Straits initiated the consultation process under the Part 9B of the Mining Act. During those consultations, Straits applied for approval to damage, disturb or interfere with an Aboriginal site of significance for the purposes of exploration operations under s. 23 of the *Aboriginal Heritage Act 1988* (SA) (AHA). In early January 2010, the Kokatha people's legal representative confirmed that any discussions in relation to an agreement under Part 9B should be deferred until after the relevant Minister's decision on the s. 23 application.

Straits' exploration program received approval from the relevant Minister in July 2010, which meant it could lawfully 'damage, disturb or interfere with any Aboriginal sites, objects or remains that may exist on Lake Torrens and a portion of Andamooka Island designated for mining exploration activity' pursuant to s. 23 of the AHA. Despite this, the Kokatha maintained Straits had no authority to affect their native title rights and interests in the absence of an agreement pursuant to Part 9B of the Mining Act. They sought judicial review of the s. 23 decision. Judgment is pending in those proceedings.

Straits applied to the ERD Court on 2 August 2010 seeking a determination pursuant to s. 63S(2) of the Mining Act that they may conduct exploratory mining operations, subject to conditions determined by the court. Judge Tilmouth, in making his determination on Straits' application, considered each of the requirements of s. 63T of the Mining Act in turn.

Effect of the proposed mining operations on 'native title in the land': s. 63T(1)(a)(i)

It was accepted that s. 63T(1)(a)(i) was not an invitation to 'engage in a determination of native title'. Rather, the effect of the proposed exploratory mining operations on claimed and registered native title rights and interests that were 'fairly open or arguable' according to the evidence given had to be considered. While accepting registered rights and interests should be given greater weight, Tilmouth J held that 'wider claimed rights were not to be ignored where there was credible evidence to support them' — at [121], [122] and [127], referring with approval to decisions of the Tribunal in relation to s. 39(1)(a)(i) of the NTA, pursuant to which the Tribunal must

consider ‘the effect of the act on the enjoyment by the native title parties of their registered native title rights and interests’.

The right to possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) was claimed by the Kokatha but was not registered. However, the right to maintain and protect sites and places of significance was registered. Tilmouth J was not prepared to limit his consideration to the registered right because this would ‘pre-empt the function of the Federal court and widen the inquiry beyond its proposer limits’. It was sufficient to:

[R]ecord for the present that it would be open to the Federal Court to accept an existing right of exclusive possession in the area around Crombie Ridge and Lake Torrens, on the basis of the limited evidence given in this proceeding—at [131].

After considering the evidence and submissions in relation to the effect of the various dealings with the area concerned, it was found that:

- the creation of Lake Torrens National Park and ‘the nature of the uses and reservations thereunder’ were relevant but ‘outstanding questions of extinguishment’ were not;
- similarly, the effect of the grant of a pastoral lease over a portion of the area concerned was relevant to the inquiry but questions of any extinguishment that may have been brought about by that grant were not—at [142] and [146].

His Honour was satisfied that there was:

[A] sound credible and acceptable body of evidence ... to the effect that Lake Torrens (including Andamooka Island) is highly significant to the *Kokatha* and that this is acknowledged by the wider Western Desert communities, particularly their *Yankunytjatjara* neighbours—at [154].

That evidence showed:

- the relevant area was ‘closely associated with dreaming stories (the *Tjukurpa*)’ and specifically involved ‘a closely guarded and dangerous form of senior initiated mens’ [sic] law, the *Wati Wilyaru Tjukurpa*’;
- according to Kokatha laws and customs, ‘only senior *Wati* may go onto the lake, as it is an historical entity of major significance to them’;
- the *Kokatha*’s opposition to exploration lay ‘much deeper than compensation, or money, which they do not see “as the issue”, or jobs for their people’;
- particular areas of the lake in the vicinity of the proposed drill sites were regarded ‘as the most important and sacred of places in the whole of their country’;
- the effect of the proposed mining operations struck ‘at the heart’ of Kokatha beliefs and ‘cut deep into their religious and spiritual beliefs’; and
- the exploration would ‘result in significant physical, spiritual and cultural consequences’ which were ‘potentially dire for the senior *Wati* entrusted with the care and protection’ of the lake—at [155] to [157].

Tilmouth J held that the drill holes ‘constituted a fundamental irretrievable violation of the combined *Wati Wilyaru Tjukurpa*’. Despite evidence that there would be ‘extensive efforts to minimise damage’ and Straits’ intention to co-operate on access, the court concluded that the impingement on native title would be ‘more than of nuisance value’. It would ‘impinge on the [Kokatha’s] capacity to exclude others from the most significant of sites’ and, in a spiritual sense,

‘would be quite dramatic’. This counted against approval of exploratory mining operations—at [163] to [164] and [256].

Effect on the way of life, culture and traditions: s. 63T(1)(a)(ii)

On the basis of the evidence, it was found that the drilling would have ‘much more than superficial effects’. According to Tilmouth J: ‘It is not to the point that these consequences actually materialise or not’. It was enough that the Kokatha ‘genuinely believe these things will happen’. Therefore, the effect of the proposed mining operation on the spiritual life, culture and traditions of the Kokatha was ‘not insubstantial’. His Honour was of the view that the strength of Kokatha culture and traditions, in conjunction with the particular location, was ‘far too important to permit any lesser conclusion’. This finding counted against approval—at [178] and [256].

Effects on the development of the social, cultural and economic structures: s. 63T(1)(a)(iii)

The effect of the proposed mining operations on the development of the social and cultural structures of the Kokatha was ‘very much bound up’ with the previous two and so it was ‘difficult to disentangle this criteria from the central importance of the area’ to the Kokatha. These considerations counted against approval. There was no evidence as to the effect on economic structures—at [179] and [256].

Effect on freedom of access, and to carry out rites and ceremonies: s. 63T(1)(iv)

Judge Tilmouth did not accept that freedom of access by the Kokatha or other Western Desert people ‘was already appreciably compromised or inhibited’ by the creation of Lake Torrens National Park, by the power of the relevant Minister to approve access, prospecting, exploration and mining and by the grant of the pastoral lease. There was ‘simply no evidence’ as to the effect of these acts and, in any case, the right of access was ‘largely preserved by statutory reservations’—at [184] and [185].

There was evidence that an access track happened ‘to pass very close to the northern half of Crombie Ridge’. While satisfied that the Kokatha would be free to access the area to carry out rites, ceremonies or other culturally significant activities, they would not have the ‘necessary privacy ... especially near Crombie Ridge’. It was found that access to the area was for ‘practical purposes denied unless privacy is guaranteed’ given the ceremonies that had to be performed could only take place if ‘seclusion was guaranteed’. His Honour concluded that drilling operations would ‘significantly impinge freedom of access to the most significant’ of all Kokatha sites, ‘consequently compromising their capacity to carry out rites, ceremonies and other activities of cultural significance to them’. This finding counted against approval—at [191] to [192] and [256].

The effect on areas or sites of particular significance: s. 63T(1)(v)

Judge Tilmouth held that, from a subjective point of view, the evidence demonstrated the site in question ‘is of much more than special significance’. Tilmouth J referred with approval to findings of the Tribunal as to what it means for an area or site to be of ‘particular significance’. His Honour held that this counted against approval—at [193] to [196] and [256].

Counsel for the Kokatha argued that s. 63T(1)(v) was a ‘free standing’ provision, ‘having a force of its own’. Tilmouth J rejected this, noting it ‘stated the position too widely’. However, his Honour was satisfied it did not carry ‘less weight’ than the other criteria in s. 63T(1) ‘simply

because it is confined to a particular area or site of particular significance'. It 'all depends on the nature and the quality of the evidence ... as to particular significance weighed according to the other evidence ... as against all the other relevant matters' —at [197] and [205], referring to the Tribunal's decision in *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) FLR 169; [2009] NNTTA 49, summarised in *Native Title Hot Spots* Issue 30.

The effect on the natural environment: s. 63T(1)(vi)

Judge Tilmouth held that, given the nature of Lake Torrens, the proposed rehabilitation activities and Straits undertakings (and absent 'accidents or unexpected contingencies'), the effect of the drilling operations would 'ultimately have minimal impact on the natural environment' and this favoured approval—at [207], [210] and [256].

Any assessment of the effect on the natural environment made by the court or other bodies: s. 63T(1)(b)

His Honour considered approvals by the Minister for Environment, Conservation, Mineral Resources and Development and the Minister for Aboriginal Affairs and Reconciliation under s. 23 of the Aboriginal Heritage Act (which is subject to an application for judicial review) favoured approval of mining operations—at [221] to [215] and [256].

The interests, proposals, opinions or wishes of native title parties in relation to management, use or control: s. 63T(1)(c)

Judge Tilmouth held that, 'viewed collectively', the Kokatha's 'interests, proposals, opinions or wishes in relation to the management, use or control of the land concerned' (as expressed in the evidence) conveyed 'a clear, consistent, longstanding and explicable message of strong opposition to mining activities in the Lake Torrens vicinity' that weighed 'significantly' in favour of refusing the application—at [219].

The economic or other significance to Australia and the State: s. 63T(1)(d)

Justice Tilmouth held that 'the proposed act of drilling' would have 'little economic significance'. Further, while there was 'potential for a larger mine further down the track' and recent results were said to be very encouraging, when the evidence was 'stripped to its essentials' it was 'near impossible to measure the potential National or State dimensions of the project, longer term'. His Honour concluded that the 'economic or other significance to South Australia or to the Nation, is presently rather slight' but, insofar as it was of any importance, it favoured approval—at [226], [236] and [255].

The public interest in the mining operation proceeding: s. 63T(1)(e)

The clear public interest in developing and exploiting mineral resources, 'especially in the current economic climate', was balanced against the public interest in preserving both 'prospective native title in land' and the status quo 'pending resolution of the native title claim', a conclusion that was 'further reinforced by the right to negotiate process'. There was 'a not insubstantial public interest in testing and assessing' the potential of the Lake Torrens anomaly. However, 'as against this', there is:

[A] substantial public interest in protecting the *Kokatha* culture and interests by preventing undue intrusions upon their capacity to practice in peace their law and ceremonies on a site most sacred to them—at [237] to [239]. .

It was found the public interest 'cuts both ways, but in the wash leans towards exploration, if only because the Lake Torrens anomaly remains a tantalising unmasked mystery' — at [255].

Other matters the court considers relevant: s. 63T(1)(f)

A range of other matters, largely concerning the behaviour of Straits, were considered relevant, including that:

- consent to drill was not obtained prior to Straits undertaking drilling operations;
- Straits 'deliberately, or recklessly not caring of the implications, completed the planned drilling cycle to obtain the samples necessary to consider if it should drill still further', while giving 'the distinct impression' to Dr Draper 'that drilling was not ongoing';
- there was no satisfactory explanation for drilling proceeding after 9 December 2007 and it was 'difficult to place any confidence in the capacity of the applicants to comply with legal requirements in the future' — at [248], and [249] to [253].

It was said that:

The court takes a dim view of these events Straits was determined to proceed holding express knowledge of Kokatha opposition and in the face of reports commissioned by it, regarding the necessity of further negotiations with them. Bluntly stated there were no agreements satisfying Part 9B of the Mining Act—at [250].

Justice Tilmouth also considered 'misstatements' in the Declarations of Environmental Factors before the relevant Minister, concluding that 'at their core, was the unmistakable representation' that there were 'no Aboriginal heritage issues of any concern that should trouble' the government. They were 'incomplete at best' and 'decidedly misleading' at worst—at [254].

Decision

His Honour determined that the mining operations may not be conducted essentially because:

In the final analysis there is a geological anomaly below Lake Torrens is worthy of further investigation. It is marginally in the public interest to do so. The potential has been overstated, at least on the basis of the relatively scant material available to the court. The extreme significance of the area to the Kokatha has not been sufficiently appreciated and their struggle to have their views considered, have not been accorded adequate recognition, to date. The fundamental shortcomings of the applicants in the field, the failure to secure adequate consents and the posture of avoiding scrutiny and accountability for precipitous decision making, tell heavily against the proposed mining operations going ahead—at [263].