SOME GUIDANCE ABOUT DISPUTED CULTURAL HERITAGE MANAGEMENT PLANS IN QUEENSLAND*

Introduction

In Queensland, under the *Aboriginal Cultural Heritage Act 2003* (Qld) (the **Act**), compliance by a project proponent with the terms of a cultural heritage management plan (**CHMP**) which has been approved by the Minister for Natural Resources, Mines and Water is deemed to be compliance with the statutory cultural heritage duty of care. Indeed, in some circumstances, such as where an environmental impact statement is required for a project and there is no relevant agreement or "right to negotiate" process in place, an approved CHMP will be a pre-condition to the grant of some rights for the project.

Although the terms of approved CHMPs will ordinarily be agreed by the relevant project proponent and the Aboriginal parties, the Act provides for the Queensland Land and Resources Tribunal to recommend the approval of an appropriate CHMP even where agreement cannot be reached.

On 3 February 2006, the Land and Resources Tribunal (President Koppenol) handed down its first decision about the approval of a contentious CHMP in *Re Queensland Electricity Transmission Corporation Limited (trading as Powerlink Queensland) and Bonner & Ors*[10] ("the Powerlink Decision"),. The facts of the case and a summary of the judgment is provided in the case note at page 14. President Koppenol found the terms of the CHMP proposed by the applicant, Powerlink, to be reasonable and recommended it for Ministerial approval.

The Powerlink Decision provides some useful guidance on the appointment of consultants, the "industry standard" daily rates to be paid to Aboriginal monitors engaged in cultural heritage survey work, and the "extra" benefits to be provided under CHMPs.

The guidelines

Guidelines which have been gazetted under section 85 of the Act provide guidance as to the expected contents of CHMPs. The guidelines refer to matters such as the methods to deal with cultural heritage finds, disciplinary procedures and cultural awareness training for employees etc.

In the Powerlink Decision, it was not necessary for the Tribunal to consider all of the matters in the guidelines because many aspects of the CHMP had already been agreed – the decision makes no comment on those agreed matters.

Appropriate remuneration rates for Aboriginal monitors

The Powerlink Decision is quite clear on what the Land and Resources Tribunal considers to be the "industry standards" for the remuneration of Aboriginal monitors, being one of the factors referred to in the guidelines.
The current "industry standard" rate in Queensland according to the Tribunal is $317.35 per day per monitor, all inclusive. It is noted that no additional amounts are payable for out-of-pocket

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expenses, vehicle or travelling costs, or administration fees. The figure is calculated on a daily rate of $300 per day considered to constitute the industry standard in 2003 (as reflected in the Native Title Protection Conditions for exploration permits), plus $17.35 to accommodate the increased cost of living since 2003. The daily rate applies where more than 3 hours work (including travelling time) is carried out in any day.

However, while Aboriginal parties might now be prepared to accept the rate of $317.35 per day per monitor for between 3 and 8 hours work per day as the industry standard, many other issues relating to remuneration remain negotiable. In addition to "industry standards", the CHMP guidelines list many other factors which can be considered to determine reasonable costs for a CHMP. Some of those costs factors include the nature of the work undertaken, the location or remoteness of the location, whether the work requires parties to stay overnight or away from home, and the size of the plan area. Since the Powerlink Decision, these other factors will probably take on a greater importance in the negotiation of a CHMP.

In the Powerlink Decision, the remuneration amounts sought by the Aboriginal parties of $450 per day up to 8 hours and $56 per hour after 8 hours, with time and a half for weekends, out-of-pocket expenses and travel costs of $120 and a 20% administration fee were considered excessive. However, although the Tribunal clearly decided that $317.35 per day was the "industry standard" rate of remuneration for Aboriginal monitors, it also found that the higher amount of $377.30 per day per monitor all inclusive and the amount of $542.30 per day for supervisors, as suggested by the Powerlink, to be reasonable.

The Powerlink Decision relates to a 90-kilometre electricity transmission line in south-east Queensland – the project area was relatively small and the monitors would not have been required to stay overnight. Since the rates of $377.30 and $542.30 per day for monitors and supervisors respectively were found to be reasonable in those circumstances, Aboriginal parties negotiating CHMPs for larger and more remote locations might argue that those amounts are starting points only. Project proponents might only be able to use the Powerlink Decision to argue that, in similar fact situations, they will not be required to pay amounts as high as those claimed by the Aboriginal parties. The negotiated remuneration is likely to fall somewhere between those amounts.

Consequently, while the Powerlink Decision is instructive on the amount considered to be the "industry standard" for the remuneration of Aboriginal monitors, it will not necessarily result in markedly smoother or simpler negotiations of remuneration to be paid under CHMPs. At least now however, project proponents have a starting point.

"Extras" to be provided under CHMPs

The Tribunal also considered a request by the Aboriginal parties for a $10,000 subsidy for legal costs should a dispute under the CHMP arise. The Tribunal did not consider the CHMP proposed by Powerlink to be unreasonable merely because it did not include such a subsidy.

This aspect of the decision may well be the most important for project proponents. It indicates that the Tribunal may be unwilling to impose terms about matters which are not provided for in the guidelines, being matters specifically relating to the identification and protection of Aboriginal cultural heritage.

Negotiations for a CHMP are often conducted in conjunction with native title negotiations about project rights. There can therefore be a blurring between the benefits offered by a project

proponent for the native title parties' consents to required project rights and those offered as part of a cultural heritage protection scheme. Experience suggests that the types of benefits which might be offered as part of compensation packages for native title consents, such as royalty-type payments, traineeships, scholarships and long-term employment opportunities, are sometimes sought by Aboriginal parties in CHMP negotiations.

Following the Powerlink Decision, project proponents negotiating a CHMP where native title is not an issue will have no legal imperative to offer Aboriginal parties benefits greater than those which are contemplated in the guidelines. However, relationship considerations may dictate offers of more generous benefits even though the absence of such benefits is unlikely to be considered unreasonable by the Tribunal.

Conclusion

Since the Powerlink Decision, the Tribunal has handed down a further decision about the approval of CHMPs. The decision in *State of Queensland and Best & Ors*[11] deals with the notice requirements in the Act relating to the approval of CHMPs.

As more judicial consideration is given to the approval of CHMPs under the Act, project proponents and relevant Aboriginal parties will hopefully find the negotiation of CHMPs more streamlined, with fewer contentious issues. However, at present there remain numerous issues in proposed CHMPs which parties will need to resolve by negotiation in order to avoid Tribunal involvement.

SOUTH AUSTRALIA

PRE-EMPTIVE RIGHTS ISSUES*

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (Judgement of Finn J [2005] FCA 1812 13 December 2005)

Corporations - Share buy back provisions - Effect on Pre-emptive Rights - Construction – Interpretation

Background

Lion Nathan Australia's well publicised bid for Coopers Brewery Limited (**Coopers**) has resulted in a number of proceedings in various jurisdictions. These proceedings were commenced by Lion Nathan Australia Ltd ("Lion Nathan") in the Federal Court claiming that Coopers were in breach of an agreement made between the parties in the mid-1990's.

Subsequent to the settlement of certain proceedings which involved, amongst others, Coopers and Lion Nathan in the mid 1990's, the parties entered into an agreement whereby Lion Nathan obtained a third tier pre-emptive right for the purchase of shares in Coopers.

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