

Future act determination — capacity of native title party to consent

BHP Billiton Minerals Pty Ltd/Abdullah/Western Australia **[2005] NNTTA 40**

Sumner DP, 7 June 2005

Issue

The main issue dealt with in this summary is whether the National Native Title Tribunal has power to make a future act determination by consent in circumstances where the sole person named as 'the applicant' in a registered claimant application (and hence, the native title party—see ss. 29, 30 and s. 253 of the *Native Title Act 1993* (Cwlth) (NTA)) was so infirm that his capacity to give consent was questionable.

Background

It was noted that the Tribunal is empowered to make a determination under s. 38 with the consent of the parties if it is otherwise appropriate to do so and it will normally be appropriate to do so where:

- the parties are legally represented; and
- those representatives have advised the Tribunal that there is consent.

The Tribunal's approach is to hear from the parties' representative: see *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361. A solicitor employed by the Pilbara Native Title Service (the Pilbara region service arm of the representative body for the area) represented the Birrimaya native title party.

Evidence as to legal capacity

The Tribunal noted that there were 'questions' about whether the sole named applicant for the claimant application, Ginger Bob, the 'native title party' in these proceedings, had legal capacity to consent to the doing of the future act and to a determination being made under s. 38.

The evidence was that:

- Mr Bob was elderly, in permanent care, very hard of hearing, had poor sight and, due to a stroke, could not speak clearly;
- the solicitor acting for the native title claim group had concerns about his capacity, which were put to a meeting of the Birrimaya native title claim group;
- there was a decision made at the meeting, via the group's usual decision-making process, that those named as claimants in the application should sign the Birrimaya Yarrie Continued Operations Agreement with the grantee parties and five of those nine people had done so—at [17] to [18].

Decision

The Tribunal was satisfied that, in the circumstances, and despite questions about the capacity of the sole applicant to give consent, the general principles could be applied, i.e. the critical question was whether the claim group as a whole has properly decided to consent to the determination sought and the Tribunal was satisfied that, in the circumstances, it had. However, it was noted steps should be taken to replace the applicant as soon as possible—at [19].

It was noted that the Tribunal is not bound by technicalities, legal forms or rules of evidence, which meant that it:

[H]as some flexibility to make a determination by consent, once satisfied that the fundamental issue of whether the claim group has consented is established. If this threshold issue is resolved there is scope for the Tribunal, in accordance with the direction in s 109(3), to find an acceptable way to give effect to the decision and not create obstacles to ensuring the objects of the Act are fulfilled—at [20].

A determination under s.38 was made that the future act could be done.

Comment on role of representative body

Interestingly, in this matter the Tribunal was satisfied, on the basis of evidence of the solicitor acting for the native title party that, despite his 'infirmity':

[T]he Birrimaya native title party have [sic] consented to the determination with conditions in accordance with a process of the kind referred to in s 203BC(2)(b) of the Act—at [19].

Section 203BC relevantly provides (in paraphrase) that, in representing people who may hold native title in future act proceedings, a representative body must be satisfied those people understand and consent to any general course of action that the representative body takes on their behalf in relation to those proceedings. For the purposes of this provision, a person who may hold native title is taken to have consented to 'action' if the group to which that person belongs gave consent in accordance with the appropriate decision-making process (traditional or, if none, as agreed and adopted) of that group. Query whether consenting to the doing of a future act can be characterised as a 'general course of action'.

The Tribunal also noted that the representative body had a formal role in protecting the interests of native title holders, representing claimants and being satisfied that persons they represent, including native title parties, understand and consent to a course of action, referring to ss. 203B(4), 203BB, and 203BC—at [20].