Taylor on behalf of the Kalkadoon People v North Queensland Electricity Commission

*Christine Lovitt**

SUMMARY

This paper identifies and examines the issues which were considered by Drummond J when the Kalkadoon case was heard before him in the Federal Court in October 1996. The case concerned an application for interlocutory injunctive relief by native title claimants in order to prevent the construction of a powerline across certain land and waters in northern Queensland in respect of which they had claimed native title.

Also referred to are two other Federal Court cases in which similar relief was sought by native title claimants. In all three cases the relief was refused. The paper looks at the reasons why the relief sought was refused and comments on the possible outcome of similar claims in the future, and the implications of such claims for the mining and petroleum industry.

INTRODUCTION

The *Kalkadoon* case[1] is one of several recent Federal Court cases concerning an application by native title claimants for interlocutory injunctive relief to restrain certain construction works from being carried out on the land in respect of which native title has been claimed.

In each case the Federal Court has refused the relief sought, taking into account the nature of the works being carried out, the balance of convenience and other relevant factors.

FACTS

In May 1996 James Taylor, on behalf of the Kalkadoon People, lodged a native title claim with the National Native Title Tribunal in respect of lands and waters in the Mt Isa region of northern Queensland. This land included

* BA, LLB (Dublin); Senior Associate, Blakiston & Crabb, Perth.

[1] Unreported, Federal Court, 18 October 1996.

Timberu Pastoral Holding, which comprises land over which pastoral leases have been granted by the Queensland government. This claim was accepted by the Registrar of the Tribunal on 28 August 1996.

In early September 1996 a contractor engaged by the North Queensland Electricity Commission (NQEC) commenced construction of a powerline, to be owned and operated by NQEC, which would run from Mt Isa eastwards to Chumvale and then on to Cloncurry township and the Ernest Henry mine.

Cloncurry township at that time had a population of about 3,000 and relied upon a 34-year-old powerline from Mt Isa. This powerline was frequently affected by storms resulting in power blackouts. Ernest Henry mine is a very large copper and gold mine which was under development at the time of the hearing. The mine development and commissioning was critical upon power being supplied to site by July 1997. NQEC was liable to pay the mine liquidated damages of $14,000 for each day that the supply of power was delayed after 15 July 1997.

The powerline route traversed part of the waters and land over which native title had been claimed by the Kalkadoon People. NQEC had acquired a 60-metre-wide easement over the proposed powerline route either by consent of the occupiers or by compulsory resumption. The line was to be 151 kilometres in length, supported by 370 steel towers. At the time of the hearing about 50 tower foundations had been built, steel had been procured and tower manufacture had already commenced in Sydney.

NQEC retained consultants to conduct cultural and heritage clearance over the land likely to be affected by the powerline construction. This work commenced in November 1995. By March 1996 the consultants had liaised with the North West Queensland Land Council (NWQLC) and the Kalkadoon Tribal Council in their efforts to identify the cultural interests to be taken into account when designing the powerline route.

Considerable heritage clearance work was undertaken and by May 1996 some 30 Aboriginal people had been directly involved in field investigations. Taylor, the applicant, was given details of the project in April 1996 by NQEC but did not at that time indicate a desire to participate in the clearance work. Taylor was a spokesperson for the Kalkadoon Dancers' Association, a body which represents a substantial number of Kalkadoon People, and which NWQLC considered to be one of its clients.

A preliminary impact assessment listing identified heritage sites was produced by NQEC on about 18 April 1996. Following receipt of the archaeologist's report on 15 May 1996 NQEC made changes to the proposed powerline route to accommodate heritage concerns. The contract for the powerline survey was let on 17 May 1996 and the line design was finalised once the survey was completed in August 1996.

On 3 May 1996 NWQLC wrote to NQEC suggesting that NQEC should not have relied only on certain members of the Kalkadoon Tribal Council and requesting NQEC not to finalise its archaeological study until further discussions with NWQLC and "other interested parties" had taken place. No reference was made in this letter to the Kalkadoon Dancers' Association.

On 17 May 1996 NQEC responded in writing to NWQLC expressing its disappointment at this development as it had understood that all relevant Aboriginal people had been consulted and that the clearance work carried out was properly done by those people. NQEC requested from NWQLC the names of any other Aboriginal individuals or organisations with whom it should make contact. NWQLC did not provide any names to NQEC in response to this request.

A meeting then took place in late June or early July 1996 and was attended by representatives from NQEC, NWQLC and Sancave Pty Ltd, a consultant to NWQLC. A Mr Perkins, of Sancave, advised that Sancave represented Taylor, the Kalkadoon Dancers' Association and all other Aboriginal groups in the area. He stated NQEC had used the wrong people for the heritage site clearance and described his role as being to negotiate compensation and employment for the Aboriginal people in the area.

Following a further meeting on 11 September 1996, the Crown Solicitor's Office, on behalf of NQEC, wrote to Sancave on 13 September 1996 offering Taylor and others who were concerned at not having been part of the heritage clearance the opportunity to participate in a further cultural heritage clearance of the proposed transmission line route. Terms of payment were proposed. Sancave replied on 17 September 1996 with a counter offer and in its letter foreshadowed an injunction application. The counter offer was not accepted by NQEC.

Taylor subsequently made an application to the Federal Court for a declaration that the Kalkadoon People are the owners of native title over the area claimed in their native title application and also for an interlocutory injunction to prevent further construction of the powerline. The application was heard by Drummond J on 14 October 1996.

ISSUES

The issues considered in this matter were as follows:

(a) the jurisdiction of the Federal Court to deal with the application;
(b) whether the enactment of the *Electricity Act* 1994 (Qld) by the Queensland government constituted an "impermissible future act" within the meaning of that term in the *Native Title Act* 1993 (Cth);
(c) whether the construction of the powerline similarly constituted an "impermissible future act";
(d) whether the native title interests claimed are likely to be irreparably harmed by construction of the powerline;
(e) the question of the balance of convenience; and
(f) the relevance of delay on the part of the applicant.

Jurisdiction of the Federal Court

The application was expressed to be brought pursuant to s 213(2) of the *Native Title Act* and s 23 of the *Federal Court of Australia Act* 1976 (Cth). Neither of these provisions confer upon the Federal Court the jurisdiction to grant the relief claimed. However, given the possibility that the applicant's native title claim may ultimately be referred by the tribunal to the Federal Court, and given the urgent nature of the application for interlocutory relief, it was found that it was appropriate for the matter to be dealt with by the Federal Court.

Electricity Act 1994 (Qld)

Section 101 of the *Electricity Act* confers an unconditional power on bodies such as NQEC to construct transmission lines on "publicly controlled places" as that term is defined in Sched 5 of the Act.

The applicant contended that the enactment of s 101 could not be a "permissible future act" for the purposes of the *Native Title Act* and that the injunction sought should be issued for that reason. Section 235(2) of the *Native Title Act* defines the enactment of legislation as a "permissible future act" only if the legislation applies in the same way to the land affected, or if the effect of the legislation on the native title in relation to the land or waters is not such as to cause the native title holders to be in a more disadvantageous position at law than they would if they held ordinary title to the land instead. "Ordinary title" is defined in s 253 to mean freehold title.

Drummond J was satisfied from the evidence of the applicant as to the nature of native title rights claimed that the area claimed could not be a "publicly controlled place". As such, he held that s 101 could not lawfully authorise NQEC to carry out electricity supply works on any land over which such native title rights existed.[2] It was, however, his opinion that s 101 was a "permissible future act" because it did not operate to expose native title owners of land to any greater disadvantage than a freehold owner.

Construction of the powerline

The applicant further argued that the construction of the powerline was also an "impermissible future act" and that, in the alternative, if it was a "permissible future act" it fell within the provisions of s 26(2)(d) of the *Native Title Act* and was invalid due to the failure of NQEC to give the Kalkadoon People the right to negotiate in accordance with s 31 of that Act.

Section 26(2) lists the various "permissible future acts" to which the right to negotiate provisions in Subdiv B of the Act apply. Section 26(2)(d) relevantly provides as follows:

[2] *Kalkadoon*, ibid, p 6.

"(d) the compulsory acquisition of native title rights and interests under a Compulsory Acquisition Act,[3] where the purposes of the acquisition is to confer rights or interests in relation to the land or waters concerned on persons other than the Government party."

It was Drummond J's opinion that the construction of the powerline was a "permissible future act" because it could be done in relation to the land in question if the Kalkadoon People, instead of holding native title, held freehold title to the land. Under s 116 of the *Electricity Act* the works could be carried out either by consent of the freeholder or by compulsory acquisition.

Having formed the view that the construction works constituted a "permissible future act" Drummond J further stated that, in his opinion, the provisions of s 26(2)(d) did not apply and accordingly the works were not invalid. In his view s 26(2)(d) did not apply because the relevant provisions of the *Electricity Act* did not constitute a "compulsory acquisition act" in that no provision of the *Electricity Act* confers on a person whose land is compulsorily acquired the same non-monetary compensation as is provided for by the *Native Title Act*.[4] The *Electricity Act* limits any such entitlement to monetary compensation.[5]

Irreparable harm to native title interests

It was not disputed that the Kalkadoon People have a well-known and established traditional connection with the land in question, nor was this issue required to be dealt with for the purposes of the application for interlocutory injunctive relief.

At the time of handing down the decision in this case the reserved decision in *Wik Peoples v Queensland*[6] had not yet been handed down and Drummond J noted that, in view of such uncertainty as to whether the grant of pastoral leases extinguished native title, it would be open to the applicant to argue at trial that the grant of the Timberu Pastoral Holding leases had not extinguished the native title claimed by the Kalkadoon People.[7]

The applicant alleged that the construction of the powerline would have a detrimental effect on the Kalkadoon People's native title in three respects, thus justifying the injunctive relief being sought. These were as follows:

1. A number of dreaming lines would be affected.
2. There were specific sites of importance sufficiently close to the proposed powerline route to be likely to be affected by it.

[3] As that term is defined in the *Native Title Act* 1993 (Cth), s 253.
[4] Section 79.
[5] Section 116(4) and (5).
[6] (1996) 141 ALR 129.
[7] The decision in the *Wik* case was subsequently handed down and supported Drummond J's view, holding that the grant of the pastoral leases in question did not extinguish native title. The *Wik* case has not, however, removed all the uncertainty as it was made clear that the effect of the grant of pastoral leases would have to be examined on a case-by-case basis before any certainty could be achieved.

3. There were many sites of significance along the powerline route which had not been identified because the proper custodians were not consulted by NQEC.

As to the first of these grounds, Drummond J found that irreparable harm would not be caused to the dreaming lines if protective ceremonies were carried out. NQEC was prepared to give an undertaking to allow such ceremonies to be carried out[8] and therefore the risk of harm could not justify the relief sought.

The specific sites referred to in the applicant's second reason all appeared to be some distance away from the powerline route, except for some stone clippings, rock paintings in a cave and some sites in the Gorge Creek area. Drummond J was not prepared to infer that the sites referred to, apart from those previously referred to as being close to the powerline route, were at any risk of real harm from construction works.

The assertion of the applicant that the rightful custodians, whose names were provided in evidence, had not been consulted and hence not all sites had been identified was diminished by the fact that five of the 13 custodians named wrote to NQEC's solicitor the day before the hearing pledging support for the powerline project and dissociating themselves from the injunction application.

In summarising his views on these three grounds Drummond J said:

> "The failure of the applicant to show anything more than a low risk of harm from powerline construction to sites of importance to Kalkadoon beliefs and traditions goes a long way to resolving his claim for interlocutory relief."[9]

Balance of convenience

Having considered the issues discussed above, and having established that the applicant's claim for native title was an issue to be tried, Drummond J then considered the balance of convenience in relation to the applicant's claim for interlocutory relief.

In essence, the balance of convenience in such a matter is determined by identifying whether the detriment caused would be greater in the case of the applicant if the relief were refused, or in the case of the respondent if the relief were granted.

The relevant factors taken into consideration were:

(a) the cost of relocating the line to allow construction to proceed pending trial;
(b) the damages payable by NQEC to the Ernest Henry mine in the event of delay in the supply of power to the mine;
(c) the liability of NQEC to pay stand-down rates and prolongation costs to the contractor if construction was delayed;

[8] In the form annexed as Exhibit 1 to the judgment.
[9] *Kalkadoon* (unreported, Federal Court, 18 October 1996), p 19.

(d) the detrimental effect of an injunction on third parties such as the Ernest Henry mine which would incur increased mine development costs, and the township of Cloncurry, which would suffer power disruption for a longer period; and
(e) the risk of irreparable harm to sites of significance to the Kalkadoon People.

Drummond J held that the balance of convenience favoured refusal of the injunction due to the likely financial loss to be suffered by NQEC and third parties for which no compensation could be recovered from the applicant.[10] In his view there was only a low risk of irreparable harm to sites of significance, particularly given that two significant changes had originally been made to the proposed powerline route to avoid sites identified by NQEC's consultant archaeologist.

Delay

On the evidence it appeared that the applicant did not make known his desire to be consulted and involved in heritage clearance work until the meeting on 11 September 1996, despite the fact that he had attended earlier meetings and had spoken with a representative of NQEC in early April. Drummond J was satisfied that, given the willingness of NQEC to consult with all interested persons, the applicant would in all probability have been enlisted by NQEC to assist with heritage clearance work had he expressed an interest.[11] He accordingly found that the applicant's delay in putting himself forward to be involved in heritage clearance work would result in far greater prejudice to NQEC, were interlocutory relief to be granted, than if the applicant had made known his wish to be involved at an earlier stage.

DECISION

Based on his findings on each of the issues referred to above, Drummond J ordered that, upon NQEC giving to the applicant an undertaking not to interfere with dreaming line ceremonies on land affected by the construction of the powerline, the application for interlocutory relief was to be dismissed.

COMMENT

The *Kalkadoon* case is of particular relevance to the mineral and petroleum industries in Australia due to the fact that so many mining and petroleum titles presently exist over land which is the subject of native title claims that have not yet been determined. The effect of this situation is that

[10] Ibid, p 23.
[11] Ibid, p 29.

it is open to native title claimants to seek injunctive relief to prevent various activities from either commencing or continuing notwithstanding that these activities are being carried out pursuant to an appropriate form of title or licence.

The issue of whether a relevant title or licence is valid for the purposes of the *Native Title Act* was considered not only in the *Kalkadoon* case but also in the cases of *Smith on behalf of the Gunggari People v Tenneco Energy Queensland Pty Ltd*[12] and *Bropho v Ball and Bluegate Nominees Pty Ltd*.[13] The *Gunggari* case concerned a licence to construct a gas pipeline granted under the *Petroleum Act* 1923 (Qld) in December 1995. In that case Drummond J was of the opinion that the grant of the licence constituted neither "the creation of a right to mine"[14] nor "the compulsory acquisition of native title rights and interests under a Compulsory Acquisition Act".[15] The failure of the applicant to establish that it had an arguable case on the issue of invalidity was a significant factor in the ultimate dismissal of the claim for injunctive relief.

In the *Bropho* case the validity of the licence in question, being a licence to construct a jetty granted under the *Jetties Act* 1926 (WA) in January 1993, was not in dispute, but the pile-driving works pursuant to the licence were claimed to be invalid. The applicant contended that the performing of the activities authorised by the jetty licence, including the pile-driving, which occurred after 1 January 1994 constituted a "future act".[16] Carr J acknowledged that this was an arguable question which was entitled to be dealt with at trial. He did, however, add that a provisional assessment of the legal merits suggested that the applicant's case was not particularly strong.[17] The interlocutory relief sought was refused on the grounds of the balance of convenience and the delay of the applicant in seeking relief.

Whilst the mineral and petroleum industries may feel less threatened by potential injunctive action as a result of the precedent set by these three decisions, the outcome of further cases is by no means certain. None of these cases involved the proposed development of a mine.

It is likely that a court would be faced with a more difficult decision as to the balance of convenience if, for example, the applicant concerned had a strong native title case, the miner wished to develop an open pit mine on an area of alleged special cultural significance and the relevant mining title had not been granted in accordance with the provisions of the *Native Title Act*.

If the *Native Title Act* is amended, as proposed, to provide for the validation of all titles granted by States and Territories between 1 January 1994 and 23 December 1996 which might otherwise have been invalid, this will considerably reduce the risk of titles being found to be invalid. Until such time as amending legislation to this effect is passed there remains

[12] Unreported, Federal Court, 3 May 1996.
[13] Unreported, Federal Court, 1 February 1997.
[14] *Native Title Act* 1993 (Cth), s 26(2)(a).
[15] *Native Title Act* 1993 (Cth), s 26(2)(d).
[16] *Native Title Act* 1993 (Cth), s 253.
[17] *Bropho* (unreported, Federal Court, 1 February 1997), p 16.

considerable uncertainty as to what forms of Crown grant, apart from pastoral leases, may have extinguished native title. For this reason the mining and petroleum industries should not dismiss the prospects of injunctive action.

Whether this trilogy of Federal Court cases is the start of a new force to be grappled with in the area of native title law remains to be seen.