that although questions of contract and property law were involved, numerous provisions of the MRA would have to be considered when determining the matter.

Noting that mining contracts are not a discrete and different branch of the law,[4] Koppenol P held that although the agreement concerned mining and a mining tenement, it was the capacity of the agreement to bind the applicant which was directly at issue. Applying *O'Grady*, the President held that the claim was about personal obligations under a contract and did not arise in relation to mining.

With respect to possession of a permit

The applicant also relied on s 363(2)(a) of the MRA, which gave the Tribunal jurisdiction to hear "proceedings with respect to … the right to possession or other interest or share in" an exploration permit. However, Koppenol P observed that the present claim was about "rights of use and enjoyment". Thus, the claim was not one with respect to the right to possession of or other interest or share in the exploration permit, as required by s 363(2)(a).

Decision

Being satisfied that the claim clearly fell outside the Tribunal's jurisdiction, Koppenol P struck it out.

ABORIGINAL CULTURAL HERITAGE MANAGEMENT PLANS*

Re Queensland Electricity Transmission Corporation Ltd (trading as Powerlink Queensland) and Bonner [2006] QLRT 8 (Koppenol P)

Aboriginal cultural heritage management plan – application for approval – appointment of consultant – rate of remuneration for Aboriginal monitors

Background

The cultural heritage management plan related to a transmission line easement to supplement electricity supply to South-East Queensland. The area was within the respondents' native title claim and stretched 90km from Middle Ridge to Greenbank. The main issues in dispute were the engagement of a cultural heritage consultant and remuneration for monitoring activities.

Cultural heritage consultant

The applicant was prepared to fund the engagement of a consultant. It proposed that, failing agreement, the applicant would choose a consultant from a list of archaeologists nominated by Dr Prangnell, the director of the University of Queensland's archaeological services unit.

The respondents proposed that they engage Dr Prangnell as the consultant. They suggested that s 68 of the *Aboriginal Cultural Heritage Act 2003*, which provided that an Aboriginal party could

---

4 *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489, [42] (FC).

* Matt Black, BA, research officer to the presiding members, Queensland Land and Resources Tribunal.

request a particular consultant be engaged for a cultural heritage study, set a benchmark for Aboriginal involvement in choosing experts.

The Tribunal rejected that approach, noting that s 68 applied only to cultural heritage studies. The guidelines gazetted under s 85 envisaged agreed appointment of a consultant. Observing that a process for resolving disputes was necessary, Koppenol P found the applicant's proposed clause was fair and reasonable. The applicant's choice of consultant would be from a list nominated by Dr Prangnell, in whom the respondents clearly had confidence.

Rate of remuneration

The applicant proposed that Aboriginal monitors be paid $300 per day, plus expenses totalling $77.30. This was said to be reasonable in the circumstances and consistent with industry standards. The respondents proposed a rate of $450 per day plus expenses, a $120 travel allowance per person per day and a 20% administration fee. They referred to projects where monitors were paid between $450 and $490 a day by government bodies, including the applicant itself.

The President accepted that rates of at least $450 per day had been paid in particular cases. On the other hand, $300 per day was the applicable rate in various indigenous land use agreements (ILUA), including the state-wide model ILUA. The native title protection conditions[5] provided for a daily rate of $317.35. The President also referred to Parliamentary debate, which suggested that a daily rate of $300 was becoming consistent in ILUAs in 2003.[6]

Although determining a reasonable pay rate is dependent on various factors, the dispute here focused upon industry standards. The President emphasised that the industry standard was what could reasonably be regarded as the rate adopted generally for Aboriginal monitoring work.[7] On the available material, Koppenol P determined $317.35 as the industry standard.

Decision

The President recommended that the Minister approve the plan as submitted by the applicant.

State of Queensland and Best [2006] QLRT 9 (Koppenol P)

Aboriginal cultural heritage management plan – application for approval – proposed Tugun highway bypass – whether public notices complied with statutory requirements – whether invalidity of referral results

Background

The principal application in this matter sought an order under s 117(2) of the *Aboriginal Cultural Heritage Act 2003* (the Act) that the Tribunal recommend that the Minister for Natural Resources, Mines and Water approve a particular cultural heritage management plan (the proposed plan). The

5 Defined in schedule 2 of the Act.

6 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2003, 4431-2 (Hon Stephen Robertson MP).

7 See definition of "industry standard": *Butterworths Australian Legal Dictionary* (1997) 595.

proposed plan related to a large highway bypass project from Currumbin, Queensland to Tweed Heads, New South Wales, known as the Tugun Bypass project (the project).

Eastern Yugambeh Ltd (the respondent) was an endorsed party for the proposed plan. It complained that the newspaper public notices which were given by the applicant under s 96 of the Act were defective, leading to invalidity of all subsequent steps.

Requirement to give 30 days notice

The respondent complained that some of the notices did not give the requisite 30 days notice. Some of the notices did give at least 30 days, but others indicated a shorter time period. The respondent submitted that the notices, in their totality, were defective. The applicant argued that it was only required to advertise in 1 newspaper and because at least 1 advertisement complied with the 30 day notice requirement, there was no relevant defect.

The President rejected the respondent's argument, seeing no reason why the advertisements should be considered in their totality. Koppenol P held that the statutory requirement of 30 days notice had been complied with.

Defects in the notices

It was common ground that the notices were technically defective because they failed to "state the notice day (proposed day) for the plan", being the date by which written notice is assumed to have come to the attention of relevant people,[8] and they mistakenly referred to s 61 of the Act instead of s 96.

The respondent drew attention to the fact that s 96(5) provided that the notice day "must" be stated in a notice. It was submitted that inclusion was a mandatory requirement and non-compliance resulted in invalidity. Similarly, the incorrect section number was said to contribute to confusion amongst Aboriginal parties who saw the notices.

The test for invalidity

The President referred to *Project Blue Sky Inc v Australian Broadcasting Authority*,[9] where the High Court held that the "test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid".

The President concluded that the defects in question did not affect a person's capacity to understand the notices or to respond to them. Applying *Project Blue Sky*, Koppenol P held that it was not a purpose of the Act that the deficiencies should invalidate the notices or the referral to the Tribunal. The matter was set down for hearing of the substantive issues.

---

8 Section 96(1)(5)(h) and Schedule 2 (definition "notice day (proposed plan)") of the Act.

9 (1998) 194 CLR 355, 390-391.