DATES V MINISTER FOR ENVIRONMENT, HERITAGE AND THE ARTS (NO 2)

Federal Court of Australia (Bennett J)
24 March 2010
[2010] FCA 256

Administrative law – *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9, 10, 12 – whether area identified is significant Aboriginal area – whether objects identified are significant Aboriginal objects – utility of challenging s 9 decision when s 10 decision made – whether there was a failure to take into account relevant considerations – whether irrelevant considerations were taken into account – whether there was a denial of procedural fairness

Facts:

In December 2008, Mr Worimi Dates applied for emergency and permanent protection of Alum Mountain at Bulahdelah, New South Wales under ss 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*Heritage Protection Act*'). In January 2009, he sought protection of 'objects' within this area under s 12 of the *Heritage Protection Act*. Mr Dates sought protection of the area due to roadworks planned by the Roads and Traffic Authority of New South Wales.

The Minister for the Environment, Heritage and the Arts declined to make declarations under any of the provisions. Although he was satisfied that the upper slopes and ridge crest outcrops of Alum Mountain were a 'significant Aboriginal area', he was not satisfied that this was the case for the lower slopes of the mountain. The proposed Bulahdelah Bypass would only affect the lower slopes, and not the upper slopes. Further, the Minister was not satisfied that the s 12 application identified 'significant Aboriginal objects'. Mr Dates sought review of the Minister's decision.

The primary issues for the Court to address were: whether the decision involved an error of law, whether in reaching the s 10 decision the Minister failed to take into account relevant considerations, whether in reaching the s 10 decision the Minister took into account irrelevant considerations, and whether there was a denial of procedural fairness.

Held, dismissing the application for review:

1. There is no utility in challenging a s 9 decision when a s 10 decision has already been made. Section 9 of the *Heritage Protection Act* provides that where the Minister receives an application by or on behalf of an Aboriginal or group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration and is satisfied that the area is a 'significant Aboriginal area' and that it is under serious and immediate threat of injury or desecration, the Minister may make a declaration in relation to the area, which has effect for a period not exceeding thirty days. Section 10 of the *Heritage Protection Act* allows the Minister to make a declaration in relation to the area. If a s 10 decision is set aside, then it would be open to the applicants to make a fresh s 9 application, which would then fall for consideration in light of the reasons for judgment as to the s 10 decision: [6], [7], [13]–[14]; *Anderson v Minister for Environment, Heritage and the Arts* [2010] FCA 57, followed.

2. The Minister addressed the correct question under the Act. It is apparent that each of the matters was considered and that they formed the basis and the evidence for the conclusions drawn. The material, in particular the various reports, formed a probative basis for the reasons, which were clearly set out: [45].

3. Aboriginal tradition is defined in terms of a body of traditions, observances, customs and beliefs of Aboriginals generally, or of a particular community or group of Aboriginals. While this includes traditions, observances,

customs or beliefs relating to particular persons, areas, objects or relationships, it does not mean that the belief of a single Aboriginal person about a particular area constitutes Aboriginal tradition. The Minister, therefore, did not ask himself the wrong question under the *Heritage Protection Act*: [47].

4. The Minister's reasons set out the evidence upon which his conclusions were based. It was not illogical for the Minister to conclude that the upper part of the mountain was significant for Aboriginal people, and the lower part was not: [48]–[50].

5. It does not constitute an error of law for an administrative decision maker to draw an inference or to make a factual finding in circumstances where there is evidence to the contrary. It was for the Minister to determine, on the basis of the evidence before him, whether he was satisfied of the relevant factual matters going to the proposition that the specified area was a significant Aboriginal area. It is not demonstrated that the Minister acted perversely, or that his lack of satisfaction was based on findings or inferences of fact which were not supported by probative material or logical grounds. The fact that the Minister relied on other evidence than Mr Dates, provided by other Aboriginal persons, does not support the proposition that the Minister erred in a way amenable to judicial review: [51]–[52]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, cited.

6. The Minister did not fail to consider relevant matters. The Minister looked at each area of Alum Mountain for which Aboriginal significance was claimed to determine whether or not that area is of Aboriginal significance within the meaning of the Act: [54]–[59].

7. The irrelevant considerations claimed are: the Minister mischaracterised certain persons, whose evidence was recorded in the Umwelt Report, as Worimi; and that the Minister referred to the fact that the base of Alum Mountain was not mentioned as an area of significance in a survey undertaken by the NSW National Parks and Wildlife Service without evidence of the material relied upon, which was apparently from the '*hearsay of an unidentified RTA Officer*'. These are not irrelevant considerations, in that the Minister was not able to take them into account. The weight to be given to the evidence, in that whether that evidence was directly set out or reported in a survey or report, was a matter for the Minister and, therefore, not open to challenge: [62]–[63]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, cited.

8. There was no denial of procedural fairness in Mr Dates not having the opportunity to reply to a letter dated 3 March 2009. The contents of the 3 March letter were either not relevant to the Minister's decision or had been before the Minister in the 30 January letter and Mr Dates response to that letter. Mr Dates did not point to any practical unfairness arising from any additional matter in the 3 March letter, relevant to the Minister's reasons or to the Minister's decision: [74].

9. The Minister declined to make a s 12 of the *Heritage Protection Act* declaration on the basis that the application was generally misconceived, as it related to areas of land rather than objects. One part of the application could potentially have concerned objects, but the Minister was not satisfied that the particular objects in question had any significance for Aboriginal people. No basis for impugning the s 12 decision is presented, other than that which has already been dealt with in relation to s 10: [77]–[78].