

Future act inquiry — good faith negotiations

***Western Australia/Daniel/Holborow/Hicks* [2002] NNTTA 230**

Deputy President Sumner, 12 November 2002

Issue

The Wong-goo-tt-oo people, one of the three native title parties in these proceedings, contended that the government party had not complied with s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA), i.e. the requirement that the parties negotiate in good faith prior to making an application to the Tribunal under s. 35 for a future act determination.

Confidential and without prejudice evidence

The Tribunal rejected the contention that it could not refer to confidential and ‘without prejudice’ documents in making its decision. The Tribunal referred to paragraphs 4.6.1 and 4.6.2 of the Procedures Under the Right to Negotiate Scheme (issued 10 September 2002) which provide that the ‘without prejudice’ nature of negotiations is subject to the requirements of a s. 35 determination inquiry to decide if a government or grantee party has negotiated in good faith—at [33].

Government party's negotiating position and possible extinguishment

The Tribunal was of the view that the government party was entitled to assess the strength of the different native title claims, including considering whether or not native title has been extinguished and that its views on these issues can legitimately influence offers made—at [46].

Separate negotiations

The Tribunal summarised the negotiations and found there had been substantial communications, discussions and conferences between the parties with a view to reaching an agreement. The Wong-goo-tt-oo contended they had a right to negotiate with the government party separately. The Tribunal accepted the s. 31(1)(b) obligation is to negotiate with each native title party. On the evidence, the Tribunal found that the government party did negotiate separately with the Wong-goo-tt-oo native title party. However, the final negotiating position of the government party was for a collective agreement involving all three native title parties—at [67] to [75].

Seeking agreement before the Federal Court determination of native title

The Tribunal held that it is contrary to the intention of the NTA to hold up future act negotiations and arbitrations pending a final determination of native title. Right to negotiate procedures should be conducted as far as possible in a timely manner. Unless there are exceptional circumstances, the Tribunal should fulfil its statutory responsibilities to make a determination within the times set by Parliament without awaiting the conclusion of Federal Court proceedings—at [96] to [98].

Parliamentary privilege

The Wong-goo-tt-oo native title party submitted that the Tribunal ought to receive Future act application 30 and have regard to the Deputy Premier's statement to the Parliamentary Estimates Committee criticising the Wong-goo-tt-oo's legal representatives. In response, the government party asserted parliamentary privilege protected the statements from being put into evidence and that the Deputy Premier could not be called to give evidence or cross-examined.

The Tribunal reviewed the principle of parliamentary privilege and noted the rationale of the principle is that a member of parliament ought to be able to speak in parliament with impunity and without any fear of consequences. The Tribunal held that the Deputy Premier could not be compelled to appear before the Tribunal to answer questions about what he said in parliament. The statement could be received into evidence but it is not permissible for the Tribunal to draw inferences from the statement. Even if the Tribunal could draw an inference, it was an isolated statement and it did not point to a concerted effort to undermine the native title party's legal representative—at [123], [125] and [132], referring to *Sankey v Whitlam* (1978) 142 CLR 1 at 35 and *Prebble v Television New Zealand Ltd* (1995) 1 AC 321 at 324.

Confidentiality

The Wong-goo-tt-oo contended the government party breached the confidentiality of the negotiations about a memorandum of understanding (MOU), which was one of the matters covered by the negotiations. The government party's explanation was that the release of general principles of the proposed grant of freehold was given for the purpose of informing officers of the Shire of Roebourne to assist their understanding of one aspect of the negotiations. The Tribunal was satisfied that the breach of confidentiality was unlikely to have had an adverse effect on the negotiations. A second breach of confidentiality occurred when details of the MOU were leaked to the media. The Tribunal made no finding about who was responsible for the breach of confidentiality—at [127] to [132].

Inequality of bargaining position

The Wong-goo-tt-oo contended that the government party failed to ensure that the native title party was adequately resourced and that this resulted in a fundamental inequality of bargaining position. The Tribunal found that:

- the wording of s. 31(1) did not suggest that one party is obliged to fund another and that s. 31(2) did not extend negotiation beyond the effect of the future act on registered native title rights and interests;
- the government party had contributed funding to the native title parties' legal costs and regarded this as an indication of good faith—at [146].

Other contentions

In response to the other contentions of bad faith negotiations the Tribunal found:

- adopting a negotiating position did not demonstrate a lack of good faith unless it could be demonstrated there were improper motives or the position was so unreasonable as to indicate a lack of sincerity in the desire to reach agreement—at [47];

- it was impossible to conclude that the government party's negotiating position exhibited bad faith given that: the existence of native title had not been established; there were three overlapping claimant groups; the government party did not accept that native title exists; and the proposed MOU offered substantial benefits to all native title parties—at [75];
- the government party's failure to accept the native title party as the traditional owners did not demonstrate a lack of good faith—at [76];
- the delays in the various stages of negotiations did not indicate unreasonableness in the government party's dealings with the native title party—at [77] to [82];
- on the facts that were accepted, the native title party was given opportunities to comment on, and negotiate about, the MOU—at [83] to [88];
- the government party's timetable for negotiations, alleged to be strict with onerous and unnecessary deadlines, was not unreasonable given the history of the negotiations—at [94];
- making a s. 35 application, or referring to an intention to make a s. 35 application once the prescribed statutory period has passed, cannot be relied upon to demonstrate a lack of good faith: *Strickland v Western Australia* (1998) 85 FCR 302 at 322—at [95];
- the government party's conduct in taking a lead role in the negotiations on behalf of the proponents over the whole area, including areas for which there were specific proposals, did not exhibit bad faith—at [102];
- significant changes between earlier proposals and the MOU must be considered in the context of the history of negotiations. The circumstances of the development of the MOU and the changed offers it contained did not exhibit a lack of good faith—at [103] to [114];
- the content of informal discussions about the MOU between the government party's chief negotiator and a member of the Wong-goo-tt-oo native title party was a lapse in the ideal negotiating behaviour expected of a government party. As it was an isolated incident and not a consistent pattern of behaviour, the behaviour did not weaken the other evidence that the government party negotiated in good faith. An isolated incident commenting on the Wong-goo-tt-oo native title party's legal representatives was also not a pattern of behaviour which would lead to a finding that the government party had not negotiated in good faith—at [119] to [122];
- there were no grounds for finding that the government party did not engage in genuine discussions about matters described in s. 33—at [136] to [138];
- inclusion in the MOU of land that is covered by s. 24MD(6B) and not by the right to negotiate provisions was not, in the circumstances, indicative of a lack of good faith—at [140] to [143];
- it was not incumbent on the Government to provide the Wong-goo-tt-oo native title party with relevant information on the industries to be established on the industrial estate given the future act in question was a compulsory acquisition of all native title rights and interests: *Risk v Williamson* (1998) 87 FCR 202—at [145].

Decision

The Tribunal determined that the government party had fulfilled its s. 31(1)(b) obligations to negotiate in good faith and that it had jurisdiction to conduct an inquiry and make a determination.