ATTEMPT BY A NATIVE TITLE PARTY TO IMPOSE CONDITIONS TO REGULATE URANIUM EXPLORATION ACTIVITIES*

Wilma Freddie and Others on Behalf of the Wiluna Native Title Claimants/The State of Western Australia/Globe Uranium Ltd [2007] NNTTA 37

Native title – Future act – Proposed grant of exploration licence – Exploration for uranium – Expedited procedure objection application – Whether act is likely to interfere directly with carrying of community or social activities – Whether act is likely to interfere with sites of particular significance – Whether act is likely to cause major disturbance to land or waters – Whether the fact that the exploration is for uranium affects the consideration of the Native Title Act 1993 (Cth) s 237.

Overview

The National Native Title Tribunal (Tribunal) held that:

- uranium exploration raised no issues given the current regulation by the State and the understanding that the grantee party will abide by the law;
- the Tribunal's inquiry was confined to assessing whether the interference and disturbance in s 237 is likely to occur and the Tribunal was not mandated to conduct a wide ranging inquiry into the Government party's regulatory regime for uranium exploration; and
- the grant of the proposed licence was an act attracting the expedited procedure.

The decision will discourage native title parties from raising uranium issues in expedited procedure hearings.

Facts

On 29 March 2006, the State of Western Australia (Government party) gave notice of its intention to grant an exploration licence (proposed licence) to Globe Uranium Ltd (grantee party) and stated that it considered that the grant attracted the expedited procedure. The proposed licence was situated 124km north east of Wiluna and entirely within the native title claim of the Wiluna Native Title Claimants (native title party).

On 1 August 2006, the native title party (NTP) made an expedited procedure objection application to the Tribunal.

The underlying land tenure of the proposed licence was entirely pastoral lease and there were no Aboriginal communities in the vicinity of the proposed licence. There were no current or pending tenements recorded as overlapping the proposed licence but several pending and granted exploration licences were immediately adjacent to the proposed licence.

The Government party proposed that the grant of the proposed licence be subject to the standard conditions imposed on all exploration licences in Western Australia.[1] The Government party also proposed additional conditions allowing the NTP, within 90 days of the grant, to initiate action to secure a Regional Standard Heritage Agreement (RSHA).

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1 See *Maitland Parker and Others on Behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon CJ Sumner at [21] conditions 1-4.

Searches of the Department of Indigenous Affairs' Register of Aboriginal Heritage Sites revealed no registered Aboriginal sites under the *Aboriginal Heritage Act 1972* (WA) (AH Act**)** within the area of the proposed licence.

Uranium Exploration and section 237 of the *Native Title Act 1993* (Cth)

One of the principle issues in the inquiry was whether the fact that the exploration was for uranium affects the consideration of s 237(c) and to some extent s 237(a).

Section 237(c) – major disturbance to land or waters

The NTP contended that there were no regulations or guidelines that directly regulate the exploration for uranium, including the increased risk of contamination. The NTP asserted that the long lasting nature of the radioactive material (in excess of 100,000 years) would constitute a major disturbance to the land from the view of the general community.

The grantee party contended that uranium exploration is heavily regulated and that the following Acts and Guidelines must be complied with when exploring for uranium in Western Australia:

- *Radiation Safety Act 1975* (WA);
- *Atomic Energy Act 1953* (Cth);
- *Environmental Protection and Biodiversity Conservation Act 1999* (Cth);
- Code of Practice and Safety Guide – Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing;[2]
- Code of Practice Safe Transport of Radioactive Material;[3] and
- Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia.[4]

The grantee party further contended that it complied with all governmental requirements and conducted exploration in accordance with accepted best practice. The grantee party also made a number of undertakings relating to its training and safety regimes, and rehabilitation of ground disturbance.[5]

The Government party argued that the regulatory regime that applied to uranium mining and exploration in Western Australia, in particular condition 4 of the standard conditions which is given effect by the completion of the program of work[6] (POW). In certain circumstances the POW requires the preparation and approval of a radiation management plan (RMP). For a RMP to be approved it must demonstrate that there are adequate measures taken to control the exposure of employees and members of the public to radioactive materials generated through mining operations, which must be below the dose level set by the *Mines Safety and Inspection Regulations 1995* (WA) and as low as reasonably practicable.

The Deputy President found that the grantee party's contentions and evidence demonstrated knowledge of the requirements of the regulatory regime relating to uranium exploration. Further, the NTP's contention – that there is no regulatory regime relating to uranium exploration – was found to be incorrect. Therefore, it was held there was no basis to rebut the normal presumption of

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2 (2005) Radiation Protection Series No 9.
3 Radiation Protection Series No 2.
4 (1992) Radiation Health Series No 35.
5 At [21]
6 As required by the *Mining Act 1978* (WA) s 63(aa).

regularity by the grantee party or doubt the grantee party's undertaking to be bound by the relevant legislation and to work according to relevant guidelines regarding radioactive substances.

Section 237(a) – interference with community or social activities

The Tribunal was required to make a predictive assessment of whether the grant of the proposed licence and activities to be undertaken are likely to interfere with community or social activities.[7] In respect of this assessment the Government party contended (based on various aspects of its regulatory regime under the *Mining Act 1978* (WA)[8]) that direct interference with such activities of the NTP in the area of the proposed licence was unlikely.

In contrast, the NTP contended that there was a community of native title holders who conducted activities in accordance with their native title right in the area of the proposed licence; and that the native title party comprises members of the public who will be exposed to radiation, especially the ingestion of particles because of where they live and aspects of their traditional way of life.

In making his assessment the Deputy President reiterated that he was satisfied that the grantee party was aware of its responsibilities to ensure uranium exploration is carried out in accordance with practices which minimise the exposure of its employees and members of the public to health risks from radioactive substances and ensure that it falls within acceptable levels.

The Deputy President found that while the NTP's contentions disclosed genuine concerns about radiation exposure, in the absence of anything but very scant evidence as to the NTP's activities in the area, and given the Government party's regulatory regime and grantee party's intentions, he was unable find that the community or social activities would be interfered with whether or not uranium was the exploration target.

Section 237(b) – interference with sites of particular significance

The Tribunal was also required to determine whether there was likely to be (in the sense of a real risk) interference with areas or sites of particular (ie more than ordinary) significance to the NTP in accordance with their traditions.

In reaching his decision the Deputy President emphasised that the AH Act protects all Aboriginal sites whether they are on the Register or not and that the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters.

The Deputy President accepted the contentions and evidence of the NTP that a *Tjukurrpa* (dreaming track) extended from well to the west of the proposed licence area through the proposed licence area and extended further to the east of it; and was a site of particular significance to the NTP in accordance with their traditions.

The NTP contended that the AH Act and its associated regulatory regime were insufficient to make s 237(b) interference unlikely. The Deputy President responded that past determinations of the Tribunal indicated that:

- the AH Act and its regulatory regime will normally be sufficient to ensure that s237(b) interference is unlikely to occur but there will be circumstances where this is not the case taking into account the nature of any sites;[9] and

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7 *Smith v Western Australia* [2001] FCA 19.

8 In particular ss 63 and 20(5).

9 *Banjo Wurrumurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa*, NNTT WO05/756, [2007] NNTTA 21 (16 March 2007), Hon CJ Sumner at [34].

- the intention of the grantee, including whether it is willing to enter into an agreement which provides for a site survey to be carried out, is a relevant consideration.[10]

The Deputy President held that there was no likelihood that the uranium exploration would interfere with sites of particular significance for the purposes of s 237(b). In reaching this conclusion he relied on the following factors:

- that there is nothing about the site or sites of particular significance identified in this case which would render the Government party's regulatory regime under the AH Act ineffective; and
- the cooperative attitude of the grantee party and the consultation that will occur with the NTP.

Judicial Observations of the Existing Regulatory Regime Relating to Uranium Exploration

In his concluding comments the Deputy President made several observations regarding the existing regulation of uranium exploration, including that:

- under the uranium exploration regulatory regime, regulatory authorities have fewer sanctions available to them in the event of non-compliance with provisions relating to the preparation of a radiation management plan (compared with uranium mining); and
- the protection relating to 'critical groups' of the general public is based on persons in permanent communities in the vicinity of the exploration activity and not persons travelling through the area for the purposes of camping, hunting or gathering bush tucker. There is no mechanism or requirement to consult with native title claimants who may visit the area where exploration is taking place.

THE POTENTIAL IMPOSITION OF PASTORAL CONDITIONS ON MINING LEASES*

FMG Chichester Pty Ltd v Rinehart and Hancock Prospecting Pty Ltd [2007] WAMW 14

Conditions on Mining lease – Pastoral Conditions to grant of mining lease – Mining lease on pastoral lease – Recommendations to Minister on grant of mining lease

Background

On 24 August 2007 Warden Calder delivered a decision in the Warden's Court concerning objections by Gina Rinehart and Hancock Prospecting Pty Ltd (Objectors) to the grant of five mining lease applications (MLAs) to FMG Chichester Pty Ltd (FMG).[1] The MLAs are required for FMG's Cloud Break and Christmas Creek projects.

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10 *Champion v Western Australia* [2005] NNTTA 1.

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1 The objections were lodged and the matter was heard before the legislation giving the force of law to FMG's State Agreement (ie *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA)) came into force in October 2006. With affect from the enactment of that legislation, the State Agreement exempted four of the five MLAs from the provisions under the *Mining Act 1978* (WA) *(Mining Act)* that entitle a person to object to the grant of a mining tenement. Once these four MLAs are granted (which are MLA 46/449, 46/451, 46/452 and 46/454) they will be 'Agreement Mining Tenements' under the State Agreement, which means they are to be dedicated to the State Agreement project for the production and transportation of iron ore.