Good faith negotiation—funding and compensation

Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation/Western Australia [2005] NNTTA 88

Deputy President Sumner, 30 November 2005

Issues

Does the s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA) require:

- the government party to negotiate about matters of compensation;
- the government party and the grantee party to provide funding for negotiations to a native title party where that party is a prescribed body corporate?

The Tribunal's comments, in relation to the problems the lack of funding for prescribed bodies corporate causes in the native title process, are of particular note.

Background

This matter concerned a future act notice issued under s. 29 of the NTA by the State of Western Australia in relation to the proposed grant of a petroleum exploration permit under the *Petroleum Act 1967* (WA) (Petroleum Act). Negotiations as required by s. 31(1)(b) of the NTA commenced on 27 June 2002. During the course of those negotiations, on 27 September 2002, a determination recognising native title was made in relation to one of the native title party's claimant application (the third native title party). On 17 July 2003, the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) was determined to be the prescribed body corporate (WDLAC) in relation to that determination of native title (see ss. 55 to 57).

Subsequently, WDLAC's details were entered in the National Native Title Register, making is a 'registered native title body corporate' (see ss. 193(2)(d)(iii) and 253 of the NTA). Therefore, pursuant to s. 30(1)(c), WDLAC was now the native title party in these proceedings before the Tribunal. As the relevant claimant application was 'finalised', the details of that claim were then removed from the Register of Native Title Claims pursuant to s. 190(4)(d) so that the registered native title claimant in that claimant application ceased to be a native title party (see s. 30(2)). The first annual general meeting of WDLAC was held in September 2004.

On 3 May 2005, the grantee party applied for a future act determination under s. 35. The third native title party (now WDLAC) alleged the government party had not negotiated in good faith prior to making the s. 35 application. Negotiations in good faith are one of the pre-conditions to the Tribunal making a determination in relation to such an application. WDLAC did not allege any subjective lack of honesty or sincerity on the part of the government party but, rather, alleged failure to negotiate in a reasonable manner in the circumstances.

Good faith obligations of the government party to negotiate on compensation
The Tribunal was satisfied that the government party had generally acted reasonably and in accordance with the good faith indicia set out in *Western Australia v Taylor* (1996) 134 FLR 211 at 224 to 225 (*Njamal*), where the Tribunal anticipated the factual context would be important. In this matter, the Tribunal recognised that:

- the nature of the future act (i.e. the grant of a petroleum exploration licence) meant the government party had made only limited substantive offers towards settlement;
- the government party was not necessarily required by the good faith obligation to make reasonable substantive offers—at [35] to [37].

The government party's negotiating position in regard to compensation was that s. 24A of the Petroleum Act imposes any liability to pay compensation on the grantee party. The Tribunal, referring to s. 24MD(3) of the NTA, was also of the view that, by operation of the NTA and the Petroleum Act, there was no obligation on the government party to negotiate about compensation in s. 31(1)(b) negotiations. The Tribunal noted that, on the material before it, at no stage did the third native title party propose the government pay compensation—at [40] to [47].

Obligation to fund negotiations of RNTBC
Among other things, WDLAC contended that:

- the area affected by the relevant s. 29 notice affected the lands of the Martu People and WDLAC had statutory obligations in relation to those lands under reg. 6 of the Native Title (Prescribed Body Corporate) Regulations 1999 (Cwlth) (PBC regulations);
- reg. 8 of the PBC regulations required WDLAC to consult with, and obtain consent of, affected common law title holders before making a 'native title decision';
- the government party was, or ought to have been, aware that WDLAC, 'like all Prescribed Bodies Corporate in the nation', had no financial resources to carry out its statutory responsibilities and that Ngaanyatjarra Land Corporation Aboriginal Council (the Ngaanyatjarra Council), the representative body for the area, was prohibited from funding WDLAC though Commonwealth grants;
- where one of the parties (here, WDLAC) is unable to participate in negotiations due to a lack of resources, and it is reasonably within the means of the other parties to facilitate that participation but they fail to do so, those parties have 'objectively failed to negotiate in good faith';
- as from 17 July 2003, when WDLAC was determined as the PBC, the government party should have recognised the consequences of issuing the s. 29 notice i.e. the third native title party (now WDLAC) was forced into negotiating without adequate resources;
- to continue negotiations without funding WDLAC was unreasonable and not consistent with the obligation to negotiate in good faith;
- what was in issue was the necessity of a contribution of the government and grantee parties, either severally or jointly, to facilitate the negotiations 'in order for negotiations to truly occur' with WDLAC—at [62] to [65].

In response, the government party's contentions (among other things):

- noted that s. 203BB(1)(b) (which deals with representative bodies' assistance and facilitation functions) and s. 203C (which deals with grants to representative bodies to enable performance of their functions) indicated an intention that assistance be in place for future act negotiations and placed no obligation on government parties or grantee parties to contribute;
- submitted that earlier Tribunal decisions, where it was found the obligation to negotiate in good faith did not extend to providing financial assistance to a native title party, should apply equally to prescribed bodies corporate as to registered native title claimants because s. 203BB(1)(b) made no such distinction, referring to *Western Australia v Daniel* (2002) 172 FLR 168; *Mt Gingee Munjie v Victoria* (1999) 163 FLR 87;
- pointed out that native title corporations are creatures of a Commonwealth statute and so the Commonwealth is responsible for funding them;
- asserted that the government party could not reasonably have known that a determination of native title would necessarily be made during the course of the negotiations or that WDLAC would not be funded;
- noted that, since the native title party failed to advise the government party that it was no longer able to participate in the negotiations due to lack of resources, the issue of funding could not be relied upon as a ground for a decision that the government party had not negotiated in good faith—at [67] and [83].

Commonwealth government's policy on funding prescribed bodies corporate

WDLAC's legal representative produced documentation of Commonwealth grant conditions for representative bodies in support of its contention that no Commonwealth funding was provided to prescribed bodies corporate for future act negotiations and statutory functions.

The Tribunal noted that the general terms and conditions relating to native title funding agreements administered by the Office of Indigenous Policy Coordination (OIPC) prohibited representative bodies using funds:

- to expressly support native title claimant group structures in areas where native title is determined to exist or otherwise support anyone else to perform the functions of a representative body in relation to those areas;
- to assist with either operating costs or regulatory compliance obligations of prescribed bodies corporate or registered native title bodies corporate without OIPC's prior approval, other than funding to assist with the establishment, incorporation and registration of prescribed bodies corporate, up to and including the first annual general meeting of such bodies—at [67].

WDLAC also:

- referred to statements made by the current Commonwealth Attorney-General expressing the Australian government's view that states and territories should contribute to the costs associated with establishing prescribed bodies corporate;
- expressed the view that the use to which funds paid to WDLAC from mining companies under agreements about the doing of other unrelated future acts was limited because WDLAC is a tax exempt charity and had advice that, to retain its

exempt status, such funds could only be used for charitable purposes within the Rules of Incorporation.

The government party contended that:

- WDLAC's rules of incorporation arguably included both charitable and non-charitable purposes and, to obtain tax exempt status as a charity, it must be assumed that the Australian Taxation Office was of the opinion that the strictly non-charitable purposes must further or aid the dominant charitable purpose or be incidental to it;
- if money received from other future act negotiations were used to support the dominant charitable purpose (e.g. further negotiations to obtain monies that could be applied to the charitable purpose), then there would be no impediment to the use of the funds for the negotiation of agreements relating to unrelated future acts;
- there was no direct evidence that the money obtained from other future act agreements could only be used to further the charitable objects of WDLAC.

It was noted that:

> It is impossible for the Tribunal to resolve this situation on the basis of the evidence provided, nor is it necessary to do so in order to deal with the principal issue of whether the Government party has negotiated in good faith. Had the issue been of critical importance I would have sought more evidence and submissions in relation to it. What can be said is that WDLAC...genuinely held the view that the mining company funds could not be used for the purposes of these negotiations. I suggest for the future that this issue be clarified in relation to WDLAC and other PBCs so that the policy debate about the funding of PBCs which has been evident in these proceedings can proceed on a firmer footing ... .
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> Even if the mining funds could legally have been used to fund the present negotiations as the Government party argues, it is difficult to criticise WDLAC for wanting to see as much of the mining funds as possible distributed to holders of native title in one form or another.
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> The WDLAC Governing Committee ... [is] faced with making a policy decision about the distribution of its income from earlier ... negotiations to support negotiations about...unrelated mining or exploration proposals. If the new proposal is a large mining venture ... then funding negotiations to achieve maximum benefits may be justified. On the other hand the future act proposed may be, as in this case, an exploration tenement with no certainty that economic production will follow. There will also be cases where ... [prescribed bodies corporate] have no income from other than Government sources to finance negotiations about future acts. This case highlights the unresolved policy differences about the funding of ... [prescribed bodies corporate], which will need to be given consideration by Commonwealth and State/Territory Governments—at [73] to [75].

The Tribunal was satisfied that:

- the NTA empowered the Australian government to fund representative bodies to assist prescribed bodies corporate to perform their statutory functions and that this power is not restricted in time;

- although funding could be applied for after the first annual general meeting of a prescribed body corporate, as a matter of policy and practice no specific funding is provided for this purpose;
- the government party would have known that the Australian government did not provide funding to representative bodies or prescribed bodies corporate to assist the latter in future act negotiations, at least by the time the s. 29 notice relevant to this inquiry was given—at [79].

Cost of compliance with PBC regulations

The Tribunal agreed with WDLAC that:

- the obligations of a registered native title body corporate under regulation 8 of the PBC Regulations are to consult with and obtain the consent of the affected common law holders of native title before making a native title decision;
- obtaining proper decisions from native title claimants and holders can be a time-consuming and expensive process, involving travel to remote communities, and can involve substantial costs—at [86] to [87].

Five person rule

Reg. 9 of the PBC Regulations sets out the 'five person rule', which (in paraphrase) says that evidence of consultation and consent can be provided if at least five members of the prescribed body corporate who are common law holders whose native title rights and interests would be affected by the proposed native title decision sign to certify that consultation had taken place and consent been given. If there are fewer than five members so affected, at least five members, including each affected common law holder who is also a member, must sign. The government party contended that that practical difficulties and cost of obtaining consent of native title holders could be overcome by the 'five person rule'. The Tribunal rejected this contention:

> The 'five person rule' is only an evidentiary aid. The five persons must still be satisfied that the appropriate consultation and consent process has been properly carried out. They cannot assert under the 'five person rule' that the consultation and consent has been properly followed if, in fact, it has not—at [87].

Summary of findings with respect to funding

In summary, the Tribunal findings in relation to funding of registered native title corporations to carry out their statutory functions in relation to future act mediation and arbitration were:

- the NTA permits representative bodies to provide assistance to both claimants and holders of native title (including in negotiations in relation to future acts) and they may apply for, and be funded by, the Australian government for this activity, referring to ss. 203BB(1)(b) and 203C;
- no distinction is drawn between registered native title claimants and those holding native title, as both are 'native title parties' under ss. 29(2)(a) and (b) but the different approaches to funding each for the conduct negotiations under s. 31(1) are a matter of Australian government policy;
- once a PBC has been determined it has statutory functions it is obliged to perform by the PBC Regulations, including obligations under reg. 8 to consult with, and

obtain the consent of, affected common law holders of native title before making a native title decision;
- a decision to agree to the grant of a petroleum exploration permit is likely to lead to native title rights and interests being affected (i.e. it is a native title decision) and this requires the consultation provided for in reg. 8(2);
- the cost of performing the statutory functions in relation to consultation and obtaining consent could be substantial in some cases;
- the Australian government does not make funds available to representative bodies specifically to enable them to be dispersed to prescribed bodies corporate for the purpose of conducting s. 31 negotiations;
- while the Australian government's funding conditions do not prohibit a representative body from dispersing funds to prescribed bodies corporate for s. 31 negotiations, this will be of no practical utility if the only funds available from the Australian government have been provided for other purposes, which appears to be the case;
- a representative body could provide assistance on a fee for service basis and, in this case, the Ngaanyatjarra Council and lawyers employed by it agreed to act for WDLAC in future act negotiations on a limited basis;
- the Australian and state/territory governments do not agree about responsibility for the funding of prescribed bodies corporate and no general funding provision is made by either of them to enable these bodies to carry out their statutory functions, apart from the limited Commonwealth funding referred to above for assistance until the first annual general meeting;
- at least since the beginning of 2002, the government party would have been aware of the Australian government's funding conditions and of the limitations placed on the use of funds for the activities of prescribed bodies corporate—at [89].

Does the obligation to negotiate in good faith extend to funding the native title party?

After referring to its previous consideration of this issue, the Tribunal found that:
- if there is no obligation on another party to fund negotiations in good faith, when dealing with a native title party who is a registered native title claimant, there was no reason for this to change simply by virtue of the native title party being a prescribed body corporate;
- subsection 31(2) makes it clear that a refusal to negotiate on the matters other than the effect of the future act on registered native title rights and interests does not mean failure to negotiate in good faith;
- the scope of good faith negotiations is confined to the effect of the future act on the native title party's registered native title rights and interests and other matters related to them in s.39(1)(a);
- there is no authority to support the proposition that it is a necessary adjunct to the obligation to negotiate in good faith for funding to be provided by the other parties to enable the negotiations to be carried out by the native title party;
- even if this is wrong, the conduct of the negotiations in relation to funding in this matter did not indicate a lack of good faith by the government party;

- concerns about funding were only raised by the native title party late in the negotiations (i.e. September/October 2004) and at no time was a specific proposal made by the native title party to the government party to fund the negotiations;
- if a native title party wants the question of the funding of negotiations to be an issue within the scope of good faith negotiations, a specific proposal backed by information (including the cost of complying with the PBC Regulations) to show that, without funding, it will not be able to properly negotiate about the future act, should be put on the table—at [88], [90] to [93].

A contention that negotiations should have included consideration of funding WDLAC after the grant of the tenement was also rejected for similar reasons:

> Even if it could be argued that good faith negotiations can encompass the funding of a PBC post-grant because s 39(1)(a)(iii) talks of the effect of the future act on the development of the social, cultural and economic structures of the native title party ... no such proposal was developed or put to either the Government party or grantee party—at [95].

Funding of negotiations - grantee party

After noting that WDLAC's contentions that obligation of a grantee party to negotiate in good faith included funding a native title party were, in all but one respect, of the same nature as those relating to the government party, it was held that the findings in relation to the effect of s. 31(2) and the failure of the native title party to make proposals on the issue, until very late in negotiations, were equally applicable to these contentions.

Notice is not part of negotiation in good faith process

The Tribunal found that:

- the giving of a s. 29 notice is not part of the negotiation process;
- negotiations commence with the letter sent by the government party pursuant to s. 31(1)(a) requesting submissions;
- the discussion noted above about the scope of good faith negotiations was applicable here i.e. giving of s. 29 notice is not related to the effect of the proposed future act on the relevant registered native title rights and interests;
- even if the giving of the notice could be related to good faith negotiations, there was no unreasonable conduct on the government party's part in this case, since at the time notice was given, the native title party was a registered native title claimant and it was not reasonable to expect the government party to anticipate that an unfunded prescribed body corporate might come into existence at some time in the future;
- even if this could be anticipated, that was no reason to refrain from giving the notice since to do so would be 'severely disruptive to the processing of future acts in a timely manner'—at [100] to [101].

Decision

The Tribunal found that the government and grantee parties did negotiate in good faith and the Tribunal could conduct a further inquiry and make a determination on the s. 35 application.

Comments on funding issue

The Tribunal made the following concluding comments on the funding of prescribed bodies corporate:

> The evidence tendered in this matter has drawn attention to what is now a longstanding policy dispute between the Commonwealth and state and territory Governments about how PBCs should be funded. I am aware that the Tribunal ... has ... pointed out its concerns for the operation of native title processes if PBCs cannot properly carry out their statutory functions. It does seem anomalous that government funding is available...to support native title parties at the claimant stage but once native title is determined government funding in practice is no longer available ... .It is not the Tribunal's role to enter into the policy dispute but I am obliged to point out that how PBCs are to be funded needs to be given urgent attention by governments ... .
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> One of the six practical reforms to deliver better outcomes in native title announced by Attorney-General Ruddock ... was an examination of current structures and processes of PBCs which was to include consultation with relevant stakeholders ... . It is not clear whether [the source of funding for prescribed bodies corporate] ... is an issue being considered ... but matters raised in this inquiry suggest that some resolution of the funding issue will be necessary to ensure the on-going effectiveness of PBCs and workability of the native title system—at [102] to [103].