Future act determination - conjunctive determination & split in applicant group

Moore/Eagle Bay Resources NL/South Australia [2005] NNTTA 53

Sosso M, 28 July 2005

Issues

This determination by the National Native Title Tribunal in a right to negotiate proceeding covers the following:

- the scope of the powers of an administrator appointed under s. 71 of the *Aboriginal Councils and Associations Act 1976* (Cwlth) (ACA Act) to enter into agreements relating to a native title party's right to negotiate;
- whether the native title party has consented when some of the people named as 'the applicant' did not oppose the making of an agreement but refused to execute it;
- what the Tribunal should take into account when considering making a conjunctive determination pursuant to s. 26D(2) of the *Native Title Act 1993* (Cwlth) (NTA), with this was the first time the Tribunal had been asked to such a determination.

Background

The South Australian Government issued a s. 29 notice of its intention to grant an exploration licence (exploration licence) under the *Petroleum Act 2000* (SA) (Petroleum Act) to Eagle Bay Resources NL (grantee party). The notice also stated that the Petroleum Act provides the holder of an exploration licence the right to apply for a petroleum production licence (production licence) where a discovery warrants production. The area covered by the proposed exploration licence overlapped the area covered by the Dieri Native Title Claim (Dieri native title party) and the Yandruwandha/Yawarrawarrka Native Title Claim (YY native title party).

The grantee party made an application under s. 35 for a future act determination under s. 38 which was proposed to include the following:

> [F]or the purpose of section 26D(2)(c) of the NTA, if a retention licence, production licence, associated facilities licence or pipeline licence is granted…under the Petroleum Act 2000 (SA), Sub-Division P of Division 3 of Part 2 of the NTA will not apply to those grants.

Issues with consent of YY native title party

The s. 35 application stated that the negotiation parties (see s. 30A) had reached agreement. However, for reasons set out below, agreement had not been finalised with the YY native title party. Therefore, a determination made by consent was sought.

Nine people were named as 'the applicant' in the relevant claimant application and, therefore, 'the registered native title claimant' and the 'native title party', i.e. nine people jointly constituted the YY native title party: see ss. 61(1) and (2), 29(2)(b), 30(1) and the definition of 'applicant' and 'registered native title claimant' in s. 253.

The evidence before the Tribunal was that, of the nine:

- one was deceased;
- three others would not sign any documents (although the solicitor acting deposed that one would do so if paid $20,000); and
- a fourth refused to say whether or not he would sign but had earlier indicated he wouldn't sign the agreement unless he was included in a survey team in relation to another petroleum exploration agreement—at [13] to [17] and [19] to [20].

A meeting of the native title claim group had resolved to remove the deceased person and two of those who refused to sign but no application under s. 66B(1) had been made to the Federal Court to remove and replace the applicant—at [18].

A corporation known as the Yandruwandha/Yawarrawarrka Traditional Land Owners (Aboriginal Corporation) (the corporation) represented the YY native title party in future act negotiations. It was incorporated under the ACA Act. The solicitor acting for the native title party filed affidavit evidence that the corporation was under administration.

A minute of consent determination, signed by the legal representatives for the negotiation parties, was lodged with the Tribunal. It sought to have included in the determination a statement that the right to negotiate provisions of the NTA would not apply to grants of 'any retention, production, associated facilities or pipeline licences subsequent to the grant' of the licence in question, 'subject to the Grantee Party complying with the terms of the Aboriginal Heritage Protection Protocol contained in the Schedule to this determination', i.e. a conjunctive determination as contemplated by s. 26D(2). This was the first time the Tribunal had been asked to make a conjunctive determination.

Tribunal's power to make consent determinations

It was noted that, while there is no express provision in the NTA for a s. 38 determination to be made by consent, it is open for the Tribunal to do so but the Tribunal must independently assess the material before it and determine if it would also be appropriate to do so—at [25] to [26].

Power of administrator to consent to agreements

The Tribunal:

- decided that the administrator exercised the same powers and was subject to the same limitations as the governing committee and the public officer of the corporation were prior to the appointment of the administrator;
- concluded that the administrator could give consents and agree to any course of action as could the governing committee, subject to the limitations set out in the ACA Act and in the corporation's constitution—at [8] to [17] and [40].

The role of the corporation and the administrator

A 'key' issue raised in this matter was the relationship between the corporation, the former committee, the applicant and the wide native title claim group. On the basis of the documents filed and the oral submissions received, the Tribunal was satisfied that (among other things):

- the relationship of the corporation, the former committee, the administrator and the persons comprising the applicant was 'close and symbiotic';
- there was a coordination of activities with a free, full and professional exchange of information;
- the administrator carried out his duties in a careful and reasoned manner and in no way compromised the previous decision-making process but rather bolstered it 'by providing an additional layer of supervision and assistance'—at [38] to [40].

'Consent' determination when not all who constitute the applicant agree

Three of the persons comprising the YY native title party had either refused or failed to sign the documents that would otherwise have resulted in an agreement and avoided the need for a tribunal determination. In deciding whether to make the s. 38 determination sought, the Tribunal:

- must be satisfied the agreement been reached with the full knowledge and full authority of the negotiation parties;
- will be prepared to act on the consent given by the native title party collectively unless there is some credible suggestion that it is not appropriate—at [62], referring to Monkey Mia at [19]

In this matter, the Tribunal was not persuaded that the three of the seven persons who refused or failed to execute the land access deed were a small minority of the wider claim group.

It was noted that:

- only the applicant has control of the litigation instituted by the filing of a claimant application and the native title claim group have no authority to take any step in the proceedings, referring to *Ankamuthi People v Queensland* (2002) 121 FCR 68 at [8] and *Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland* (2004) 214 ALR 306 at [10], summarised in *Native Title Hot Spots* Issue 1 and Issue 13 respectively;
- the applicant is authorised by the claim group to advance their collective interests (i.e. as the agent of the claim group), their representative function entails the exercise of something akin to a fiduciary duty, they give voice to the aspirations of claim group members and they do not act as an independent voice disconnected from the aspirations, views and concerns of their fellow native title claimants;
- the position of an applicant does not involve a personal right and a person or persons performing this critical role should not engage in 'spoiling' tactics or in conduct that is aimed at harming the interests of the claim group and is not to act independently apart from the wishes of the native title claim group, referring to *Button v Chapman* [2003] FCA 861 at [9], summarised in *Native Title Hot Spots* Issue 7;

- relevant court cases emphasise the communal nature of native title and that individuals or sub-groups are not at liberty under the NTA to pre-empt or subvert the accepted decision-making process of a properly constituted native title claim group;
- normally, if almost half of the persons who comprised the applicant refused to execute documents, there would be an issue as to whether the claim group was divided on the merits of proceeding with an agreement;
- to contend that the Tribunal should look beyond the applicant and consider the views of the wider claim group is to ignore the clear legislative intent underlined by s. 62A—at [43] to [45] and [60].

The law on point

The main points of law were set out, including that:

- under s. 39(4), the Tribunal must take any agreement of the negotiation parties into account when making a determination but is not compelled to make a determination in accordance with the agreement but must be satisfied that it is appropriate to do so;
- the attitude of the parties is critical but the Tribunal must take into account a range of issues, not least of which is whether the agreement reached is not illegal and that parties have entered into the agreement freely, consciously and without duress;
- the Tribunal places particular regard on whether the negotiation parties are legally represented and will ordinarily act on the consent of the negotiation parties as conveyed by their legal representatives but there are instances where further information as to consent will be required;
- if the Tribunal has material before it indicating that there is no unanimity amongst the persons comprising the applicant, it is put on notice that further inquiry is needed and the parties requesting a consent determination need to satisfy the Tribunal that such a course of action is not only legally permissible but also an appropriate exercise of the member's discretion—at [56] to [59].

Full knowledge and authority required for consent determination

The Tribunal noted that the 'key issue' in determining whether or not to make a s. 38 determination at the request of the negotiation parties (i.e. by consent) is that the agreement reached has been made with the full knowledge and full authority of the negotiation parties.

Where (as in this case) some of the persons who jointly constitute the applicant (and, in accordance with s. 253, 29 and 30, the 'registered native title claimant' and the 'native title party') decline, or fail to, sign relevant documents, the position the Tribunal adopts is that:

- a 'native title party' is not each a registered native title claimant on the same claim but is, with the others, jointly the registered native title claimant acting collectively as representatives and agents of the claim group (see s. 62A);
- each individual person constituting the registered native title claimant is not entitled to separate representation in a right to negotiate inquiry;

- the Tribunal will act on the consent given by the native title party collectively unless there is some credible suggestion that this is not appropriate;
- lawyers acting for the native title party should normally be in a position to advise the Tribunal that the consent has properly been given, based on the established decision-making processes of the native title claim group—at [62].

A useful summary of some of the 'numerous occasions' when the Tribunal has made a s. 38 determination by consent even though not all of the persons comprising the applicant had not consented is provided at [63].

Conclusion on consent issue and the s. 39 factors
In the light of these factors, the Tribunal was satisfied that:
- the YY native title party had, with full knowledge, given its consent to making of a determination along the lines submitted by the legal representatives of the negotiation parties; and
- the Tribunal was empowered to make the consent determination sought, subject to consideration of s. 26D.

The issues taken into account were (among others):
- the YY native title party was, at all times, legally represented and also had the benefit of the independent assistance of the administrator of the corporation;
- the YY native title party has previously entered into similar agreements, the proposed agreement in this case was, if anything, more favourable and the terms of the agreement are of a standard type;
- there was no material suggesting that there is any opposition based on the substance of the proposed agreement and there was sufficient material to show that the claim group as a whole supported the execution of the agreements;
- granting the proposed tenement would assist the YY native title party by developing their economic structures;
- the area of the proposed tenement had been the subject of petroleum exploration and it was not likely that the grant of the proposed tenement would affect the way of life, culture or traditions of the YY native title party or the enjoyment of their registered native title rights and interests and the material before the Tribunal did not suggest that the subject area contained any sites or areas of particular significance;
- the broader public interest in the granting of the petroleum tenement in contributing to the ongoing exploration activities essential to the health of the mining activity and the economy ; and
- the specific economic significance of the doing of the future act for South Australia and the wider Australian economy—at [65].

On the last four points, see s. 39, which sets out the criteria the Tribunal must have regard to when making a s. 38 determination.

Conjunctive determination pursuant to s. 26D(2) of the NTA.
Subdivision P contains the right to negotiate provisions. There are many exceptions to or exclusions from those provisions, with s. 26D(2) being one. The relevant parts

provide that subdiv P does not apply to a later act consisting of the creation of a right to mine if:

- an earlier right to mine (the earlier act) that was not invalid to any extent under s. 28 was created after s. 26D commenced in October 1998; and
- subdiv P applied to the earlier act and because of a s. 38 determination that the earlier act could be done and that that determination:
  - included a statement to the effect that, if the later act were done, subdiv P would not apply to the later act; and
  - provided that, if the later act were done, certain conditions would be complied with by parties other than native title parties (whether before or after the act was done); and
- those conditions are complied with before the later act is done.

The Tribunal noted that:

- subsection 26D(2) enabled the negotiation parties, at the exploration stage, to reach a comprehensive settlement from the exploration stage through to the mining or production stage, allowing the parties to create a legal framework for the entire process and ensuring that the right to negotiate only applied at the outset;
- from one viewpoint, this was 'a most desirable outcome' but it had proven difficult to achieve in hard rock mineral exploration projects, where it was not clear at the outset what type of mineral might be discovered and how it might be extracted—at [68].

On the latter point, the Tribunal noted that:

> There is a significant difference between hard rock exploration and mining and the exploration and production of petroleum and gas. Hard rock exploration is, almost without exception, less intrusive and less expensive to conduct than hard rock mining. The type of minerals that may be located by the exploration are sometimes not certain. More significantly, the nature of the mining operations required to extract minerals located will often be impossible to ascertain at the exploration stage. When mining commences, the actual impact on native title rights and interests will be hard to predict at the outset … particularly … if open cut mining is used … . Likewise it would be highly unusual for an explorer to know, when applying for an exploration permit, whether or not minerals will be discovered, let alone the means required for extracting them, the nature of the disruption that will be caused by the grant of a right to mine and the economic benefits for the local, regional, State and national economies—at [80].

The grantee party (and the other negotiation parties by agreement) in this case sought a conjunctive determination which exempted a variety of future acts from subdiv P. Two questions arose as a result:

- whether the reference to ' later act' could apply to multiple future acts;
- the limitations, if any, on the area of land and waters in respect of which those later acts may be done as exempted acts—at [69].

The Tribunal found that:

- pursuant to s. 23 of the *Acts Interpretation Act 1901* (Cwlth), 'later act' in s. 26D(2) could be read to cover multiple future acts and applied to classes of future acts as distinct from particular future acts; and
- the later acts must be done over areas that are wholly within the area affected by the earlier act area—at [70] to [71].

The Tribunal noted that s. 26D(2) was inserted into the NTA to facilitate exploration and mining activities where one right to negotiate could be applied to the whole process and was particularly suited to petroleum and gas exploration and production as:

- the major expenditure was incurred in the exploration stage;
- the act of exploration was as disruptive as production;
- a petroleum or gas explorer knows from the outset the type of resource and the cost of extracting it;
- under the land access deeds, the negotiation parties acknowledged that the non-extinguishment principle applied to the grant of any licence or later act and to any work done pursuant to any licence or later act—at [79] to [82], referring to s. 24MD(3).

Decision

The Tribunal was satisfied that it was appropriate to make the conjunctive determination sought.