Tullock (Tarlpa)/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22

DP Sumner, 24 February 2011

Issue

The question in this matter was whether the grant of an exploration licence was likely to interfere directly with the carrying on of the native title party's community activities associated with the obligation under traditional law to look after country. It was found that the grant of the licence was not likely to do so. This question was relevant to an inquiry under s. 237(a) of *Native Title Act 1993* (Cwlth) (NTA), which is part of the definition of a future act that 'attracts the expedited procedure'.

Background

The area covered by the proposed future act (the grant of an exploration licence) was overlapped by the Tarlpa claimant application, which is registered on the Register of Native Title Claims. The registered native title claimants (the native title party) made an expedited procedure objection application. Section 237 provides that:

> A future act is ***an act attracting the expedited procedure*** if:
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders ... of native title in relation to the land or waters concerned; and
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders ... of the native title in relation to the land or waters concerned; and
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned (emphasis in NTA).

The native title party abandoned any reliance on ss. 237(b) and (c). As to s. 237(a), it argued the act did not attract the expedited procedure because the future act was likely to interfere with the community activities associated with the obligation to 'look after country' based on (among other things) the evidence of one of the Tarlpa claimants, Victor Ashwin, and the evidence of anthropologist Lindsay Langford. All parties agreed s. 237(a) was the sole issue.

Acceptance of anthropologist's evidence

The Tribunal rejected the government party's contention that 'limited, if any' weight should be given to Mr Langford's evidence because he was employed by the Central Desert Native Title Services Ltd (the native title party's legal representative) and was not a native title party. This was not 'a sufficient basis to disregard or discredit his evidence'. Further:

> [T]he Government party agreed that this matter could be determined on the papers. If it sought to impugn Mr Langford's credibility or candour, then it should have sought leave to cross-examine him—at [34].

The Tribunal also noted that comments in native title decisions made by the Federal Court as to the value of anthropological evidence were 'of assistance in this matter and support the Tribunal's acceptance' of Mr Langford's evidence—at [37].

History and interpretation of s. 237(a)

The Tribunal set out a detailed exposition of the legislative history of s. 237(a) because it was at the heart of this matter—at [54] to [75]. It was found that, in the context of s. 237(a):

- the meaning of 'to interfere' is an action which has the effect of 'hampering or affecting adversely any community activities of the native title holders';
- it is reasonable to conclude that 'carrying on' means 'continuing or going on with' the relevant activities or 'keeping up, conducting' those activities;
- a distinction must be drawn between the relevant activity as such and 'the physical aspects of carrying it on', i.e. s. 237(a) is "concerned with the likelihood of direct interference with the 'the physical conduct of the activity' in question if the future act is done";
- the notion of direct interference 'involves ... an evaluative judgment that the act is likely to be a proximate cause of the apprehended interference';
- the act must substantially impact upon the carrying on of the relevant community or social activities, i.e. 'trivial impacts' or those that are irrelevant to the carrying on of those community or social activities 'are outside the scope of the ... interference contemplated by the section'—at [106] to [108] and [110], referring to *Drury v Western Australia* (2002) 170 FLR 182; [2002] NNTTA 171 at [17.2] and citing *Smith v Western Australia* (2001) 108 FCR 442; [2001] FCA 19 (*Smith*) at [26].

It was also found that the activities concerned do not have to take place on the area that will be affected if the future act is done. Further, 'the presence or absence of an Aboriginal community or the carrying on of community or social activities of native title holders on the area' concerned 'is not a consideration' which on its own is definitive as to whether the carrying on of those activities is likely to be interfered with—at [84] and [87].

However:

> [T]he fact that there is a physical community made up of members of the native title claim group on or near the proposed tenement area … will be relevant to whether or not the future act would be a proximate cause of the alleged interference where … the ... activities relied upon are hunting, camping, fishing or ceremonial activities. … [A]ctivities of that kind ... carried on by … claim group members at great distances from the proposed tenement area ... may still answer the description of 'community or social activities' of the persons holding native title to that area but it may be difficult (although not impossible) on the facts to show that the grant of the tenement, and the activities undertaken as a result, would be a proximate cause of any direct interference with carrying on those community or social activities because of the geographical distance—at [88].

Must the activities arise from registered native title rights and interests?

At [93], Deputy President Sumner asked whether the community or social activities must be 'manifestations of the *registered* native title rights and interests [i.e. in this case, those that appear on the Register of Native Title Claims]; or, alternatively the *claimed* native title rights and interests?' This was because in *Silver v Northern Territory* (2002) 169 FLR 1; [2002] NNTTA 18 at [58], Deputy President Sosso said the Tribunal's inquiry under s 237(a) was concerned with activities that are 'a manifestation of *claimed* native title rights and interests' (emphasis added) but at [45] said the Tribunal must deal with *registered* native title rights and interests. In this matter, there was some doubt as to whether the relevant community activities were a 'manifestation' of registered native title rights and interests in relation to the area concerned. This was because the duty to look after country via carrying on the relevant community activities seemed to be

"reflected in the claimed native title right to 'speak for and make non-exclusive decisions about the area covered by the application", which did not appear to be registered in relation to the area concerned.

Two possible answers to the question were identified:

> [Paragraph] 237(a) should ... be read to embrace the all of the native title holders' community or social activities, provided [they] ... are a manifestation of the claimed native title rights and interests ... . On the other hand, if the expedited procedure does not apply so that the claimants have the right to negotiate, s 31(2) provides that the other negotiation parties cannot be found to have failed to negotiate in good faith with the native title party as required by s 31(1)(b) simply because [any of] those parties ... failed or refused to negotiate about 'matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties'. On this basis, the community or social activities must arise from the registered native title rights and interests—at [96].

None of the parties raised this issue. In those circumstances, Deputy President Sumner dealt with the issue 'on the basis of the best case (or most beneficial) scenario from the native title party's perspective', i.e. the relevant community or social activities must be 'a manifestation of the claimed native title rights and interests'—at [102].

Nature of the activities – physical aspect

According to the Tribunal, the evidence was that the community activities associated with 'looking after country' were essentially:

- discussing within the community the proposed activities of the grantee party;
- meeting, negotiating and if possible reaching agreement with the grantee party on how it conducts its exploration activity; and
- ensuring that the grantee party has complied with any obligations it has agreed to, while conducting its exploration activities and at the cessation of those activities—at [45].

The government party contended (among other things) that the native title party had not identified a physical dimension to the community activities, in the absence of which there would be no physical interference with those activities as required under s. 237(a). Deputy President Sumner surveyed the decisions on point before finding that:

> [S]ince the 1998 amendments [to the NTA], the Tribunal has always acted on the basis that, in a practical sense, the community or social activities encompassed by s 237(a) are essentially physical activities, even if they are carried out because of the spiritual relationship that a native title party has to the relevant land. In … [*Smith*] (at [29]), French J declined to decide whether DP Franklyn was correct to say in … [*Western Australia v Smith* (2000) 163 FLR 32] ... that s 237(a) 'is concerned with and limited to interference with the physical aspects of the carrying on of community and social activities of the native title holders' because the appellant was not relying upon any non-physical aspect ... in that matter. Since … [*Smith*], the Federal Court has not been called upon to deal with this issue and the Tribunal has continued with the approach described above—at [75].

In any case, the Tribunal accepted that: 'Meeting, negotiating, reaching accord and monitoring compliance with an agreement all have a physical dimension'—at [80].

Tribunal had to consider ss. 237(a) & (b)

While the focus of the inquiry was s 237(a), following French J in *Smith* at [23], the Tribunal must 'assess whether, *as a matter of fact*, the proposed future act is likely to give rise to the interference or disturbance referred to' in s. 237(a), (b) and (c) (emphasis added). On the basis of the material before it, the Tribunal was satisfied that 'it is not likely that there will be interference or disturbance of the kind mentioned' in ss. 237(b) and (c)—at [124] to [125].

Decision

At [113] to [114], Deputy President Sumner found that:

> The native title party's case appears to come down to saying that the grant of the exploration licence itself will require it, according to its traditional laws and customs, to take action involving discussions, negotiations and attempting to reach agreement with the grantee party and that the carrying on of these activities is likely to be directly interfered with by the grant of the tenement and whatever exploration the grantee party is permitted to do.
>
> I can accept that the native title party's traditional law and customs require it to take this action and respond to the proposed grant but do not think that this means that the capacity to carry on these activities is hampered or adversely affected in a direct way. The activities associated with looking after country, as relied upon in this matter, can still be carried on. For example, the native title party's own contention is that the relevant community activities include reaching agreement with the grantee party 'if possible' and, if such an agreement is reached, to ensure compliance with it. There would be no direct interference with carrying on this activity by the native title party if the future act was done.

Therefore, it was determined that the grant of the exploration licence was an act attracting the expedited procedure.