Negotiation in good faith

Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd [2009] NNTTA 35

Sosso DP, 17 April 2009

Issue

The issue in this case was whether or not Mineralogy Pty Ltd (the grantee party) had negotiated in good faith with two native title parties before making a future act determination application pursuant to s. 35(1) of the *Native Title Act 1993* (Cwlth) (NTA). It was found that the grantee party had not done so and, therefore, the National Native Title Tribunal was not empowered to make a determination on the application.

Background

The grantee party lodged a future act determination application in relation the proposed grant of an exploration licence. The area covered by the application for the licence was completely overlapped by the area subject to the Yaburara Mardudhunera People's registered claimant application (the first native title party) and the area of the Kuruma Marthudunera People's registered claimant application (the second native title party).

The second native party lodged an objection to the application of the expedited procedure to the grant of the licence (the future act), which was resolved in October 1998 by consent such that, pursuant to s. 31(1)(b), the negotiation parties were required to negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the future act. Negotiations were initiated by the government party (the State of Western Australia) on 12 December 2006, i.e. almost eight years later. Mediation assistance was provided by the Tribunal until it was terminated on 17 October 2008 because of the grantee party's failure to participate.

Native title parties' contentions

The first native title party contended the grantee party had not made any reasonable effort to negotiate. The second native title party's contentions included that:

- the grantee party attended mediation conferences but failed to put forward any proposals or respond meaningfully to heritage protection proposals;
- the only offer put forward by the grantee party was an undertaking to comply with the *Aboriginal Heritage Act 1972* (WA) and the NTA;
- as these are legal requirements, the grantee party failed to consider offers beyond its legal obligations.
- the grantee party's negotiators had, on two occasions, authority to do no more than listen;

- there was no genuine attempt to reach agreement, exemplified by the grantee party failing to respond to a draft agreement and not presenting any alternative draft.

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, the legal principles set out in *Gulliver v Western Desert Lands Aboriginal Corporation* (2005) 196 FLR 52 and the indicia set out in *Western Australia v Taylor* (1996) 134 FLR 221—at [21], [22] and [26].

It was noted (among other things) that:

- the focus of statutorily mandated good faith negotiations is the effect of the proposed future act on the registered native title rights and interests of the native title party;
- the matters set out in s. 39 can logically form the basis of negotiations but the negotiations are not limited to such matters ;
- the question as to whether or not there have been negotiations in good faith cannot be answered in the abstract and each matter has to be dealt with on the particular facts presented;
- when required to determine the good faith of a party, the Tribunal must assess that party's overall conduct in context;
- applying such a contextual evaluation, a negotiation party with considerable resources, access to professional advice and the ability to organise and attend meetings will be required to act reasonably having regard to its ability to negotiate;
- there is a proportionate analysis, in that the greater the possible impact of the proposed future act has on registered native title rights and interests, the greater the obligation on non-native title parties to negotiate about possible impacts—at [28], [31] to [32], referring to *Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319 at [33] to [35] and *Doxford v Barnes* (2008) 218 FLR 414 at [37].

Findings

In relation to the first native title party, the Tribunal found (among other things) that:

- the grantee party made limited efforts to contact and negotiate with the first native title party and no effort after receiving notice of the first native title party's new address for service;
- the grantee party was obliged to make contact after receiving that notice and the failure to do so was 'fatal' to the grantee party's contention that it had negotiated in good faith;
- the grantee party is a substantial organisation with experience in native title negotiations and litigation and it would know from that experience the obligations imposed by s. 31(1)(b)—at [25], [41] to [69] and [71].

The Tribunal also noted there were negotiations between the first native title party and the grantee, or its business associates, in regard to other tenements, which raised further questions as to why there were no negotiations over the licence the subject of these proceedings—at [70].

In relation to the second native title party, the Tribunal found (among other things) that:

- the grantee party's contentions were focused on considerations relevant to an expedited procedure objection inquiry and the matters set out in s. 237, not to a good faith inquiry;
- the long history of poor relations between the grantee and the second native title party was demonstrated in both the evidence before the Tribunal and in other matters, such as *Minerology Pty Ltd v Kuruma Marthudunera Native Title Claimants* [2008] WAMW 3;
- the evidence indicated the grantee party had made minimum efforts to engage in negotiations, adopted a confrontational attitude in communications with the second native title party and made no serious attempt to reach an accord;
- the grantee party's obligation under s. 31(1)(b) required more than making a power-point presentation on its position and then simply listening to the second native title party's submissions;
- the grantee party was obliged to negotiate, which meant 'communicating, having discussions or conferring with a view to reaching agreement';
- the grantee party failed to negotiate in good faith because it took a rigid non-negotiable position;
- the grantee party had been on notice for a number of years that the second native title party had 'legitimate and long held concerns' about an earlier cultural heritage survey—at [36] to [40], [74] to [78], [84], [86], [88] and [91], referring to *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303 at 312.

Decision

The Tribunal found that grantee party did not discharge its obligation to negotiate in good faith as required by s. 31(1)(b) with either of the native title parties and, therefore, that the Tribunal was not empowered to conduct an inquiry and make a future act determination.