

Future act inquiry —jurisdictional challenge, validity of form

Andrews/Exploration and Resource Development Pty Ltd/Northern Territory [2002] NNTTA 170; (2002) 170 FLR 138

Member Sosso, 19 August 2002

Issue

Among other things, in this matter the National Native Title Tribunal considered:

- the principles that should apply to any challenge to its jurisdiction; and
- the validity of the Form 4 which was lodged by multiple objectors.

Principles applying to a jurisdictional challenge

The Tribunal set out a number of important principles in deciding that the issues raised did not go to the jurisdiction of the Tribunal to conduct an inquiry, including:

- jurisdictional challenges should only be made where there are clear and fundamental threshold principles at stake;
- the party raising the challenge must support and substantiate it;
- the challenge must clearly raise an issue that goes to the capacity of the Tribunal to make a determination;
- it must not go to the merits of the objection or to fundamental issues relating to the factual determination of native title, the latter being within the jurisdiction of the Federal Court;
- registration of a claimant application does not prevent either a party raising a jurisdictional challenge or the Tribunal from looking behind the Register of Native Title Claims;
- however, the Tribunal would not substitute its views for those of the Registrar unless there were clear and compelling reasons for doing so;
- once the issue of jurisdiction is raised, the Tribunal must determine whether or not it has jurisdiction, even though this may involve deciding ‘very complicated questions of mixed fact and law’, referring to *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467;
- if a native title party presented evidence that the other parties considered inadequate, then the proper means to address that issue was through evaluation of the s. 237 criteria;
- it is ‘a fundamental misconception to characterise matters of merit with matters of jurisdiction’ — at [42] to [74].

Use of single Form 4

The native title parties lodged a single Form 4 rather than three separate objections. The parties determined not to proceed on the issues raised by the government party. However, the Tribunal took the opportunity to make some comments on the point, including that:

- there is no bar to the Tribunal accepting a Form 4 which contains more than one party objecting to the same future act but there would be only one inquiry and one determination in those circumstances, notwithstanding the multiple objectors
- section 140 of the NTA enables the Tribunal to hold a single inquiry into multiple objection applications, potentially involving many proposed tenements. It does not result in a merger of objection applications
- it is open to the Tribunal to uphold an objection on the basis of evidence provided by one native title party even though the evidence of another native title party may not sustain such a finding;
- however, s. 32 of the NTA does not relieve a native title party from articulating its case;
- nor can that party rely on contentions of another native title party without providing any evidence or contentions of its own—at [33] to [39].