Future act determination — no submissions from native title party

Western Australia/Hughes/Rough Range Oil Pty Ltd [2004] NNTTA 108

Deputy President Sumner, 1 December 2004

Background
In this matter, an application for a future act determination was made pursuant to s. 35 of the *Native Title Act 1993* (Cwlth) by the grantee party. The two native title parties, the Gnulli and the Thalanyji, were both represented.

A heritage protection agreement in the form of a state deed had been made with the Gnulli native title party and lodged pursuant to s. 41A(1)(a). A s. 31(1)(b) agreement could not be executed because there was no agreement between all negotiation parties. The Thalanyji had advised that they would not be making any submission due to lack of resources. The Tribunal advised that, in the absence of any submissions by the native title party, a decision under s. 38 would be made on the basis of the submissions made by the state and grantee parties and any other material before the Tribunal—at [13].

The Tribunal found that the state deed signed by the Gnulli native title party was sufficient evidence of their consent to justify making a determination—at [11].

As to the Thalanyji, it was said that:

- the Tribunal must act on the basis of evidence which ordinarily will be provided by the parties;
- there is no onus of proof as such-rather, a 'commonsense' approach to evidence, which means that parties will produce evidence to support their contentions, particularly where facts are peculiarly within their knowledge;
- the Tribunal will not normally conduct its own inquiries and obtain evidence, particularly where a party is represented;
- if a party fails to provide relevant evidence, the Tribunal is normally entitled to proceed to make a determination without it;
- the Thalanyji native title party was represented throughout by someone who, although not a legal practitioner, had experience in acting for native title parties, was fully aware of the consequences of non-participation and who said he had specific instructions from his clients not to participate;
- in these circumstances, the Tribunal fulfilled its statutory obligations under the NTA by giving the native title party an opportunity to provide contentions and evidence and then proceeding to make a determination on the papers if that opportunity was not taken up;
- the task of the Tribunal in making a determination is a discretionary one which involves weighing the various factors in s. 39 based on evidence produced;

- there was no evidence from the Thalanyji native title party with respect to any matters to be considered pursuant to s. 39;
- it had been impossible to balance the various interests properly because the native title party had chosen not to use the process available under the NTA;
- nevertheless, the Tribunal was satisfied, given the large area involved, the nature of the activities to be undertaken, the non-exclusive nature of any native title rights and interests and the requirement to protect Aboriginal sites, that the grant of the proposed permit could proceed—at [18], [19] and[39].

The Tribunal went onto say that:

> The attitude of the Thalanyji ... creates an unsatisfactory situation and is inconvenient to the other parties who are required to commit resources to complying with directions in the normal way. A question arises whether in these circumstances the matter could be dealt with in a more summary way. There is nothing specific in the Act to permit this course of action and neither the Government nor grantee parties made any submission to this effect ... . [However,] I leave open the possibility that in future matters a different, more summary procedure might be considered to dispose of similar matters, particularly if non-participation by native title parties were to become commonplace—at [14].