WESTERN DESERT LANDS ABORIGINAL CORPORATION (JAMUKURNU – YAPALIKUNU)/WESTERN AUSTRALIA/ HOLOCENE PTY LTD

National Native Title Tribunal (Deputy President Sumner)
27 May 2009
[2009] NNTTA 49

Native title – future act determination – application for determination for the grant of a mining lease – determination criteria under *Native Title Act 1993* (Cth), s 39 – importance of the interests, proposals, opinions or wishes of the native title party in relation to the future act – significance of the preamble to the *Native Title Act 1993* (Cth) and of international instruments – interaction between the *Mining Act 1978* (WA), the *Native Title Act 1993* (Cth) and the *Racial Discrimination Act 1975* (Cth)

Facts:

Pursuant to s 29 of the *Native Title Act 1993* (Cth) ('*NTA*'), the State of Western Australia notified the Western Desert Lands Aboriginal Corporation ('WDLAC' or 'the native title party'), the prescribed body corporate of the Martu people, of a future act. This future act was the grant of a mining lease to Holocene Pty Ltd. The proposed lease fell entirely on land – mostly on an area known as Lake Disappointment – over which the WDLAC holds native title rights and interests. There are, however, no Aboriginal communities living within the area or in the near vicinity of the proposed lease.

Following failed negotiations between the parties pursuant to the provisions of the *NTA* dealing with future acts, during which a precursory agreement (a 'term sheet') was produced, an application was made by Holocene for a future act determination by the National Native Title Tribunal under s 38 of the *NTA*. The application was made on the basis that the parties had been unable to reach agreement according to s 31(1)(b) of the *NTA*.

The Tribunal accordingly undertook the making of a determination under s 38. This involved taking into account the criteria set out in s 39. Section 39 provides:

(1) In making its determination, the arbitral body must take into account the following:
  (a) the effect of the act on:
    (i) the enjoyment by the native title parties of their registered native title rights and interests; and
    (ii) the way of life, culture and traditions of any of those parties; and
    (iii) the development of the social, cultural and economic structures of any of those parties; and
    (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
    (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
  (b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
  (c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
  (d) any public interest in the doing of the act;
  (e) any other matter that the arbitral body considers relevant.

Particularly in issue in this case was the relative importance – including in light of the *NTA*'s Preamble and various international law instruments – of the wishes of native

title parties where a proposed future act will interfere with determined and exclusive native title rights (s 39(1)(b)). The Tribunal also had to consider the interaction between s 29(2) of the *Mining Act 1978* (WA) (which says that a mining tenement may not be granted over certain private land except with the consent of the owner), the *NTA* and the *Racial Discrimination Act 1975* (Cth) ('*RDA*').

Held, determining under s 38 of the *NTA* that the future act must not be done:

1. The weighting allocated to each of the criterion listed in s 39 is not specified in the *NTA,* but is dependent on the availability of probative and logical evidence: [37]; *Western Australia v Thomas* [1996] NNTTA 30, affirmed.

2. A beneficial construction should be given to the provisions of the *NTA* designed to protect the interests of native title parties and Aboriginal people. This includes the 'right to negotiate' regime. The Preamble and, where appropriate, a beneficial interpretation of the *NTA*'s substantive provisions must be considered in the context of the *NTA*'s objects, purpose and plain meaning. In this respect, the *NTA* attempts to strike a balance between native title rights and the interests of the broader community. Moreover, the *NTA* was enacted with the knowledge of the importance of the mining industry and that the 'right to negotiate' provisions were intended to deal with the ongoing grant of mining titles: [42]–[45]; *Western Australia v Thomas* [1996] NNTTA 30, affirmed; *Re Koara People* [1996] NNTTA 31, affirmed; *Kanak v National Native Title Tribunal* (1995) 61 FCR 103, affirmed; *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, followed.

3. International instruments cannot be relied upon unless they have been enacted into domestic law. While it is true that international law can be used as an aid in statutory interpretation where the terms of a statute are ambiguous, such reliance on international law will generally be inappropriate when the relevant instrument has not been ratified or entered into by Australia or when such acts were not in contemplation by Australia at the time when the statute in question was enacted. While the *Declaration on the Rights of Indigenous Peoples* is now endorsed by the Australian Government, there is no specific legislation which gives effect to it. At any rate, the terms of s 39 are not ambiguous: [46]; *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007), considered.

4. Land the subject of a native title determination does not constitute 'private land' for the purposes of s 29(2) of the *Mining Act 1978* (WA). Moreover, even though the native title party is probably an owner or occupier of the land in question, none of the categories of activity for which consent is required under s 29(2) are established on the facts of this case. In any event, this inquiry is concerned with the provisions of the *NTA* that must be followed to ensure the validity of a grant which affects native title. If there are any requirements which must be followed to make a grant under the *Mining Act 1978* (WA) – by virtue of either that Act or other legislation such as the *RDA* – these are not matters for the Tribunal: [47]–[52]; *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, considered.

5. While s 7(1) of the *NTA* says that it is to be read and construed subject to the provisions of the *RDA*, s 7(2) makes clear that this only means that the provisions of the *RDA* apply to the performance of functions and exercise of powers conferred or authorised by the *NTA* and to ensure that any ambiguous terms are construed consistently with the *RDA*. In the present case, there are no ambiguities in the relevant *NTA* provisions which would require resort to the *RDA* to resolve them: [50], [52]; *Western Australia v Commonwealth* (1995) 183 CLR 373, followed; *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, considered.

6. Concerning s 39(1)(a)(i) of the *NTA*, an examination of the actual enjoyment or exercise of the rights should be undertaken as opposed to a worst-case scenario analysis that assumes the existence and enjoyment of all registered native title rights equally over the whole of the determination area (including the particular location of the future act). In the present case, the effect of the proposed project on the physical enjoyment of native title rights will not be substantial due to the relatively small size of the subject area, the infrequent use of the area by the native title holders, and the minor interference and potential improvement the project will have on accessibility to the area: [64]–[81]; *Western Australia v Thomas* [1996] NNTTA 30, cited; *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387, cited; *WMC Resources v Evans* (1999) 163 FLR 333, cited.

7. Concerning s 39(1)(a)(ii), there is a strong connection between the Martu people and the subject area, however there is no specific evidence to suggest that conducting mining activities in the area without Martu authority would

undermine the Martu people's rights over the land. The current way of life, culture and traditions of the Martu people will not be detrimentally affected by the grant of the proposed lease. That being said, s 39(1)(a)(i) does have relevance in this case because of the lake's importance to the Martu and its connection to their way of life, culture and traditions in a spiritual way: [85]–[88].

8. Concerning s 39(1)(a)(iii), there is no evidence to suggest that the development of Martu economic structures would be negatively impacted by the future act, nor is there any specific evidence about a negative impact on Martu social structures resulting from the future act. If there were major concerns about the effect of the future act on Martu social structures, this effect could be minimised by the drafting of conditions reducing the impact: [90]–[94]; *Western Australia v Thomas* [1996] NNTTA 30, cited.

9. Concerning s 39(1)(a)(iv), Martu access to the subject area would only be minimally restricted for operational and safety reasons by the future act. The proposed restrictions are of minor significance as evidence suggests that the Martu people infrequently access the area. There is nothing to suggest that Martu ceremonial activities conducted in the Lake Disappointment area actually occur in the proposed lease area: [95]–[98].

10. Concerning s 39(1)(a)(v), Lake Disappointment is a site of particular significance to the Martu people, being integrated into Martu culture and connection to country generally. The existing Martu view that mining on Lake Disappointment is acceptable on certain terms does not signify that the lake is not of significant importance. The impact of the proposed mining activities on Lake Disappointment will not be minimal. While rehabilitation is expected to eventually reverse any impact, the project's 50-year duration suggests that the impact to the site will not be insignificant: [148]–[155].

11. Concerning s 39(1)(b), the native title party in this case decided to continue negotiations in the knowledge that the lake would be disturbed by the proposed mining lease but also in the knowledge that, if agreement were reached, the project would proceed in an acceptable manner and substantial benefits would flow to them. However, this fact does not automatically justify a determination that the future act may be done where no agreement has been reached. Furthermore, where there has been a determination of substantial and exclusive native title rights, as in the present case, the weight to be given to the native title holders' interests, proposals, opinions or wishes is increased. This cannot, however, be of such weight that it would be tantamount to a veto to be applied in all cases. The weight attached to s 39(1)(b) will also be less where the future act would have little impact on the enjoyment of native title rights and no interference with sites of particular significance: [160]–[163].

12. Concerning s 39(1)(c), the proposed mining lease is not speculative in that there is evidence indicating the potential for economic benefits. However, because the mine is not expected to earn billions of dollars in export income or employ large numbers of people, the future act's economic significance is a minor consideration. While the Martu people would obtain some economic benefits from the proposed mine, no great weight is attached to these. The compensation payable to the Martu people for the effect of the proposed mine on their native title rights is not an economic benefit but rather a legal entitlement to be recompensed for the loss or damage suffered: [171]–[176]; *Haines v Bendall* (1991) 172 CLR 60, cited.

13. Concerning s 39(1)(e), even if a proposed future act project is privately owned, there can be a public interest in the project if it has economic, employment and revenue benefits which can in turn enhance the capacity of governments to provide essential public services. Such a public interest exists in the present case. Equally, there may be public interest considerations against mining over areas of special significance to Aboriginal people: [179]–[183]; *Western Australia v Thomas* [1996] NNTTA 30, cited; *Evans v Western Australia* (1997) 77 FCR 193, cited.

14. Concerning s 39(1)(f), it is appropriate to have regard to Holocene's previous expenditure in relation to the proposed project, the Western Australian Government's environmental protection regime, WDLAC's current opposition to mining based on the parties' failure to agree to acceptable terms, and the level of benefits to the Martu people contemplated by the 'term sheet': [184]–[188], [209]; *Western Australia v Thomas* [1996] NNTTA 30, affirmed; *Minister for Mines (WA) v Evans* (1998) 163 FLR 274, affirmed.

15. As s 38(2) of the *NTA* makes clear, the Tribunal has no power to make a determination containing a condition for the payment of compensation to a native title party: [194]–[196]; *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387, affirmed.

16. In the present case, the interests, proposals, opinions and wishes of WDLAC concerning the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the project proceeding: [216].