Future act determination application a nullity – native title party deceased

Dimer/Askins/Western Australia [2006] NNTTA 70

Member O'Dea, 8 June 2006

Issue

The main issues in this decision were:

- whether there was a 'native title party' in proceedings brought pursuant to s. 35 of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where all those who jointly comprised that party were dead when the application was made;
- if not, whether a representative body could be authorised by the relevant native title claim group to make the application; and
- if not, whether it was open to the arbitral body (in this case the National Native Title Tribunal) to substitute another party as the applicant.

Background

The Goldfields Land and Sea Council (GLSC), the native title representative body for the area concerned, lodged an application pursuant to ss. 35 and 75 to have a future act determination made, purportedly by consent, in relation to the grant of two exploration licences. The only 'native title party' (as defined in the NTA - see below) was comprised of two people who were both dead when the application was made to the Tribunal.

The inquiry

During the inquiry, the Tribunal raised the question of the capacity of the 'native title party' to either consent to the doing of the future act or bring the application in these circumstances. To assist the Tribunal address that issue, the parties were directed to:

- lodge evidence showing why the GLSC believed the native title party had consented to the doing of the relevant future acts (i.e. the grant of two exploration licences); and
- make submissions going to how the Tribunal was empowered to make a determination in the absence of any living 'applicant' (and, therefore, any native title party - see below) in the claimant application to which the proceedings related—at [8].

A solicitor employed by the GLSC subsequently gave evidence confirming (among other things) that the relevant native title claim group (via a working party) had authorised him to sign on behalf of the native title claim group and that it was pursuant to this authority that:

- he made the future act determination application; and
- believed that consent had been given to the exploration licences being granted.

The solicitor also deposed to the fact that the native title claim group did not intend to amend the relevant claimant application to replace the applicant at any time in the immediate future.

The government party (the State of Western Australia) submitted (among other things) that it was open to the Tribunal to make a determination, referring to ss. 139 and 109(1) of the NTA.

After considered the evidence and the submissions, and for the reasons set out below, the Tribunal:

- indicated that it was not satisfied that a future act determination could be made;
- decided that the future act determination application was a nullity.

The statutory framework

The Tribunal noted that, pursuant to s. 75, an application under s. 35 may be made to the Tribunal by any 'negotiating party' as this is defined in s. 30A, i.e. either the government, grantee or native title party. In this case, the application was purportedly made by the 'native title party'.

Member O'Dea set out the way in which that term is defined in the NTA:

- pursuant to s. 253, it has the meaning given by ss. 29(2)(a) and (b) and 30 and, in this case, s. 29(2)(b) was the relevant provision;
- therefore, the 'native title party' in this matter was 'any registered native title claimant' in relation to the relevant land and waters;
- a 'registered native title claimant' in relation to land and waters is defined in s. 253 to mean 'a person or persons whose name or names appear [sic] in an entry on the Register of Native Title Claims [the register] as the applicant in relation to a claim to hold native title in relation to the land and waters';
- in this case, there was only one claimant application on the register in relation to the relevant land and waters;
- all of the people whose names appeared in the entry on the register as 'the applicant' in that application were dead prior to any decision by the native title claim group to either enter into any agreement with the grantee party or make the future act determination application—at [12] to [13].

The member went on to note that:

- a claimant application may be made by 'the person or persons authorised [in accordance with s. 251B] by all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed', paraphrasing s. 61(1);
- the person (or persons) so authorised is (or are) the applicant and, if more than one person is authorised, they are jointly 'the applicant', referring to s. 61(2)(c);
- the NTA 'bluntly excludes all others who may be part of the "native title claim group" from being considered part of the applicant', referring to s. 61(2)(d);
- section 62A gives the applicant the power to 'deal with all matters arising' under the NTA in relation to that claimant application—at [14].

No native title party in this case

Member O'Dea was of the view that this statutory framework was such that:

> It is an inescapable conclusion ... that, if there is no living applicant, there is no party empowered to act on behalf of the native title claim group which is essential to the process of dealing with 'any matters arising under this Act'—at [15].

It was noted that:

- the problem could be remedied by a Federal Court order to replace the current applicant with a new, duly authorised applicant;
- the native title group in this matter had indicated it was inconvenient to do so at present;
- while replacing the applicant might be 'time-consuming[,] ... complex' and may trigger the application of the registration test, the native title claim group had 'no alternative' but to seek to replace the current applicant;
- this was because none of the people who are part of the native title claim group, but not part of the applicant, 'can have any formal role in taking any steps in the matter'—at [17], referring to *Foster/Copper Strike Ltd/Queensland* [2006] NNTTA 61 (*Foster*) at [34], summarised in *Native Title Hot Spots* Issue 20.

Therefore, in circumstances where all those comprising the 'native title party' are dead, the Tribunal has no capacity to assist the native title claim group—at [18].

Member O'Dea acknowledged that this finding 'thwarted' the wishes of the negotiating parties and that the evidence indicated that the native title claim group wanted the consent determination to be made. However, the Tribunal was required to decide whether it could make a future act determination in this matter for the reasons noted above, i.e. there was no 'native title party' for these proceedings—at [19].

Consent and the competency of application

While it was 'indisputable' that the framework of the relevant provisions of the NTA (e.g. ss. 38, 109(1) and 139) indicated that the Tribunal should, wherever possible, promote agreement-making, this did not assist in the current situation because:

> [T]here was no ... [native title party] ... and, therefore, not only could it not be said that the ... [native title party] consented to the proposed ... [future act determination], it was not competent to make the s. 35 application - at [20].

The member noted that the 'critical question' was whether the native title party, as defined in the NTA and noted above, had consented to the making of the determination. In relation to this case, this meant 'in a nutshell' that:

> [I]f none of the persons who collectively comprise the ... [native title party] have either executed or consented to the agreement there is no accord between the negotiation parties as one of those parties is incapable of reaching agreement—at [23], quoting Member Sosso in *Foster* at [38].

Substitution of competent party no cure

The Tribunal rejected the government party's proposal to remedy the situation by substituting a competent party because:

- if a plaintiff is dead at the commencement of proceeding, that proceeding is a nullity and cannot be cured by amendment, referring to Halsbury's Laws of Australia at [325-1470];
- the application in this case was brought under s. 75 after the death of the persons who were entitled to bring it (i.e. the native title party);
- therefore, it is a nullity and this cannot be cured by amendment - at [24] to [26].

Decision

The application was dismissed pursuant to s. 148(a).

Comment

The Tribunal noted that, while it was open to another negotiation party to bring an application under s. 75, the problem of how it could be dealt with by consent without any living native title party would arise again—at [27].

With respect, in this case there is a more fundamental issue. There was no native title party with whom the other negotiating parties could negotiate in good faith prior to making the application. Therefore, the Tribunal's power to deal with the application would not be enlivened, regardless of who made the future act determination application, i.e. an application by any other party could not be accepted in any case. This is because negotiation in good faith with the native title party (rather than with the native title claim group) is one of the pre-conditions to the exercise of the Tribunal's power (see, for example, *Walley v Western Australia* (1996) 67 FCR 366) and, in this case, there was no such party.

The member also noted that, alternatively, the state could validly grant the exploration licences, relying upon s. 28(1)(b), i.e. immediately before the future acts (the grants) were done, there was no native title party. In any case, 'there is nothing to prevent the grantee party and the native title [claim] group from honouring the agreement they reached'—at [27].

Although not noted by the member, the lack of any living applicant is also an issue in relation to the claimant application in the Federal Court. The Full Court has twice noted that, because of the way 'claimant application' is defined in s. 253, the absence of an 'authorised applicant' means there is no 'claimant application' before the court: see *Noble v Mundraby* [2005] FCAFC 212 and *Noble v Murgha* [2005] FCAFC 211, summarised in *Native Title Hot Spots* Issue 16.