Future act proceedings – Queensland alternative regime

RAG Australia Coal P/L v Barada Barna Kabalbara & Yetimarla [2003] QLRT 7

President Koppenol and Deputy President Kingham, 30 January 2003

Issue
The question in this case was whether the Queensland Land and Resources Tribunal (QLRT) should grant a stay of proceedings and declaratory relief sought by the native title parties in relation to the proposed grant of five mining lease applications.

Background
The principal proceedings were the five mining lease applications made by RAG Australia Coal P/L and Thiess Investments P/L. An objection had been lodged in respect of one of those applications by a party other than the native title parties. The native title parties did not lodge objections to any of the mining lease applications. At the hearing of the mining lease applications and the objection (scheduled for late March 2003), the QLRT will also be required to make a native title issues decision under s. 675 of the *Mineral Resources Act 1989* (Qld) (MRA). This is referred to as a 'combined hearing' under s. 671 of the MRA.

Application for stay
The application sought a stay of proceedings until:

- the mining registrar complied with s. 252A (the issue of certificate of public notice) and s. 265 (mining registrar to fix hearing a date) of the MRA;
- the State of Queensland complied with Chapter 5 of the Environmental Protection Act 1994 (Qld) (EPA), which relates to environmental authorities for mining activities; and
- the QLRT made an order under s. 220 of the EPA, which relates to orders for an objections decision hearing in respect of an objection to an environmental authority (mining lease) application (the objections decision hearing).

The thrust of the native title parties' submissions was that Parliament intended that the combined hearing under the MRA should occur concurrently with an objections decision hearing under the EPA. The QLRT noted that the relief sought by way of staying the principal proceedings pending compliance with the relevant statutory provisions was apparently intended to facilitate the objective of a concurrent hearing.

Statutory compliance
In relation to the alleged non-compliance with statutory requirements by the mining registrar and the state, the QLRT took the view that it was properly seized of the applications for mining leases and native title issues decisions and that a preliminary

determination of such questions (which were ones of mixed fact and law) was not appropriate. The QLRT noted:

- that the native title parties could seek judicial review of the relevant decision or make relevant submissions at the combined hearing; and
- the difficulties associated with (and in many cases, inadvisability of) hearing preliminary questions, especially those of mixed fact and law, referring to *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9 at [52] to [53].

Concurrent hearing

The QLRT noted that it did not have jurisdiction to convene an objections decision hearing under s. 220 of the EPA as it had not received a referral notice under s. 219. (A referral notice can only be filed if a relevant objection has been made and is current as at the close of the objection period to the application. No such objection had been made.)

Section 220 of the EPA requires the QLRT to ensure that, 'as much as practicable', the objections decision hearing under the EPA happens as closely as possible to hearings under the MRA for each relevant mining tenement. Having regard to the wording of that section, the Minister's second reading speech for the Environmental Protection and Other Legislation Amendment Act 2000 Bill and other relevant provisions of the EPA and MRA, the QLRT did not accept that there a legislative intent was demonstrated that required there to be one single concurrent hearing of the tenure, native title and environmental issues for the mining lease applications.

Disadvantage or prejudice

The native title parties submitted that they would be disadvantaged at the combined hearing of the tenure and native title issues if they did not have access to the environmental authority documentation. The QLRT rejected this submission on the bases that:

- subsection 677(1) of the MRA does not require the QLRT to take into account the environmental impact of the proposed mining lease;
- even if the native title parties had lodged an objection to the proposed mining leases, s. 668(8) of the MRA provides that that objection may only relate to their registered native title rights and interests;
- the relevant provisions of the MRA do not refer to environmental issues because the EPA (at s. 216 and s. 217) makes express provision for objections to environmental authority applications or draft environmental authorities;
- the native title parties will have the opportunity to object to the applications for environmental authorities under the relevant EPA provisions and the QLRT is required to consider each current objection in making the objections decision; and
- section 306A of the EPA provides that if there is any inconsistency between a native title issues condition (imposed or made under a native title issues decision) and a condition of an environmental authority (mining activities), then the native title conditions prevail to the extent of the inconsistency.

Application for declaration

The native title parties also sought a declaration that the references to 'native title rights and interests' in relation to compensation trust decisions in Part 18 of the MRA are references to registered native title rights and interests that are not yet determined by the Federal Court.

All parties accepted that it was registered rights and interests that were involved prior to any Federal Court determination that native title exists. The declaration was, therefore, refused on the basis that there was no one presently existing who had a true interest to oppose the declaration sought and that the declaration would produce no foreseeable consequences for the parties.

Decision
The applications for a stay of proceedings and for declaratory relief were refused. Costs were reserved.