

Future act determination – good faith negotiations

Down/Barnes/Western Australia [2004] NNTTA 91

Franklyn DP, 1 October 2004

Issue

The question here was whether the grantee party had negotiated in good faith prior to lodging an application under s. 35 for a future act determination under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA). Negotiations in good faith are one of the pre-conditions to the Tribunal making a determination in relation to such an application.

Background

The native title party alleged that the grantee had not negotiated in good faith and also contended that the grantee party did not own the proposed tenement that was the subject of the inquiry. The native title party wished to negotiate with the company it alleged owned the tenement and alleged that, as the grantee did not own the tenement, he had not acted in good faith. (The native title party eventually conceded that the grantee was the proper party as the sale was conditional on the grant being made and ministerial approval being given to the sale)—at [7] and [21].

The grantee party contended the issue of good faith had been addressed and determined before the inquiry and the matters raised by the native title party were not now relevant—at [8].

The Tribunal confirmed that the issue of good faith goes to the jurisdiction of the Tribunal and must be dealt with prior to determination of a s. 35 application. The Tribunal was satisfied the matter could be determined on the papers—at [21].

Note that only some of the native title party's contentions are summarised here.

The Valmin code

The native title party's contentions included that the grantee party had not complied with the Code and Guidelines for the Technical Assessment and/or Valuation of Mineral and Petroleum Assets and Mineral and Petroleum Securities for Independent Expert Reports (Valmin code). The Tribunal:

- noted the Valmin code was not a statutory document, had no force of law and was not directed to negotiations but rather at preparing expert reports;
- found there was no obligation on the grantee to provide any report referred to under the Valmin code and any failure to do so was not a failure to negotiate in good faith—at [12.1].

Refusal to pay for heritage survey

It was also argued that, by refusing to pay for an Aboriginal heritage survey, the grantee party was not acting in good faith. The Tribunal found that:

- there is no legal requirement for an Aboriginal heritage survey to be carried out by, or paid for by, a grantee party;
- although carrying out a heritage survey is often the subject of negotiations, failure to agree is not of itself evidence of a lack of good faith—at [12.3].

Refusal to accept proposal or commit to costs

The Tribunal did not accept that refusing to agree to the native title party's proposal or to commit to costs stalled the negotiation process and so showed a lack of good faith, particularly when considered against evidence of mediation meetings called for by the grantee party—at [12.4].

Further, the Tribunal was of the opinion that agreeing to the native title party's proposal for an annual 'production fee' by way of compensation and offering a fixed annual payment instead was not evidence of a lack of good faith: 'It does not seem unreasonable to refuse to agree to an annual percentage based on production when the production potential of the area has not yet been assessed'—at [14].

Findings

The Tribunal found that:

- the facts did not support the contention that the grantee party had not negotiated in good faith, with the paucity of evidence in support being noted;
- the native title party's contentions were generally based on a misunderstanding of the application of some of the documents relied upon and a misunderstanding of the law, for example at it relates to Aboriginal heritage surveys;
- a request for mediation assistance does not demonstrate good faith has occurred but, in the circumstances of other discussions, the grantee's evidence of meetings which was undisputed, and lack of specific evidence from the native title party, good faith negotiations were not refuted—at [22] to [25].

The Tribunal reaffirmed that it is not required to adopt strict rules on the burden of proof, there is a requirement for the party alleging a lack of good faith to provide evidence to support its contentions—at [25].

Decision

The facts did not support the contention that the grantee party had not negotiated in good faith and the Tribunal was therefore empowered to make a determination under s. 38—at [22] to [25].