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ABORIGINAL HERITAGE UPDATE

SUPREME COURT CLARIFIES MEANING OF 'SACRED SITE' IN WESTERN AUSTRALIA

In *Robinson v Fielding* [2015] WASC 108 the Supreme Court of Western Australia determined that the Aboriginal Cultural Material Committee, the body charged with evaluating the importance of places and objects for the purposes of the *Aboriginal Heritage Act 1972* (WA), had misconstrued the term 'sacred site' in determining that certain land and waters in Port Hedland Harbour were not an 'Aboriginal site' within the meaning of the Act. In doing so, the Court clarified the meaning of that term, overruling existing guidelines and ostensibly expanding the class of places to which the Act may apply.

BACKGROUND

The legislation

The *Aboriginal Heritage Act 1972* (WA) (**Act**) establishes a statutory mechanism for the protection of specified places and objects by providing, among other things, that it is an offence for any person to conceal, alter, damage or destroy, those places or objects without authorisation.

The Act applies to any 'Aboriginal site', as defined in section 5 of the Act, being:

- (a) *any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purposes connected with the traditional cultural life of the Aboriginal people, past or present;*
- (b) *any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;*
- (c) *any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;*
- (d) *any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.*

The Act charges the Aboriginal Cultural Material Committee (**Committee**), a body comprised of several appointed members (including an anthropologist with specialist experience in relation to Australian Aboriginal cultures) and specified ex-officio members (including the Director of the WA Museum and officers from specified government Departments), with responsibility for evaluating the importance and significance of relevant places.

In doing so, the Committee is required to give primary consideration to 'sacred beliefs, and ritual or ceremonial usage' but also have regard to:

- (a) *any existing use or significance attributed under relevant Aboriginal custom;*
- (b) *any former or reputed use or significance which may be attributed on the basis of tradition, historical association or Aboriginal sentiment;*
- (c) *any potential anthropological, archaeological or ethnographical interest;*
and
- (d) *aesthetic values.*

The issues

In December 2013 the Committee resolved that a place known as '*Marapikurrinya Yintha*' and comprising specified land and waters in Port Hedland Harbour, which it had previously resolved was an 'Aboriginal site' on the basis of being a 'sacred, ritual or ceremonial site of importance and special significance to persons of Aboriginal descent', was no longer such a site. This resolution was made in response to a notice by which a third party sought, in effect, to use that land and waters in a way that might damage the *Marapikurrinya Yintha*.

The applicants, being members of the *Marapikurrinya* family group, a sub-set of the *Kariyarra* native title claim group, sought review of the Committee's decision on the basis that in reaching its decision the Committee had:

- 1 failed to exercise an independent discretion;
- 2 took into account irrelevant considerations or failed to take into account relevant considerations;
- 3 arrived at a result which was unreasonable or arrived at that result arbitrarily;
- 4 misconstrued or misapplied the meaning of 'sacred, ritual or ceremonial site of importance and special significance to persons of Aboriginal descent'; and

- 5 failed to comply with any duty of procedural fairness owed to the applicants.

THE DECISION

Overview

The Court proceeded on the basis that the Committee's decision relied on a finding that the *Marapikurrinya Yintha* no longer satisfied the threshold requirement of being a 'sacred, ritual or ceremonial site', as opposed to it having met that requirement but not having satisfied the additional criteria of having 'importance and special significance to persons of Aboriginal descent'.

After determining that the applicants had standing to bring the proceedings, the Supreme Court found that neither grounds 1 nor 2 were made out. In particular, the Court was not satisfied that there was any basis on which to conclude that the Committee had not assessed all of the materials before it in making its decision or that it had taken into account irrelevant considerations or failed to take into account such relevant considerations as had been put before it. The Court also found that, given certain other failings, it was not necessary to deal with ground 3.

However, in relation to grounds 4 and 5, the Court found that the Committee had acted upon a misconstruction of the expression 'sacred, ritual or ceremonial site of importance and special significance to persons of Aboriginal descent' and had failed to provide the applicants with due opportunity to respond to its proposal to cease recognising the *Marapikurrinya Yintha* as an 'Aboriginal site'. In setting aside the Committee's decision, the Court clarified the meaning of the expression 'sacred site' and the content of the applicable duty of procedural fairness.

'Sacred site'

The Court's consideration of each of the expressions 'sacred' and 'site' arose in the context of a set of interpretive guidelines published by the Committee approximately six months prior to their decision. The guidelines specified that the following would be taken into account when determining whether or not a place was a 'sacred site' for the purposes of the Act:

- *The meaning of "site" is narrower than "place";*
- *For a place to be a sacred site means that it is devoted to a religious use rather than a place subject to mythological story, song or belief;*
- *For a sacred site associated with Travelling Ancestors:*

- *There are stories and songs that celebrate the activities of ancestral figure(s);*
- *Either there are events which occurred to the ancestral figure at that place; or*
- *The ancestral figure left some mark or thing that has form e.g. a spring or rock formation;*
- *For sacred sites associated with figures or powers, the place is associated with a figure or a power which belongs to the country or was always there.*

The distinction in the guidelines between 'place' and 'site' appears to have sought to give meaning to the contrasting use of the term 'place' in all but one limbs of the definition of 'Aboriginal site' and its absence from the remaining limb, relating to 'sacred, ritual or ceremonial sites'. This 'narrower' conception of 'site', as a 'location on which a particular thing is devoted to a particular use', when used together with the term 'sacred', seems to have formed the basis for the view that the compound expression 'sacred site' means a place 'devoted to a religious use rather than a place subject to mythological story, song or belief'. This distinction is significant, as the number of places that are 'devoted to a religious use' can be expected to be much fewer than those which are 'subject to mythological story, song or belief' but which may not be put to a particular use.

After reviewing relevant dictionary definitions and the context of the Act as a whole, the Court rejected both the characterisation of the word 'site' as somehow narrower than 'place' as well as the suggestion that for a place to be a sacred site it must be 'devoted to a religious use rather than be subject to mythological story, song or belief' or that 'specific rituals or ceremonies are required to be associated with it'.

Specifically, the Court held that:

- 1 the term 'site' was 'not a word which, by itself, connotes some narrowly constrained area' but that it was constrained only by 'the object or activity associated with it'; and
- 2 the suggestion that in order to be a 'sacred site' a place must have specific rituals or ceremonies associated with 'is to deny the expression "sacred site" any separate meaning' (i.e. as distinct from 'ritual site' or 'ceremonial site').

The Court went on to conclude that 'if an area of land or water is associated with some religious or spiritual belief, that area is capable of being

described as a "sacred site"'. In doing so, the Court made clear that while evidence of specific rituals, ceremonial or cultural activities may be relevant to the assessment of the importance or significance of a place that had been determined to be a 'sacred site', it was not relevant to the threshold question of whether or not that place was a 'sacred site'.

Procedural fairness

In addition to its findings regarding 'sacred sites', the Court found that, where a third party is seeking authorisation to use the relevant area in a way that might damage a site, 'the scheme of the [Act] is such that the [Committee] is obliged, as a matter of procedural fairness, to ensure that it has sufficient information from the Aboriginal persons who might be affected by a decision as to the existence, significance and importance of sites'. In determining the content of the Committee's obligation, the Court held:

- 1 it was not necessary, as a general rule, 'to specifically invite persons who might be affected by the decision to make either written or oral submissions';
- 2 it 'may be sufficient to meet the obligation' by inviting the person seeking authorisation to 'provide appropriate reports which canvass the inquiries made of, and views expressed by, those Aboriginal groups with a connection to the land'; and
- 3 'whether anything more might be required in any particular case is a matter to be considered in light of the individual circumstances of each case'.

In this case, the Court found the fact that the Committee proposed to depart from the basis of its previous considerations of the status of the *Marapikurrinya Yintha*, that it knew the applicants had played a significant part in those previous considerations and was well aware of their identity meant that the Committee was bound to provide the applicants with an opportunity to respond to the proposal to cease to recognise the *Marapikurrinya Yintha* as an 'Aboriginal site'.

IMPLICATIONS

The Court's rejection of the views expressed in the guidelines and its subsequent findings ostensibly open the class of places to which the Act may apply to include areas of lands and waters which may be 'subject to mythological story, song or belief' but which may not be put to a particular use. This can be expected to expand the number of places that may constitute 'sacred sites' for the purposes of the

Act, including to places which may have previously been found not to constitute such sites.

However, while the Court's decision may result in a greater number of registered 'Aboriginal sites' over time, any increase is unlikely to be immediate. In practice, any assessment (or re-assessment) as to whether or not a potential 'sacred site' constitutes an 'Aboriginal site', will still require sufficient evidence as to:

- 1 the existence of relevant stories, songs or beliefs; and
- 2 that place's 'importance and special significance to persons of Aboriginal descent'.

In many cases, supplementary information is likely to be required. A number of places that meet the first requirement may not meet the second. Further, the extent of any usage of a 'sacred site' will continue to be relevant to, and is likely to be a significant factor in, the Committee's evaluation of its 'importance and special significance'.

It is unlikely that the Court's decision gives rise to any material risk to developers whose activities rely on authorisations given under the Act, even where the relevant land includes a place that may now constitute a 'sacred site'. However, some risk may arise where activities are being conducted on land that may now constitute a 'sacred site' in reliance on the guidelines or advice premised on the guidelines and without a relevant authorisation. In all cases, legal advice should be sought as to specific circumstances.

EFFECT OF REFORMS

The Act is the subject of the *Aboriginal Heritage Amendment Bill 2014* (WA) (**Bill**), currently before Western Australia's Parliament. While the Bill does not propose to alter the criteria by which 'Aboriginal sites' are evaluated for the purposes of the Act, it does contemplate the transfer of the evaluative function from the Committee to the Chief Executive Officer of the Department of Aboriginal Affairs (**CEO**).

In the event that the Bill proceeds in its current form, the Court's findings in relation to the meaning of 'sacred site' and the content of the duty of procedural fairness will apply equally to the CEO's consideration of the same matters.

MORE INFORMATION

For more information, please contact:

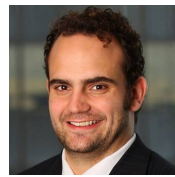


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