

4. LIABILITY FOR DAMAGE TO ABORIGINAL RELICS

Histollo Pty Limited v Director General of National Parks & Wildlife Service

(New South Wales Court of Criminal Appeal, 10 December 1998)

In this case the Court considered section 90(1) of the *National Parks & Wildlife Act, 1974* (NSW) which provides that a person who without first obtaining the consent of the Director General knowingly destroys, defaces or damages or knowingly causes or permits the destruction or defacement of or damage to, a relic or Aboriginal place is guilty of an offence against that Act. A relic is defined as any deposit, object or material evidence relating to indigenous and non-European habitation of New South Wales and includes Aboriginal remains.

Facts

A director of Histollo, Mr Merceica undertook earthmoving activities on land after Histollo purchased the land. The land purchase contract provided for the land to be purchased subject to a conservation agreement which prohibited any development to be undertaken within a specified conservation zone without the consent of the Director of the National Parks & Wildlife Service ('the Service') and prohibited activity in that zone which would cause disturbance to the ground surface without the Minister's approval. The s149 Certificate in the contract also stated that the land contained an Aboriginal site protected under the *National Parks & Wildlife Act* and that Aboriginal relics exist on the land. The evidence established that Histollo through Mr Merceica knew that the relics on the land were important stones having some Aboriginal significance but it did not establish that it knew which stones were important stones or that Histollo's acts were causing damage to relics.

The case on appeal turned on whether Histollo had knowledge that it was destroying or damaging relics. Histollo did not have actual knowledge and the issue was whether the doctrine of wilful blindness could be used to infer actual knowledge in the circumstances. The relevant circumstances were that Histollo did not make any enquiries of the Service as to which materials were relics and their location before commencing earthmoving activities. After those activities commenced, the Service officers directed Histollo not to do any further earthmoving activities on the land because of the existence of the Aboriginal relics but those officers did not identify the relics to Histollo. Histollo expected the officers to tell it of the location of the relevant relics and it did not make its own enquiries as to their location. If enquiries had been made then the location of the relics would have been identified. The wilful blindness doctrine was considered because of this failure to make enquiries.

Reckless indifference not sufficient

It was held that the wilful blindness concept did not apply, and the charges were not proved beyond reasonable doubt. Histollo may have been recklessly indifferent to the probability that its conduct would cause damage to the relics but reckless indifference is not sufficient under s90. For the s90 offence to be committed, the accused must know that the object being damaged is an Aboriginal relic.

Comment

Section 90 is an important section for the resources industry as it can impact on mining and exploration activities regularly. This case has highlighted a deficiency in s90 if the underlying intent of that section is to ensure the preservation of Aboriginal relics, but it remains to be seen whether the Government will seek to amend it. It can also be expected that Service officers will whenever possible be drawing the attention of holders of exploration and mining titles and other users of land to the existence and location of Aboriginal relics on relevant land.

5. EVIDENTIARY REQUIREMENTS IN NATIVE TITLE CLAIM: COURT FINDS NO CONTINUING TRADITIONAL CONNECTION TO LAND

Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors

(Federal Court of Australia, 18 December 1998, Olney J)

The Claim

In this case application was made for a determination of native title over some 98 parcels of land in Victoria and 53 parcels of land in New South Wales. That land included state forests, state parks, water supply reserves, water reserves, flora and fauna reserves, forest reserves, scenic reserves, Aboriginal freehold land, vacant crown land, reserved crown land and a mine. The native title rights claimed included the right to possession, occupation, use and enjoyment of the claim area and the natural resources in that area to the exclusion of all others.

There were over 500 non-claimant parties to the proceedings with some taking a more active role in the proceedings than others.

Legal points

The Court confirmed that where the rights granted by legislative or executive act do not necessarily extinguish the rights and interests of native title holders (ie where the act is not a grant of freehold title or a lease granting exclusive possession), the existence and nature of the native title rights and interests must first be established before the extent of any inconsistency can be ascertained. Accordingly, the Court had to first decide whether native title existed in respect of the claim area and if so the nature of those rights and interests before deciding any extinguishment issues. If native title rights and interests existed but had been lost then they cannot be revived.

The fundamental elements to be proved to establish the native title claim included the following. First, that the members of the claimant group are descendents of the indigenous people who occupied (in the sense that their presence on the land was part of a functioning society) the claim area prior to 1788 (the time that Crown sovereignty was asserted); second, the nature and content of the traditional laws acknowledged, and the traditional customs observed by the indigenous people, in relation to their traditional land at that time; third,