

Future act determination – power to impose agreement as a condition

Enmic Pty Ltd/Borinelli/Western Australia [2006] NNTTA 29

Deputy President Sumner, 31 March 2006

Issue

The issue noted here was whether the National Native Title Tribunal, as the arbitral body, had power to impose conditions on the doing of a future act when making a future act determination by consent.

Background

The negotiation parties in this right to negotiate proceeding consented to the Tribunal making a determination under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) that the future act (the grant of a mining lease) may be done subject to undertakings made by the grantee party and native title party to be bound by the terms of an ancillary agreement between them.

Power to impose conditions in a consent determination that the act may be done

Deputy President Sumner noted (among other things) that:

- while the Tribunal has a broad power to impose conditions, it is subject to some statutory limitations;
- the Tribunal had previously made future act determinations ‘subject to’ or ‘pursuant to’ an agreement between the parties;
- a future act determination in that form raises the question of whether the terms of the agreement become conditions of the Tribunal’s determination;
- therefore, the Tribunal will only do so after seeing the relevant agreement and satisfying itself that it does not contain terms that the Tribunal cannot impose as conditions of a future act determination—at [10] to [11].

Heritage protection agreements

One of the agreements in this matter was a heritage protection agreement (HPA). It was noted that these are usually relatively simple agreements containing provision for the payment of fees for the conduct of heritage surveys. It was found that the HPA in this case contained no terms which the Tribunal could not impose as conditions of a future act determination—at [11].

The ancillary agreement

The Tribunal noted that the second agreement, referred to as an ancillary agreement, contained a clause relating to the payment of compensation. This was determined to be something the Tribunal had no power to impose as a condition of a future act determination—at [12].

The question then was whether the terms of agreement would become conditions of the Tribunal's determination if that determination was made in the terms sought by the parties. The draft determination in this matter was subject to the grantee party's undertaking to 'be bound' by the terms of the ancillary agreement. In an earlier matter, the Tribunal had made a determination in similar terms: see *BHP Billiton Minerals Pty Ltd/Abdullah/Western Australia* [2005] NNTTA 40 (summarised in *Native Title Hot Spots Issue 16*).

However, the Tribunal reconsidered the issue in this case because it was concerned that, 'despite the intentions of the parties', the terms of the ancillary agreement would become conditions of the determination, 'something which is beyond power' because of the clause in the agreement relating to the payment of compensation—at [13] and see [11].

The Tribunal also noted its comments in other matters that, even if it was within power to make a determination 'subject to' an agreement, or conditional on the parties being 'bound' by the terms of that agreement, this may not have any practical effect above and beyond what is already provided for under the NTA, i.e. making the terms of an agreement the conditions of a determination 'would not enhance the rights ... a native title party would have under the agreement'. This was said to be because a future act determination, subject to conditions, 'has effect as if the conditions were terms of a contract among the negotiation parties', i.e. this is 'something which is secured by the agreement itself'—at [14] and see s. 41(1).

It was also proposed that the future act may be done subject to an 'acknowledgement' by the grantee and native title parties that the ancillary agreement 'stands as a properly executed agreement between the parties'. The Tribunal agreed with the government party's submission that, whether the conditional determination of this kind is made or whether there is a public recording in the Tribunal's reasoning of the parties' intent to be bound, the result is the same, i.e. evidence of the parties' bona fide intention at the time of the agreement—at [17].

Decision

The Tribunal accepted an alternatively worded minute of consent determination executed by all the parties that avoided raising doubt about the imposition of conditions and then made a consent determination that the future act (i.e. the grant of the mining lease) may be done—at [23].