Expedited procedure — evidence, community & social activities

Monadee/Western Australia/Cossack Resources [2003] NNTTA 38

Member Sosso, 26 February 2003

Issues
In this matter, among other things, the National Native Title Tribunal made comments about the level of evidence provided by the parties to the proceedings and also determined whether it could take into account the fact that members of the first native title party were members of an Indigenous church which meets on the subject area for religious and related activities as evidence of community and social activities for the purposes of s. 237(a) of the *Native Title Act 1993* (Cwlth).

Background
This inquiry related to the proposed grant of a prospecting licence to Cossack Resources Pty Ltd in relation to an area of Western Australia in the vicinity of Karratha. The government party considered that the act attracted the expedited procedure. Two native title parties objected to the inclusion of that statement in the s. 29 notice.

Evidence from non-native title parties
The Tribunal commented that a certain level of evidence should be provided to enable the Tribunal to consider the factors that need to be evaluated in the predicative risk assessment conducted under s. 237 to determine whether or not a proposed future act is an act attracting the expedited procedure.

In this inquiry, which concerned the grant of a prospecting licence, there was no evidence from the grantee party and slight evidence from the government party. There was no evidence of whether there had been any previous exploration or mining activities, only evidence of previous grants, and many other evidentiary matters that were absent. The Tribunal dealt with the matter on the basis that the grantee party will fully exercise its legal entitlements if the prospecting licence is granted—at [7] to [9] and [17].

Section 237 conditions
The native title party's affidavit evidence was uncontested. The Tribunal noted that the s. 237(a) predictive risk assessment is directed only at those activities which are a manifestation of claimed native title rights and interests. Following *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [44], where it was recognised that some evolution and development of traditional law and custom may be acceptable, the Tribunal held it was open to it to take into account the fact that members of the first native title party are members of an indigenous church which meets on the subject area for religious and related activities—at [27].

The proposed tenement is primarily on an indigenous owned pastoral lease. The Tribunal found the usual risk assessment factors of the ongoing lawful activities of the pastoralists prevailing over native title rights did not automatically occur. Further, evidence was led that the native title claimants had easy access to the pastoral lease to carry out traditional activities. The Tribunal inferred that the type of restrictions otherwise placed on native title holders traditional activities do not occur on this pastoral lease and there was free access—at [28].

The Tribunal did not make a predictive assessment pursuant to s. 237(b) but did hold that whether or not a grantee party has funded or supported an Aboriginal heritage survey is irrelevant when making a s. 237(b) assessment, unless evidence was led that the grantee party expressed hostility to issue of sacred site protection and the like and would be likely to interfere with sites despite the legal regime—at [13].

Decision

The Tribunal held on the basis of the uncontested affidavit evidence of community activities carried out regularly and by a significant number of native title holders and no evidence of previous mining activities or the grantees intentions, that the grant would be likely to have substantial impact on community and social activities. The proposed grant was determined not to be an act attracting the expedited procedure—at [28] to [30].