INDIGENOUS AFFAIRS

Indigenous people power challenges mining might

MOIRA RAYNER SEPTEMBER 22, 2009

A mining registrar in Western Australia has a hard decision to make. The Martu Idja Banjima Native Title claimants — the Martidja Manyjima people of the Pilbara — want him to hear their challenge to BHP Billiton's claim for more mining leases on 200 square kilometres of their traditional land. BHP Billiton doesn't.

The Martidja Manyjima people have decided the damage to their responsibilities to the land of water degradation and destruction of sacred sites by the owners of the nearby massive Hope Downs mine is just too great. They don't want money, they want to limit the endless expansion of mining on their country.

The power differential couldn't be greater. Potentially, the country may have ore worth $25 billion in exports next year alone, which both State and Federal governments desire, as do the owners and shareholders of the four big mines already in the area, which have ambitious expansion plans.

The Martidja Manyjima people are just 200 extended families. They want to tell the registrar that the cumulative impact of mining on their country's water resources (already pumping billions of gallons from the aquifer to expose the ore), as well as irreversible damage to their culture, has been and will be catastrophic.

They have approached the registrar, who recommends to the minister whether more leases should be granted, to present the evidence of enormous human rights violations, in the public interest. The mining companies have opposed even this, claiming that the Martidja Manyjima people have enough protections under WA's Environmental and Aboriginal Heritage protection laws.

Here's where it gets interesting.

There is a precedent for their request: a WA Supreme Court ruling that a mining registrar could and should consider the publicly-funded Environmental Defender's Office arguments because environmental issues are a public interest issue when deciding on mining in Perth's lovely hill suburbs. Not a lot of Aboriginal householders live there.

The solicitors for the Martidja Manyjima people want their client to have similar rights. They say neither an environmental impact assessment nor a comprehensive heritage survey has been carried out, even though 35,000-year-old artefacts have been found on the site. They say the cumulative effect of mining on their human rights has not been and should be properly considered.

The solicitors invited the Australian Human Rights Commission to intervene. In her letter of reply, AHRC President Hon Catherine Branson QC said it would not 'at this point', but clearly set out its view of the public interest in protecting the human rights of Indigenous people in mining determinations.

The AHRC takes the view that a group's human rights can be violated by public or private entities, and though particular activities might not in themselves violate Section 27, the cumulative effect of

minerals exploration may. It is, in the AHRC's view, vital to ensure that the special relationship of these people is protected and there is ample international jurisprudence and authority to establish this as a principle of Australian decision-making.

Non-compliance with Australia's human rights obligations is, Branson states, as contrary to the public interest as is acting in breach of a Commonwealth law.

BHP Billiton has promised to 'uphold fundamental rights and respect cultures, customs and values' under the Enduring Value — the Australian Minerals Industry Framework for Sustainable Development to which it is a signatory. The Minerals Council of Australia's Framework for sustainable Development also commits the industry to 'respect the culture and traditions of Indigenous peoples and their relationship with lands and waters'.

The Australian Government has supported the UN Declaration on the Rights of Indigenous Peoples, which details these obligations, noting that ours is one of the oldest continuing cultures in the world. Not for long, if the Pilbara destroys this country.

The Indigenous claimants say that granting more minerals leases will affect a significant portion of their land including cultural sites, and interfere with their ability to perform culturally significant activities. If true these consequences enliven internationally recognised rights under Article 27 of the International Covenant on Civil and Political Rights (Articles 27 and 1) and the International Covenant on Economic, Social and Cultural Rights, which Australia has ratified.

According to the AHRC, Article 27 of the ICCPR requires that such rights be protected against not only acts of government but also the acts of other persons within the state party to these covenants.

The AHRC also observed that WA's Aboriginal Heritage Act does not protect rights adequately. It permits the destruction of registered Aboriginal sites with the minister's consent (Section 18) without limiting or setting a minimum level of protection to a particular group's enjoyment of their culture and interests.

The Commonwealth Native Title Act has been repeatedly criticised as discriminatory and providing inadequate protection of Indigenous land rights. The right to Indigenous self-determination is part not only of Australia's binding obligation to eliminate all forms of race discrimination, but also the new UN Declaration on the Rights of Indigenous Peoples which explicitly covers indigenous people's rights to maintain and strengthen their distinctive cultural ties and obligations to the land.

The Indigenous claimants say that the land is already 'dying' because of existing mining activities.

The Mining Registrar is being asked to find that it is relevant to his decision to take these public interest considerations into account. And if he considers that granting the leases is likely to result in breach of the human rights of the Indigenous claimants, he should recommend against it.

Whatever the Registrar's decision — and the pressures on him will make it a hard one — appeals will follow.

The Common Law is an evolutionary instrument adapting to changing social and economic circumstances. Law is created every time a tribunal makes a decision applying established rules to new facts. Courts' decisions set 'precedents' that must be followed in similar circumstances by subordinate tribunals. Human rights have become part of those circumstances because we are all

affected by world events, governments ratify international human rights instruments, and formally accept that respect for them is a necessary element of communal life.

These rights may be inconvenient and can be statutorily created, modified or removed, as the Howard Government did in exempting the NT Intervention from the Racial Discrimination Act 1975, which implemented our obligations under the Convention on the Elimination of All Forms of Racial Discrimination.

Such inconvenience has encouraged Commonwealth and State attorneys general, with the notable exception of Victoria's Rob Hulls, to decline to introduce even the most anodyne human rights protections in domestic laws. But it is in the nation's interests to give voice to unpopular rights and powerless people.

Justice and the public interest would both seem to require that all relevant evidence be heard. Where else, but in our courts? Journalists don't hang out in Pilbara towns to write stories about finding 35,000-year-old artefacts or dried-up water-holes. Papers don't put them on the front page.

What this mining registrar does or doesn't do will affect every one of us. May they have their day in court. May we be sufficiently interested to read about it. May we care about the outcome. It's our country, too.

Moira Rayner is a barrister and writer. She is a former Equal Opportunity and HREOC Commissioner. She is principal of Moira Rayner and Associates