WESTERN AUSTRALIA

ABORIGINAL HERITAGE

Tickner v Bropho

Federal Court of Appeal, 30 April 1993, Judgment No. 306 of 1993

This Federal Court decision is the latest case in the long running saga of the Western Australian Government's re-development of the "Old Swan Brewery site" on perth' Swan River foreshore and the endeavours of Mr Robert Bropho, an aboriginal elder, to have the site aboriginal heritage values protected.[1] Once again, Mr Bropho has been successful at law. The Court upheld the decision of Wilcox J at first instance declaring invalid the decisions of Mr Tickner, the Federal Minister for Aboriginal Affairs ("the Minister"), not to make declarations under ss.9 and 10 of the **Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)** ("the Act") to protect the Aboriginal heritage values of the site. The lesson from the case is that the Commonwealth cannot avoid exercising its statutory responsibilities in deference to the application of State law on the same issues.

Sections 9 and 10 of the Act provide, respectively, for the Minister to make emergency and permanent declarations protecting "a significant Aboriginal area" from "threat of injury or application to be made to the Minister by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of specified area. In the case of an emergency declaration, the Minister may make a declaration is she is satisfied of two conditions; that the area is a significant Aboriginal area and that it is under "serious and immediate threat of injury or desecration". The emergency declaration has effect for a maximum period of 30 days or, upon further declaration by the Minister, a maximum period of 60 days. The procedure for making a permanent declaration involves similar ministerial findings that the area is a significant Aboriginal area under threat of injury or desecration, but it also requires the Minister to consider a report on the application with the opportunity for public submissions to be made in the compilation of the report. Both sections express the Minister's powers in permissive terms, setting conditions for the making of the declarations, but not expressly obligating the Minister to make findings or consider a report in the event that the Minister does not make a declaration. The key issue in the case was the extent to which the Minister was required to consider the applications in the event that the Minister decided not to make an application.

FACTS

The case arose out of the State Government's decision in early August 1992 to lease the land in question with permission for it to be developed for offices and other commercial purposes. Following the grant of the lease, the Western Australian Minister of Heritage made an order suspending the operation of all relevant State planning and Aboriginal heritage legislation in relation to the site. In mid-August, Mr Bropho made applications, both orally and in writing, to the Federal Minister for declarations under ss.9 and 10 of the Act. At the end of August, construction work began on the site, but ceased on 22 September when the Legislative Council disallowed the State Minister's order suspending the operation of the planning and Aboriginal heritage legislation. This revived the operation of s.17 of the Aboriginal Heritage Act 1972 (WA) which made it an offence to excavate an Aboriginal site without special authorisation. The Western Australian Minister gave such authorisation on 22 October and construction work recommenced.

Meanwhile Mr Bropho had made repeated enquires about the applications to the Federal Minister. The Minister wrote on 11 November rejecting the application for an emergency declaration on 7 January 1993 rejecting the application for the permanent declaration, without commissioning a report on the application. The Minister supplied reasons for the s.9 decision on 12 January 1993. From these documents, the Court found that the Minister's reasons for rejecting:

- the s.9 declaration were that the Legislative Council's disallowance of the State Minister's order meant that the Western Australian Government had to comply with the requirements of its own Aboriginal Heritage Act and that this meant that there was no serious or immediate threat of injury or desecration;
- the s.10 declaration were that the Minister had decided that such a declaration would not be the best way to resolve the situation and had not answered the question whether there was a threat of injury or desecration.

There was no real question that the area had been the subject of a s.10 declaration which had subsequently been revoked upon the Federal Minister becoming satisfied that the State law provided for protection of this area.

DECISION

At first instance, Wilcox J found that the Federal Minister's s.9 decision was unreasonable in that, at the time it was made, it was clear that State law would not protect the area from injury or desecration because the State Minister had approved construction on the site. Thus, his Honour held that, as the State Minister had decided not to protect the Aboriginal area, the duty fell upon the Federal Minister to consider protection of this area under the Commonwealth Act. The difficulty with this finding was that the grounds of application for review did not establish that the Federal Minister knew of the decision of the State Minister; rather they alleged that the Federal Minister was in effect deferring to a predetermined decision by the State Minister; rather they alleged that the Federal Minister was in effect deferring to a predetermined decision by the State Minister and that this was unreasonable.

On appeal, Black CJ agreed that it could not be concluded that the Federal Minister knew of the State Minister's decision, but held that the Federal Minister's decision was still unreasonable, because he and his departmental officer failed to obtain information that was readily available and of critical importance to the s.9 decision.[2] Lockhart J upheld Wilcox J's conclusion, holding that it was reasonably open to Wilcox J to find that the Federal Minister's s.9 decision was made on or about 11 November as the Minister could have led evidence of the date of his decision, especially as it was a matter peculiarly within his own knowledge.[3] On the other hand, French J (dissenting) held that Wilcox J's finding was not within the "general framework of that ground [of review]" and that a finding that the Federal Minister believed that the State Minister's decision was a forgone conclusion did not support a conclusion of unreasonableness.[4] His Honour said that the appropriate course was to allow the processes of State law to be exhausted before consideration an application for a declaration under the Commonwealth Act. With respect, it is difficult to understand why French J should have decided this issue on the precise terms of the grounds of application rather than on the best evidence presented to Wilcox J in court showing that the processes of State law had been completed.

In relation to s.10, Wilcox J held that the Minister could not effectively ignore the application by declining to address the threshold question of whether the area was under threat of injury or desecration. In the alternative, Wilcox J held that, even if the Minister's decision was that the area was under threat of injury or desecration but that the Minister would make no declaration, the section did not permit the Minister to refuse to make a declaration without first obtaining a report. On appeal, all three judges upheld the judgement of Wilcox J. Their Honours acknowledged that s.10 did not specifically mandate a finding on the question of injury or desecration or the preparation and consideration of a report in the event that no declaration was made. However, reading the Act as a whole revealed a strong purpose of protecting Aboriginal heritage. Construed in the light of this, s.10 did not permit the Minister to decide an application without first determining whether the area was a significant Aboriginal area and under threat of injury of desecration. Further, if the threshold questions were answered in the positive, the Minister could not refuse to make a declaration without obtaining and considering a report. It was not open to the Federal Minister effectively to ignore the application, even if the issue has been considered under State law. Section 10 and other provisions empower the Minister to make a declaration providing a range of protective measures, from full protection to partial or conditional protection, and to conciliate and negotiate with the affected parties to balance in the interests involved.

SIGNIFICANCE

In summary, this case is a timely reminder to Commonwealth Ministers of their responsibility to exercise the powers the Commonwealth Parliament has vested in them for protection of national interests. Whilst the exercise of these responsibilities may, on occasion, bring them into conflict with their State counterparts, it is not open to them simply to defer to the decisions of State Governments, even if they be made after considerable debate under the processes of State law. It may be that the State law gives a lesser degree of protection than Commonwealth law, and that the perspective of State Ministers does not encompass national interests.

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[1]Earlier cases from this saga include **Bropho v Western Australia (1991) 171 CLR 1** and **Western Australia v Bropho (1991) 5 WAR 75.**

[2]Transcript of reasons for judgment of Black CJ. pp. 26-30.

[3]Transcript of reasons for judgment of Lockhart J, p. 28.

[4]Transcript of reasons for judgment of French J, p. 4

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NEW SOUTH WALES

OBJECTOR APPEALS UNDER SECTION 98 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT

R. & W. Davidson v Hornsby Council

Land & Environment Court, 11 October 1993, Bignold J.

This case arose from an application by a third party objector to be joined as party to proceedings. It ended up as an application for costs thrown away because the proceedings had been discontinued. The interesting question addressed in the case was the validity of certain purported appeals by third-party objectors to a designated development, pursuant to s.98 of the **Environment Planning and Assessment Act** ("the **Act**").

FACTS

The applicant developer lodged an appeal in the Land and Environment Court on 4 August, 1993 against a deemed refusal by Council of a development application for a helipad, which was a designated development.

At the first call-over, the Court was informed that the Council had granted consent subject to conditions, after the filing of the appeal in the Court, and had notified people who had objected to the proposed development of its determination. (The authority to grant consent during the pendency of the appeal lies in s.96(2) of the **Act.**) The Registrar adjourned the matter to 24 September, 1993.

The Council notified objectors on 18 August, 1993 of its determination to grant development consent. Two days later it notified the objectors of the developer's appeal pursuant to s.97 of the **Act** and of each objector's statutory entitlement under s.97(2) to be heard at the hearing "as if a party to the appeal".

Before the next call-over, the Registrar received many letters from people who had made objections to the Council. Some of those people purported to exercise the right conferred on an objector by s.98(1) of the Act.