Hearing by independent person – s. 24MD(6B)

Gobawarrah Minduarra Yinhawanga People & Innawonga People v Western Australia

Heath SM (Independent Person), 2 May 2005

Issues

The main issues covered in this determination made by an 'independent person' appointed by the State of Western Australia are:

- the role of an 'independent person' under section 24MD(6B) of the NTA;
- the nature of consultation under section 24MD(6B)(e).

Background

The state intended to grant Hamersley Iron a miscellaneous licence under the *Mining Act 1978* (WA) for the construction of 'infrastructure', i.e. a gas pipeline and access track. The state notified the relevant registered native title claimants under s. 24MD(6B)(c) that the act was to be done. The claimants objected to the grant and the state 'ensured' the objection was 'heard by an independent person' as required by s. 24MD(6B)(f).

The objectors, the Gobawarrah Minduarra Yinhawanga People and the Innawonga people ,argued that the independent person:

- only had jurisdiction to make a determination if the facts come within the terms of s. 24MD(6B);
- was under a duty to inquire into the question of jurisdiction, relying on *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467 and *Risk v Williamson* (1998) 87 FCR 202, where it was held that the National Native Title Tribunal (NNTT) has such a duty if one of the parties before it raised the question;
- is a statutory body carrying out a statutory function in the same way as the NNTT.

It was submitted that proper consultation had not been undertaken as required under s. 24MD(6B)(e).

Hamersley Iron argued that the independent person was appointed by the state to perform a particular statutory function to enable the state to ensure compliance with s. 24MD(6B).

SM Heath referred to the state's 'helpful' submissions on the future act provisions of the NTA before setting out the following propositions:

- the future act provisions include procedural steps to be followed to ensure that any 'future act' that 'affects native title' is 'valid';
- neither a failure to follow the 'correct' procedure nor a failure to follow any procedure when doing a future act is 'actionable per se';

- it is only the doing of the 'future act' that may 'give rise to a cause of action'—at [9] to [10].

Comment

With respect:

- an act can only be a 'future act' if it affects native title—see s. 227 and *Lardil Peoples v Queensland* (2001) 108 FCR 453 (Lardil Peoples) at [47], [58], [70] and [114], *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467 at 478; and
- the Federal Court has said on several occasions that, if the NTA does not provide an effective or adequate statutory remedy for a failure to afford procedural rights, 'equity can intervene to protect or give effect to them', e.g. Lardil Peoples at [73].

Role of the independent person under s. 24MD(6B)(f) and objections to 'jurisdiction'

SM Heath went on to consider the role of the independent person, noting that:

- there are no statutory requirements found in s. 24MD(6B)(f) and no formal appointment of the 'independent person' is required by the NTA;
- the position carries no powers other than those contained in that provision;
- by way of contrast, the NNTT is an independent statutory tribunal created and given 'powers' by the NTA;
- the independent person's 'ability' to consider a matter under s. 24MD(6B)(f) 'only arises' upon referral by the state and that 'ability' is governed by that section;
- a hearing under s. 24MD(6B) 'is not a forum in which relief may be sought on the basis that the party has not complied with a provision of the NTA' but, rather, it is 'limited to considering the objection';
- the hearing takes place 'not as an exercise in determining the legal rights of the parties but as a means of ensuring that any concerns of the Native Title Claimants [sic] are considered before the act is done—at [12] to [13].

Support for this view was drawn from s. 24MD(6B)(g), which provides that the independent person's determination (including any recommendation) must be complied with unless the relevant minister (i.e. state, territory or Commonwealth) responsible for indigenous affairs is consulted, the consultation is taken into account and 'it is in the interests' [as defined in s. 24MD(6C)] of the state, territory or Commonwealth not to comply with it. However, note that the Tribunal's determinations can be 'overruled' in a similar, albeit more formal, way for similar reasons—see s. 42.

As a result of accepting and adopting the state's submissions, it was determined that it is not necessary for the 'independent person' to consider objections to 'jurisdiction'; the independent person need only consider the 'substantive issues'—at [14].

Scope of the reasons for upholding objections and imposing conditions

The objectors argued the independent person was not confined to considering the matters set out in s. 24MD(6B)(e), i.e. to taking into account the ways of minimising the future act's impact on registered native title rights and interests and (if relevant) any access to the land or the way in which anything authorised by the act might be

done. Rather, it was argued, an objection could be 'upheld for various reasons assessed on all the circumstances of the case and weighing up all the factors for and against the grant which affects such native title rights and interests'. These submissions were rejected, i.e. the relevant criteria are those found in s. 24MD(6B)(e)—at [16].

What is consultation for the purposes of s.24MD(6B)(e)?

The objectors submitted that:

- consultation required the provision of full information of the proposed act to facilitate a native title party being in a position to give a meaningful response, referring to Canadian cases that discuss the meaning of a duty to consult; and
- it was necessary for the land to be surveyed and for them to know precisely where the proposed 'infrastructure' would be situated in order to minimise the impact of, and disturbance by activities done under, the grant of the miscellaneous licence and discuss access;
- the applicant should have provided detailed information or suggestions about either minimising the impact of the future act or access.

In response, Hamersley Iron:

- pointed to information provided about the proposed infrastructure, meetings and correspondence about obtaining the objectors' views and providing its response to those views, opportunities provided to appoint appropriate claimants to consult with the company and funds provided to the objectors for obtaining professional advice and assistance;
- submitted that the concept of consultation in subdiv. M of Pt 2 Div 3 of the NTA must be distinguished from the 'right to negotiate' found in subdiv. P.

SM Heath accepted that the New Zealand Court of Appeals in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 provided a 'good summary' of what s. 24MD(6B) required of the party obliged to consult, which includes:

- allowing sufficient time and making genuine efforts so that consultation is a reality, not a charade;
- not merely telling or presenting;
- ensuring the party consulted is to be 'adequately informed so as to be able to make intelligent and useful responses';
- keeping an open mind and being ready to change or even start afresh (while still being allowed to have a plan in mind at the outset)—at [23] to [24].

This was qualified by the comment that what is required will depend on the facts in each case.

The objectors submitted that, under s. 24MD(6B), in most cases a heritage survey and 'on country' meetings would be required to explain what is proposed and where. It was also suggested that consultations had taken place with the 'negotiation teams' rather than the 'working groups' for the objectors. Hamersley Iron submitted (among other things) that the onus was on the objectors to provide information about any

particular consultation process to be followed and that, as the objectors were legally represented, it need only inform their legal representatives that it wished to consult with the appropriate persons—at [25].

SM Heath noted that the NTA requires consultation with any 'registered native title claimant' (among others) who objects. He was satisfied that there was the requisite consultation in this case, particularly given the objectors' legal representatives arranged the various meetings and also attended—at [28] and [31].

SM Heath determined (among other things) that:

- the objectors were given sufficient information to enable consideration of the proposed future act;
- there was 'significant' conflict in the evidence as to whether a survey was requested or not but 'at no time did the objectors request the survey proceed or ask that the consultation be delayed until the survey was conducted';
- the objectors could not 'leave responsibility for heritage survey as the sole province' of Hamersley Iron when the conduct of the survey was 'necessarily in the control of the objectors';
- until sites were identified by a survey, no further consultation as to ways to minimise the impact of the infrastructure could take place;
- the conduct of a heritage survey is 'required in any event' by the *Aboriginal Heritage Act 1972* (WA) (AHA) and would occur 'regardless of the objection' (with respect, such a survey is not a requirement of the AHA but often done by way of 'risk management' to prevent contravention of the AHA);
- Hamersley Iron had indicated it intended to take steps to minimise the impact of the pipeline on both sites of significance and the environment;
- The AHA and *Environmental Protection Act 1986* (WA) (EPA) applied and placed relevant restrictions activities that could be done under the miscellaneous licence—at [32] to [37].

Determination

Given the 'additional' restraints imposed by the AHA and the EPA, SM Heath was satisfied that, 'as far as possible', Hamersley Iron had tried to minimise the impact of the proposed future act on the objectors' registered rights and interests and the other matters covered by s. 24MB9(6B). Therefore, the objection was dismissed—at [38] to [39].