Judicial Review – the Mirvac Decision

Background

Preparing to develop the cultural heritage management plan

On 24 February 2017, Mirvac Queensland Pty Ltd (Mirvac) advised the chief executive of the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) of its intention to develop a cultural heritage management plan (CHMP) for a proposed residential development at Greenbank (Greenbank Project), pursuant to section 91 of the *Aboriginal Cultural Heritage Act 2003* (the ACHA).

Mirvac also provided a written notice to the previously registered Jagera People #2 native title claimant (Jagera People) as the native title party and Aboriginal party for the Greenbank Project area on the same day.

On 7 March 2017, the Jagera People were endorsed by Mirvac to develop the CHMP for the Greenbank Project.

On 6 September 2017, Mirvac provided DATSIP with an executed CHMP for the Greenbank Project developed with the Jagera People and requested that it be approved by the chief executive plan in accordance with section 107(1)(b) of the ACHA. All consultation parties agreed that the CHMP should be approved.

Loss of Aboriginal party status

On 4 August 2017, the Yuggera Ugarapul People native title claim was registered over a small portion of the Greenbank Project area.

On 14 September 2017, the Danggan Balun (Five Rivers) native title claim was registered over the remainder of the Greenbank Project area.

This meant that from this date, the Jagera People were no longer the native title party or an Aboriginal party for any part of the Greenbank Project area.

This raised the question – **Can an Aboriginal party who loses its native title party status remain the endorsed party to a CHMP?**

Refusal to approve the plan

On 30 October 2017, the chief executive determined that **at the time a decision was made to approve the CHMP**, the Jagera People were no longer the native title party for the CHMP area and the loss of this status resulted in the loss of their endorsed party status. The CHMP therefore could not be approved under section 107(1)(b) of the ACHA as, according to the chief executive, the relevant elements of this section did not apply.

The chief executive, having determined that there was no endorsed party for the CHMP, needed to consider the CHMP under section 107(2) of the ACHA. The chief executive refused to approve the CHMP as it did not make enough provision to avoid harming Aboriginal cultural heritage due to the involvement of a party that was no longer the Aboriginal party.

Judical Review

On 21 November 2017, Mirvac filed an application for a statutory order of review of the chief executive's decision to refuse the approval of the CHMP under section 20 of the *Judicial Review Act 1991* (Qld).

The review was founded on the belief that the chief executive had erred in law by refusing to approve the CHMP.

On 7 February 2018, the matter was heard before Justice Bond in the Supreme Court of Queensland.

The Mirvac Decision

On 31 October 2018, Justice Bond delivered his judgment and ordered:

- the decision to refuse to approve the CHMP be set aside, and
- directed that the chief executive **must** approve the CHMP pursuant to section 107(3) of the ACHA.

The court determined that the elements described in section 107(1)(b) of the ACHA **did apply at the time the CHMP was submitted for approval**, namely:

- the Jagera People were still the Aboriginal party (and therefore the endorsed party), and
- all of the consultation parties agreed to have it registered.

Subsequently, and in accordance with section 107(3) of the ACHA, the chief executive **must** approve the CHMP.

Implications of the Mirvac decision

The decision has clarified the operation of section 107 and the obligations of the chief executive in deciding whether or not to approve a CHMP in circumstances where an endorsed party has lost its status as an Aboriginal party.

The Mirvac decision has made it clear that the relevant time to consider the factual circumstances described in section 107(1) of the ACHA is at the time the CHMP is submitted to the chief executive for approval – regardless of when the chief executive actually considers the CHMP for approval.

The decision also dispels a widely held assumption that an Aboriginal party will remain the endorsed party regardless of whether it loses this status prior to submitting the CHMP to the chief executive for approval.

The decision clearly states that an endorsed party that loses its status as the Aboriginal party for the CHMP area cannot be described as an endorsed party.

Therefore, in circumstances where an endorsed party for a CHMP loses its Aboriginal party status **prior** to a CHMP being submitted to the chief executive for approval, then the CHMP may not be approved under section 107(1) of the ACHA as the mandatory duty imposed by section 107(3) would not apply.

The decision does however raise the question of whether the formalised process for sponsors – to notify and endorse Aboriginal parties **at the time of notification** – reflects the original intention of Part 7 in the protection of cultural heritage under cultural heritage management plans?