

# Consent determination - factors Tribunal considers

## *Foster/Copper Strike Ltd/Queensland* [2006] NNTTA 61

Member Sosso, 19 May 2006

### **Issue**

The main issue in this matter was the factors that are relevant when the National Native Title Tribunal, as the arbitral body, is asked to make a future act determination by consent in circumstances where not all of the people comprising the native title party have signed agreements in principle.

### **Background**

The applicant (and, therefore, the native title party - see below) in the registered claimant application to which this matter related was jointly comprised of 28 people. An agreement had been reached in principle that two future acts (the grant of exploration licences) could be done and an application had been lodged with the Tribunal pursuant to ss. 35 and 75 of the *Native Title Act 1993* (Cwlth) (NTA) in which a 'consent' future act determination was sought.

Affidavit evidence showed that 21 of the 28 people who jointly comprised the native title party had signed two 'in principle' agreements. Of the remaining seven, three were deceased, three could not be located and one refused to sign, not because he objected to the terms of the agreements but because of disagreements he had with others who constituted the native title party—see [8] and [13] to [17].

### **Meaning of 'native title party'**

The 'native title party' relevant to these proceedings was a 'registered native title claimant' in relation to the relevant land or waters: see ss. 29 and 30. Therefore, the 'native title party' was:

[T]he person or persons whose name or names appear [sic] in the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters: s. 253.

Since the NTA provides that, where more than one name appears in the register, the persons are jointly 'the applicant', all 28 people named in the register were, jointly, the 'native title party': see s. 61(2)(c) and *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in *Native Title Hot Spots Issue 20*.

The Tribunal noted that, while the members of the native title claim group who are the duly authorised 'applicant' have the carriage of a claimant application, and other members of the native title claim group cannot take any step in the proceeding:

[T]he authority given to the ... applicant is not open-ended and the relevant person or persons must act in good faith ... with the aim of advancing the interests of the claim group ... and in accordance with the interests and wishes of the ... claim group—at [34].

### **Consent determinations**

The Tribunal referred to and adopted its earlier decisions on the power of the Tribunal, in appropriate circumstances, to make a future act determination under s. 38 with consent of the parties and without conducting an inquiry, despite the absence of any express statutory power to do so—at [24] and [27].

After noting several key issues, the Tribunal summed up its approach as follows:

In short, when looked at as a whole, the scheme of section 39 enables the Tribunal to make consent determinations that truly accord with the interests and wishes of the [native title] claim group, despite the fact that due to unforeseen circumstances there is not an ability for all the persons who collectively comprise the ... [native title party] to execute a contract. However ... [this] is only permissible when it is clear from the evidence ... that there is not internal dispute within the persons comprising the ... [native title party] or the wider claim group on the doing of the future act from the perspective of the merits of the agreement or the potential impact of the act—at [31].

Member Sosso went on to acknowledge that the scheme of the NTA put the Tribunal on notice that, 'wherever possible', it should 'promote agreement-making and recognise the primacy of any reasonable agreement reached between the negotiation parties'—at [33].

However:

It needs to be emphasised ... that the Tribunal is not bound to make a determination in accordance with an agreement reached between the negotiation parties ... . There may be instances where the agreement is flawed, contrary to public policy, falls outside the jurisdiction of the Tribunal or is contrary to law ... . The Tribunal has an inherent discretion, when taking an agreement into account, to go beyond or even not to accept it ... . The key issue ... is that the Tribunal be satisfied of two essential matters. First, that the determination is in accordance with the law, and second, if it is based on the asserted "in principle" agreement of the parties, the "agreement" was properly made— at [33].

### **Factors relevant to consent**

In deciding whether a 'native title party' is actually consenting to the making of a future act determination, the Tribunal noted that two matters are of central importance:

- whether the agreement had been endorsed by the wider native title claim group, either specifically or because it was of a type that the particular claim group had previously given general consent to; and
- the reason why people comprising the native title party had not executed the agreement, e.g. they could not be located, had passed away, were incapacitated or refused for reasons unrelated to either the terms of the agreement or the process adopted by the claim group in endorsing the agreement—at [37].

It was acknowledged that where (as in this case) numerous persons comprise ‘the applicant’ (and, therefore, the ‘native title party’) there is ‘an inherent risk that, if there is disagreement:

- the decision-making process will be stymied; and
- in a future act context, this may result in an ‘impasse with a claim group being incapable of entering into commercial arrangements with grantee parties’ — at [35].

In these circumstances, the Tribunal does not have a ‘charter or a legislative head of power’ to assist a claim group which is ‘in gridlock because of internal disputes’. If the native title party is incapable of reaching accord in right to negotiate proceedings due to such disputes, then (subject to various pre-conditions being met), an application may be made under s. 75 to the Tribunal for a future act determination. Where this is the case, the member was of the view that there was no scope for a consent determination:

[I]t is clear that the native title party is not consenting. It cannot consent if it is internally divided. So, the Tribunal must undertake a proper inquiry and carefully weigh up the section 39 criteria before making a determination — at [36].

It was noted that, on becoming aware of discord within the claim group or between the persons comprising the native title party about the terms of the agreement or the doing of the relevant future act, the Tribunal is on notice that evidence will be needed to demonstrate it is appropriate for a consent determination to be made.

### **Consent may be inferred if refusal unrelated to future act**

Member Sosso went on to make clear that:

[I]f a person who is one of those persons comprising the ... [native title party] refuses to execute an agreement [relevant to proceedings before the Tribunal] for reasons that are unrelated to the terms of the proposed agreement or the possible impact of the proposed future act on the matters outlined in ... [s.] 39(1)(a), then it is open to the Tribunal to work on the assumption that there has been a true accord between the negotiation parties. The Act requires a high duty of care, akin to a fiduciary duty, from persons carrying out the responsibilities of an applicant [and therefore a native title party] ... . Native title is by its very nature communal ... . It does not entail empowering people to deviate from the traditional laws and customs of their claim group ... [and] it is not intended to allow a recalcitrant applicant to exercise in bad faith a right of veto over commercial negotiations to the detriment of the wider claim group interests — at [39].

### **Decision**

In this matter, the Tribunal was satisfied that:

- the wider claim group had previously endorsed agreements in identical terms to the ‘in principle’ agreements relevant to these proceedings;
- none of the seven people comprising the native title party had refused to sign the proposed agreements on relevant grounds;
- the failure of other previously named persons comprising the native title party to execute the agreements was due to the representative body’s failure to locate them, despite its best endeavours — at [40].

Given these findings (among others), and after ensuring that it was within power, the Tribunal made the determination sought by consent i.e. the future acts may be done subject to compliance with the native title and heritage agreement lodged with the Tribunal in these proceedings—at [45].