

CITATION: LPMT 174-2014-H (21454518)

PARTIES: LARRAKIA NATION

v

HERITAGE COUNCIL NT

TITLE OF COURT: LANDS PLANNING AND MINING
TRIBUNAL

JURISDICTION: HERITAGE ACT

FILE NO(s): LPMT 174-2014-H (21454518)

DELIVERED ON: 30 December 2014

DELIVERED AT: DARWIN

DECISION OF: Mr Greg Cavanagh, CHAIRPERSON

Judgment category classification: B
Judgment ID number: LPMT 174
Number of paragraphs: 17

IN THE LANDS, PLANNING AND MINING TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. LPMT 174-2014-H

BETWEEN:

LARRAKIA NATION

Appellant

AND

HERITAGE COUNCIL NT

Respondent

DECISION

(Delivered on 30 December 2014)

THE APPEAL TO THE TRIBUNAL

1. Pursuant to its rights contained in Part 4.1 of the *Heritage Act* (NT) (“the Act”), the appellant has appealed a decision of the Heritage Council. This is the first ever such appeal under the Act, and will be the last to this Tribunal as the Northern Territory Civil and Administrative Tribunal (NTCAT) takes over jurisdiction from 1 January 2015. The decision is in relation to the Kulaluk Lease Area within urban Darwin. The Act allows affected persons to apply for a review of the merits of a reviewable decision of the Council:

90. Reviewable decisions and affected persons

- (1) A reviewable decision is a decision mentioned in Schedule 1.
- (2) An affected person, for a reviewable decision, is a person mentioned in Schedule 1 for the decision.

91. Review notice

- (1) A review notice, for a reviewable decision, is a written notice stating the following:
 - (a) the decision and the reasons for it;
 - (b) that an affected person may apply to the Tribunal for a review of the merits of the decision;
 - (c) the period allowed for applying for the review;
 - (d) how to apply for the review.
- (2) The validity of a reviewable decision is not affected by a failure to give a review notice to an affected person for the decision.

92. Application for review

- (1) An affected person for a reviewable decision may apply to the Tribunal for a review of the merits of the decision.
- (2) The application must be made within 28 days after:
 - (a) the affected person receives a review notice for the decision; or
 - (b) if the affected person does not receive a review notice for the decision – the day the person becomes aware of the decision.

2. The review and proceedings relating thereto are governed by Division 1A of the *Lands, Mining and Planning Tribunal ("LMPT Act")*. The following sections of this Act are relevant:

21E Review procedure

- (1) In hearing an application for the review of a reviewable decision, the Tribunal must review afresh the merits of the decision.
- (2) In doing so, the Tribunal is not bound by anything done by the decision maker in making the reviewable decision.
- (3) Without limiting subsection (2), the Tribunal may:

- (a) consider evidence that was not considered by the decision maker; and
- (b) disregard evidence that was considered by the decision maker.

3. Furthermore:

21F Decision on review

- (1) In deciding the application, the Tribunal may:
 - (a) confirm the reviewable decision; or
 - (b) set aside the reviewable decision and substitute its own decision; or
 - (c) set aside the reviewable decision and refer the matter to which the application relates to the decision maker for reconsideration.
- (2) In referring the matter to the decision maker, the Tribunal must give the directions it considers appropriate for the reconsideration of the matter.
- (3) The Tribunal may make the incidental orders it considers appropriate to give effect to its decision.
- (4) The Tribunal must give reasons for its decision.
- (5) If the Tribunal substitutes its own decision for the reviewable decision, the substituted decision is (other than for Part 4.1 of the *Heritage Act*) taken to be the decision maker's decision.

4. Pursuant to section 21F(2) above, I held a “directions hearing” with the parties on 5 December 2014 and made the following orders:

- 1. Order parties deliver by close of business (4.21pm) on 19 December 2014 any further and all written material and submissions relevant to this review to the Registrar.
- 2. Respondent to furnish Appellant with copy of relevant file within seven days.

5. Accordingly, I apprehend the appeal procedure to be in the nature of a “de novo” hearing, ie, a fresh review. The merits of the original application to the Heritage Council are considered without reference to its decision; there is no search for an error by the Heritage Council.
6. However, in my view, whereas I do not pay attention to the decision by the Heritage Council, I may (and indeed should) have regard to the Council’s own investigations and conclusions. In this regard, I agree with the quoted words from a New Zealand Court (“Principles of Planning Law”, Leslie Stein, Oxford University Press), page 265:

It is ... true that hearings in the Environment Court are rehearings conducted de novo. However the Court does not have to ignore the fact that Council officers and the Council had already covered the same ground. The evidence the Council broadly conveyed to the Court regarding the Council’s own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.

7. Accordingly, I have sought the whole of the relevant file from the Heritage Council in relation to their decision. A copy of this file is mentioned in order No. 2 made by me on 5 December 2014.
8. The Heritage Act (NT) has, inter alia, the objects of:

Section 3 Object of Act

(1) The object of this Act is to provide for the conservation of the Territory’s cultural and natural heritage.

(2) The object is achieved by:

(a) declaring places and objects of heritage significance to be heritage places and objects; and

- (b) declaring classes of places and objects of heritage significance to be protected classes of heritage places and objects;

9. Section 10 of the Heritage Act defines the meaning of “heritage significance” as follows:

Section 10 Meaning of heritage significance

The heritage significance of a place or object includes its aesthetic, historical, scientific and social significance.

Section 11 Meaning of heritage assessment criteria

The heritage assessment criteria for a place or object are as follows:

- (a) whether it is important to the course, or pattern, of the Territory’s cultural or natural history;
- (b) whether it possesses uncommon, rare or endangered aspects of the Territory’s cultural or natural history;
- (c) whether it has potential to yield information that will contribute to an understanding of the Territory’s cultural or natural history;
- (d) whether it is important in demonstrating the principal characteristics of a class of cultural or natural places or environments;
- (e) whether it is important in exhibiting particular aesthetic characteristics;
- (f) whether it is important in demonstrating a high degree of creative or technical achievement during a particular period;
- (g) whether it has a strong or special association with a particular community or cultural group for social, cultural, or spiritual reasons, including the significance of a place to Aboriginal people as part of their continuing and developing cultural traditions;
- (h) whether it has a special association with the life or works of a person, or group of persons, of importance in the Territory’s history.

Section 12 Meaning of conservation and interpretation of places and objects

(1) The conservation of a place or object includes the maintenance, preservation, restoration, reconstruction, adaptation and interpretation of the place or object for the retention of its heritage significance.

(2) The interpretation of a place or object is the way of presenting the heritage significance of the place or object.

10. It is within the context of the foregoing definitions that the Heritage Council concluded that the Kulaluk lease area is not of heritage significance. Accordingly, a review notice in accordance with Section 25 of the Heritage Act was forwarded to the appellant on the 21st October 2011. The Heritage Council's reasons for the decision are tersely put as "the place did not meet the threshold of significance required to warrant proceeding further with the process".
11. In accordance with the provisions of the LMPT Act, the appellant filed an application for review received 25th November 2011.
12. In my view, the heritage assessment criteria set out in section 11 of the Act are disjunctive in nature, ie, not each and every one of the criteria need be satisfied to classify a place as having heritage significance. However, I do find that if the significance hinges on one or a few of the criteria, then the weight involved in making a favourable decision increases.
13. The Council's own assessment concludes on the available evidence that the following criteria, inter alia, are met, and I quote their own heritage assessment report page 41, 42 and 43:

“(a) Whether it is important to the course, or pattern, of the Territory’s cultural or natural history;

The granting of the original Special Purpose Lease for Kulaluk to the Gwalwa Daraniki Association in 1979, after an eight-year long struggle for recognition as the original landowners can be considered a significant event in the Territory's cultural history. It was the first

granting of a title to traditional owners in an urban environment.
This criteria is **met**.

- (c) **Whether it has potential to yield information that will contribute to an understanding of the Territory's cultural or natural history;**

The Kulaluk Lease Area contains Aboriginal sites of cultural significance and burial grounds, of which the extent of boundaries remain undetermined. Archaeological surveys and excavations could yield further information and provide answers to other research questions. This criteria is **met**.

- (g) **Whether it has a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons, including the significance of a place to Aboriginal people as part of their continuing and developing cultural traditions;**

The Kulaluk Lease Area has a strong and special association with the Gulumirrgin (Larrakia) people for social, cultural and spiritual reasons, as it contains a Gulumirrgin burial ground. This burial site was traditionally used by the Larrakia and other local Aboriginal inhabitants of the area.

There are a number of different cultural sites of significance within the Kulaluk Lease Area and a number different traditional owners or custodians claim to speak for the land in question. These factors point to the significance of the place to Aboriginal people. This criteria is **met**.

- (h) **Whether it has a special association with the life or works of a person, or group of persons, of importance in the Territory's history.**

Even though a small group of people originally stood up for the land rights struggle that resulted in the Special Purpose Lease at Kulaluk being handed over, they are generally not widely recognised or well-known within the Territory as a whole. This criteria is **marginally met.**"

14. And summarises:

"The Kulaluk Lease Area has been assessed against the relevant criteria established under the *Heritage Act*. It has been assessed as meeting Criterion (a), (c), (g) and marginally meeting (b) and (h).

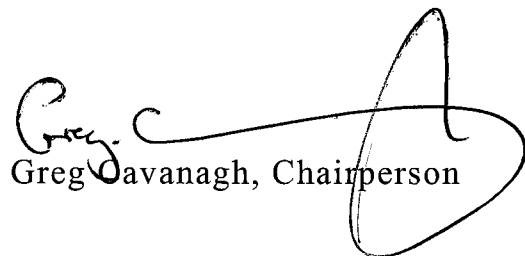
The following statement of heritage value is presented for consideration by Council:

The Kulaluk Lease Area symbolises the first land grant made to the Larrakia people in acknowledgement of their longstanding traditional ownership and occupation of land and seas in the Darwin region. After an eight-year long struggle for recognition, it was the first land title granted to an Aboriginal group in an urban environment in Australia.

The Kulaluk Lease Area has a strong and special association with the Larrakia people for spiritual, cultural and social reasons. The area is believed to contain a burial ground which has traditionally been used by the Larrakia and other Aboriginal people.”

15. The Heritage Council procured an archaeological report that found no evidence of the existence of Aboriginal burial grounds. Therefore, I apprehend that section 11(c) criteria may not be said to be met to an extent. However, on the material submitted, in my view, sections 11(a) and (g) are strongly met and section 11(h) is not “marginally met”, but also strongly met.
16. Unfortunately, the material submitted, both in the original application and to this Tribunal, does not appear to have been subjected to rigorous and objective historical analysis. In my view, such an analysis needs to be done before a decision is made on the heritage significance.
17. Accordingly, pursuant to section 21F(1)(c) of the Act:
 1. I set aside the reviewable decision and refer the matter back to the Heritage Council for reconsideration.
 2. I direct that the Council commission and obtain an objective and thorough historical analysis of all the relevant material pertaining to sections 11(a), (g) and (h) criteria of the Act before reconsideration.

Dated: 30 December 2014


Greg O'Connell, Chairperson