

## Future act determination — scope of ss. 32 and 38

### *Taylor/Queensland/Freehold Mining Ltd and Western Metals Copper Ltd (Receivers and Managers Appointed)* [2004] NNTTA 80

Sosso M, 7 September 2004

#### **Issue**

The parties sought to resolve an objection to the application of the expedited procedure by a determination of a type not contemplated by s. 32 of the *Native Title Act 1993* (Cwlth) (NTA).

#### **Background**

The proposed tenement was land previously excluded from the Exploration Permit for Mineral 10313 (EPM) granted in 1994. The grantee party applied under s. 176A of the Mineral Resources Act 1994 (Qld) (MRA) to have the excluded land included in the EPM. The s. 29 notice also stated that the holders of the EPM intended to apply under s. 151 of the MRA for approval to assign the interest of Western Metals Copper Ltd (Western) to Freehold Mining Ltd (Freehold). Western had receivers and managers appointed in 2003. The assignment was approved on 23 April 2004—at [3] to [9].

#### **Jurisdiction under s. 32 is limited**

Freehold then concluded an agreement with the native title party. The government party and the receiver and manager of Western, for different reasons, were not prepared to enter an agreement under s.31.

The Tribunal set out its reasons on this issue as follows:

In an endeavour to break this deadlock, it was first submitted that each of the parties would consent that I determine that the expedited procedure applied. However, what the parties actually wanted was a determination of a type that is not contemplated by section 32 [i.e. a determination that the expedited procedure applied but subject to conditions] ... . A Member holding an inquiry into whether a future act attracts the expedited procedure has only a very limited jurisdiction. The only question the Tribunal determines is whether the future act attracts or does not attract the expedited procedure after considering the criteria outlined in section 237. There is no power to make a conditional finding or to require parties to do certain things. An expedited procedure inquiry is relatively straightforward and the central issue is resolved either by a negative or positive decision on the one issue, namely whether the act notified in the section 29 notice attracts the expedited procedure—at [15].

The government party then withdrew the statement under s. 29(7) that the expedited procedure applied and simultaneously made application under s.35 for the Tribunal to make a determination under s. 38—at [17] and [18].

### **Pre-conditions to the making of a section 38 determination**

The Tribunal considered that the pre-conditions to the making of a s. 38 determination were met with regard to:

- the requirements that more than six months had passed since notification day in the s. 29 notice; and
- a s. 31 agreement had not been made.

In the absence of any negotiating parties formally raising the issue of good faith negotiation, the Tribunal noted that there is a presumption created by s. 36(2) that good faith negotiations have taken place. None of the parties raised the good faith issue and, therefore, the Tribunal found there was no impediment to making a determination—at [20] to [22].

### **Consent determination under section 38**

The native title party, government party, Western and Freehold all consented to a determination that the future act could be done without imposing conditions. The Tribunal adopted the principles that apply to the making of consent determinations set out in *Monkey Mia Dolphin Resort v Western Australia* (2001) 164 FLR 361; [2001] NNTTA 50—at [27] to [28].

The Tribunal considered the requirement that, before making a determination, the Tribunal take into account the issues agreed upon by the parties, with the objective that (absent any compelling reason to the contrary) the agreement should form the basis of the determination—see s. 39(4).

There is no need for the Tribunal to weigh up the s. 39(1) criteria in the circumstances but two factors were taken into account:

- the clear preference in the NTA for negotiated outcomes; and
- the facilitation of agreements negotiated by the parties to allow for mineral exploration is in the interests of the public as well as the immediate parties—at [29] to [31].

### **Decision**

By consent, the Tribunal determined the future act could be done pursuant to s. 38 of the NTA—at [32].