Negotiation in good faith–unregistered areas not relevant

Dann/Western Australia/Empire Oil Company (WA) Limited [2006] NNTTA 153

Sosso M, 24 November 2006

Issues
In these right to negotiation proceedings, the native title party contended that the National Native Title Tribunal was not empowered to make a future act determination because the grantee party had not negotiated in good faith as required by s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA). The main issue addressed which is summarised here is whether the grantee party was required to agree to a proposed cultural heritage agreement applying to areas that were not subject the relevant registered claimant application.

Background
The grantee party lodged a future act determination application pursuant to ss. 35 and 75 of the NTA in relation to the grant of a proposed exploration permit under the *Petroleum Act 1967* (WA) (the proposed tenement). The native title party had earlier unsuccessfully challenged the validity of the s. 29 notice: see *Dann/Western Australia/Empire Oil (WA) Limited* [2006] NNTTA 126, summarised in *Native Title Hot Spots* Issue 21.

The Tribunal reviewed the accounts of negotiations over, among other things, the terms of a heritage agreement. There were a number of Tribunal convened mediations over a period of months in late 2005 and early 2006. Ultimately, once issues relating to compensation were resolved, the remaining issue was the area over which heritage surveys would be required.

The native title party's main contentions were summarised by the Tribunal as an allegation that 'by constantly shifting the goal posts, by failing to disclose allegedly critical contractual changes and by engaging in intransigent and unreasonable negotiation conduct, [the grantee party] has manifestly failed to negotiate in good faith'—at [23] to [43], [56] to [57] and [66].

Scope of good faith negotiations
The Tribunal outlined the legal principles in evaluating whether negotiations in good faith had taken place and:

- confirmed that s. 32(1) does not limit the scope of negotiations but, rather, creates an opportunity for dialogue, referring to *Walley v Western Australia* (1999) 87 FCR 565; and

- noted that s. 31(2) relieves a negotiation party from having to negotiate about matters unrelated to the effect of the proposed tenement on the native title party's registered native title rights and interests—at [52] and [76].

The Tribunal held:

- as the native title party's registered claimant application specifically excluded certain areas, there were no registered native title rights and interests in relation to those areas and no 'legislative nexus' imposing an obligation to negotiate in good faith in respect of those areas outside the claimed area;
- it was open to the native title party to seek protection for a greater area but a refusal by the other parties to negotiate heritage protocols for areas where there were no registered rights and interests did not amount to a failure to negotiate in good faith;
- the evidence did not support a finding of dishonesty on the part of the grantee;
- it was not open to the Tribunal to decide whether or not there had been negotiations in good faith on the basis of the Tribunal's view of the reasonableness of the substantive offers;
- rather, the Tribunal was required to determine if there has been a genuine attempt to reach agreement—at [76] to [78] and [82], referring to *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 32.

Decision

The grantee party was found to have negotiated in good faith, as required by s. 31(1)(b), and so the Tribunal was empowered to hold and inquiry and make a s. 38 determination in relation to the grant of the proposed tenement—at [85].