Grantee party did not negotiate in good faith

Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd [2008] NNTTA 90

Deputy President Sosso, 11 July 2008

Issue
The issue before the National Native Title Tribunal was whether or not FMG Pilbara Pty Ltd (the grantee party) had negotiated in good faith prior to making a future act determination application (FADA) pursuant to ss. 35 and 75 of the *Native Title Act 1993* (Cwth). It was found that the grantee party has not done so and, therefore, that the Tribunal was not empowered to make a determination on the FADA.

Background
The grantee party made a FADA in relation the proposed grant of mining lease 47/4104. The area covered by the application for the lease overlapped part of the area subject to the Puutu, Kunti, Kurrama and Pinikura Peoples' registered claimant application (the first native title party) and part of the area subject to an approved determination of native title made for which the Wintawari Guruma Aboriginal Corporation is the registered native title body corporate (the second native title party).

The grantee party has numerous tenements and tenement proposals in the Pilbara region and had met with various native title parties seeking to negotiate land access agreements in relation to the grantee party's project and mining tenure. The grantee party's summary of the facts relevant to the negotiations that took place prior to the making of the FADA was not contested.

Both native title parties contended that the grantee did not negotiate in good faith prior to making the FADA. As the issue of good faith goes to the jurisdiction of the Tribunal, it must be dealt with prior to determination of a FADA.

Native title party's contentions
The first native title party had no complaint about the grantee party's conduct of the negotiations but contended (among other things) that:

- all discussions with the grantee were about a claim-wide agreement and the proposed mining lease which was the subject of the FADA was not raised as a priority tenement in any of those discussions;
- land access agreement negotiations between the parties were at an early stage and little of substance had been discussed prior to the grantee making the FADA;
- the grantee did not negotiate about any matters in ss. 33 and 39 of the NTA, the exercise of native title rights and interests, the effect on those interests or significant sites in the mine area and did not make any offer of the kind contemplated by s. 33(1).

The second native title party contended that:

- the negotiations for the whole of claim agreement included relieving the grantee party of the right to negotiate proceedings but, until that agreement was completed, the NTA continued to apply;
- the grantee party's compensation proposals were limited to 'things produced', rather than profits made or income produced;
- given the scale of the grantee party's iron ore mining activities, there was nothing reasonable in the financial package offered by the grantee party.

Legal principles

The Tribunal adopted the analysis of the obligation to negotiate in good faith stated in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at 93 to 94, noting that:

- once an application is made under ss. 35 and 75, the prior conduct of the parties is the focus of the inquiry and evidence of subsequent negotiations is not relevant, referring to *Cameron v Hoolihan* (2005) 196 FLR 37;
- while there is no statutory obligation for a government or grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate such payments may in some circumstances be an indication of a failure to negotiate in good faith, referring to *Brownley v Western Australia* (1999) 95 FCR 152 at [54] to [55];
- the obligation imposed on a grantee party is to receive and consider fairly any payment proposal but without an obligation to 'capitulate to reach agreement', referring to *Western Australia/West Australian Petroleum Pty Ltd/Hayes* [2001] NNTTA 18 at [37] to [38].

Findings

The Tribunal noted (among other things) that:

- the history of negotiations between the second native title party and the grantee did not reveal that the grantee adopted an unreasonable negotiating position;
- the statutory obligation is to negotiate about the doing of the proposed future act and does not extend beyond negotiating about the effect of the act on the registered native title rights and interests of the native title parties;
- parties are at liberty to subsume individual right to negotiate discussions in negotiations of a broader agreement than the doing of the act;
- the s. 31 requirement to negotiate about the doing of the act in the context of its effect on native title rights and interests cannot be avoided unless there is an explicit agreement to that effect. There was no such agreement between the grantee and first native title party;
- the obligation to negotiate in good faith with the first native title party had not been met when the s. 35 application was lodged as the material indicates the negotiations for a LAA were at an early stage and had not advanced to a stage where the general discussions in themselves could satisfy s. 31(1)(b);
- a grantee party could satisfy s. 31(1)(b) if, even at an early stage of negotiations, there was under a general framework of advanced discussions for the doing of the relevant future act. While other proposed tenements were raised as a priority in

bipartite discussions, the proposed mining lease was not the subject of serious negotiations—at [39], [49], [52], [58] and [72] to [74].

It was found that:

- the evidence did not support a finding that the grantee party engaged in disingenuous conduct in its negotiations with the first native title party;
- rather the grantee party was acting honestly but made an error in seeking a future act determination about the proposed mining lease when the negotiations about that tenement were in their infancy;
- the process of negotiations with the second native title party indicated the land access agreement process had stalled;
- if the broader agreement could not be progressed, the onus was on the grantee party to disaggregate the proposed mining lease and revive negotiations about it;
- it would be contrary to the requirement found in s. 31(1)(b) to rely on failed general negotiations which never substantively addressed the proposed mining lease—at [77] and [82].

Decision

The Tribunal found that the grantee party did not discharge its obligation to negotiate in good faith with either of the native title parties and so the Tribunal had no jurisdiction to conduct an inquiry and make a future act determination.

Appeal proceedings

On 7 August 2008, FMG Pilbara Pty Ltd filed an appeal in the Federal Court pursuant to s. 169 of the NTA against the Tribunal's finding that it did not negotiate in good faith.