Negotiation in good faith

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49

Spender, Sundberg and McKerracher JJ, 30 April 2009

Issue

The questions of law before the Full Court of the Federal Court were whether:

- negotiations in good faith must have reached a certain stage at the end of the prescribed six-month period before an application for a future act determination can be made;
- a negotiation party has negotiated in good faith 'about' or 'over' a particular future act if negotiations conducted on a broader basis include that future act.

The court found a future act determination can be made once the prescribed period expires regardless of the stage negotiations have reached, provided those negotiations were conducted in good faith during that period. In the circumstances of this case, the court was also satisfied that the grantee party could rely on broader, 'whole of project' negotiations to discharge its obligation to negotiate in good faith in relation to the particular future act in question.

Application for special leave to appeal

One of the native title parties (PPKP) filed an application in the High Court for special leave to appeal against the whole of the judgment on 25 May 2009.

Background

The first respondent (PKKP) is the registered native title claimant in relation to the Puutu Kunti Kurrama Pinikura People's claimant application. The second respondent (WGAC) is the registered native title body corporate in relation to the approved determination of native title made in *Hughes v Western Australia* [2007] FCA 365 under the *Native Title Act 1993* (Cwlth) (NTA).

The future act relevant to these proceedings was the proposed grant of a mining lease in the Pilbara region of Western Australia to FMG Pilbara Pty Ltd (FMG). The proposed lease area overlapped part of the PPKP's claim area and part of the WGAC's determination area. FMG and WGAC commenced 'whole of project' negotiations in relation to a draft land access agreement (LAA) in late March 2006. FMG and PKKP started negotiations in relation to a second draft LAA in February 2007. Each draft LAA provided that the native title parties would agree to a range of future acts being done to facilitate FMG's projects in the relevant area in return for (among others things) compensation from FMG. Those future acts could not be specifically identified in advance. However, the breadth of the description of projects in each draft LAA, and the geographic area each was to cover, indicated that the mining lease relevant to these proceedings was embraced by those negotiations.

Notice under s. 29 of the proposal to grant the mining lease was given on 25 April 2007 by the State of Western Australia. If the government party (i.e. the state) gives notice under s. 29 that it proposes to do a future act to which the right to negotiate applies, registered native title claimants and registered native title bodies corporate have the 'benefit' of the 'negotiation procedure' set out in ss. 29 to 35—at [6].

Under that procedure, the 'negotiation parties' (in this case, the state, PKKP, WGAC and FMG) must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the future act covered by the notice, with or without conditions. If no agreement is reached, and at least six months have passed since the 'notification day' specified in the s. 29 notice, any negotiation party may apply to the Tribunal for a future act determination under s. 38— ss. 30A and 31(1)(b), 35(1).

On 23 November 2007, FMG applied to the Tribunal for such a determination. No agreement had been reached and at least six months had passed since the notification day (i.e. 25 April 2007). Therefore, FMG was prima facie entitled to make the application. However, the native title parties argued that FMG had not negotiated in good faith about the grant of the mining lease.
The Tribunal found that productive negotiations on the LAA had taken place with PKKP but it was only on 6 September 2007 that FMG confirmed that it wanted to include negotiations about the lease covered by the s. 29 notice in those negotiations. At the next meeting, held on 24 September 2007, FMG specifically raised various exploration tenements but made no mention of the proposed mining lease. It was not until a meeting on 5 November 2007 that the proposed mining lease was mentioned. Around three weeks later, FMG lodged the s. 35(1) application.
The Tribunal acknowledged that s. 31(1)(b) could be satisfied if the LAA discussions included 'advanced negotiations on the doing of the relevant future act'. However, when PKKP agreed to include negotiations about the proposed mining lease in the LAA discussions, this was 'no more than a sign of common sense and goodwill on its behalf'. It was 'not an abdication of its right to negotiate about the [particular] future act'. FMG had confused 'appropriate negotiating behaviour' by PKKP with 'surrender of rights'. In relation to WGAC, the Tribunal found that, when the LAA negotiations stalled, FMG was obliged to revive negotiations about the proposed mining lease because there had never been any substantive discussions about the mining lease in question. Therefore, the Tribunal determined that FMG had not fulfilled its obligation under s. 31(1)(b) and that it had no jurisdiction to conduct an inquiry and make a future act determination pursuant to ss. 38 and 139(b) of the NTA—see *Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 (*Cox/WGAC/WA/FMG* summarised in *Native Title Hot Spots* Issue 28) at [57], [59], [64], [82] and [90] to [92].

FMG filed an appeal in the court against the Tribunal's decision under s. 169 of the NTA, which restricts the appeal to a question of law. The matter was referred to the Full Court of the Federal Court pursuant to s. 20(1A) of the *Federal Court Act 1976* (Cwlth).

Good faith question goes to power, not jurisdiction

The Tribunal cannot make a future act determination if a negotiation party satisfies it that another negotiation party (other than a native title party) did not negotiate in good faith—see s. 36(2). The court found that negotiation in good faith is not a 'jurisdictional precondition'. The prohibition found in s. 36(2):

> [A]ffects the 'power' of the Tribunal to make an arbitral determination rather than its 'jurisdiction'. The prohibition on exercise of the power only arises when the good faith point is both taken and taken successfully by a negotiation party. If there were no good faith but the point were [sic] not taken, the Tribunal would still have jurisdiction and power. The power to make a determination is a function of the jurisdiction conferred on the Tribunal—at [11].

Tribunal's findings

The Tribunal found (among other things) that:

- FMG had negotiated in good faith throughout the requisite six-month period, diligently advancing negotiations over a draft LAA;
- it was entirely appropriate for FMG to seek to negotiate a broader agreement involving all of its 'projects' in the relevant claim area, as distinct from doing so on a proposed tenement by tenement basis; and
- both PKKP and WGAC had agreed to include negotiations about the mining lease in question in the LAA negotiations.

On appeal, no challenge was made to any of Tribunal's findings on the facts.

Meaning of 'negotiate in good faith' under s. 31(1)(b)

The court accepted that the right to negotiate regime is an element of the protection of native title, one of the main objects found in s. 3 of the NTA and that, given its beneficial nature, it is not to be narrowly construed—at [18].

It was noted that:

- the expression 'negotiate in good faith' is to be construed 'in its natural and ordinary meaning' by identifying what the 'good faith' obligation is intended to achieve;
- that obligation 'is made obvious by the wording of the provision in which it is found within the context of the statutory scheme';
- the requirement for good faith is directed to the quality of a party's conduct, which is to be assessed by reference to what a party has done, or not done, in the course of negotiations;
- that assessment is directed to, and concerned with, a party's state of mind as manifested by its conduct in the negotiations;
- if negotiations reach a standoff, notwithstanding attempts made within the relevant six month period to negotiate in good faith, there are no further obligations placed on any party;
- in those circumstances, any party wishing to make an application under s. 35(1) may do so (e.g. there is no need to 'give further warning of the intention to do so')—at [19] to [20] and [27], referring to various authorities.

According to Spender, Sundberg and McKerracher JJ:

- the statutory scheme recognises Parliament's intention that there must be a 'good faith period' of negotiation before there is any application for a future act determination;
- the six months provided for in s. 35 'ensures that there is reasonable time to enable those negotiations to be conducted';
- at the same time, if the negotiations do not result in agreement, the matter may be 'taken forward at the end of the six month period' by making an application under s. 35(1) for a determination—at [21].

As their Honours saw it, s. 36(2) provided the negotiating parties with 'ongoing protection' because:

> [I]f any such party satisfies the ... Tribunal ... that another negotiation party (other than the native title party) did not negotiate in good faith, the arbitral body must not make the determination on the application—at [21].

Therefore, only two obligations were 'spelt out' by the statutory scheme:

- negotiations directed to reaching an agreement are carried out in good faith; and
- not less than six months has passed since the notification day in the s. 29 notice—at [22].

Negotiations under s. 31(1)(b) do not have to reach any particular stage

The court did not agree with the Tribunal's conclusion that negotiations which had only reached an 'embryonic' stage could not be negotiations for the purpose of s. 31(1)(b). According to the court:

> The interpretation adopted by the Tribunal ... is an additional requirement which is not to be found in the Act. It puts a gloss on the statutory provisions and places a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain ... [a future act] determination—at [23].

According to the court, the Tribunal found FMG:

- approached the negotiations with an open mind rather than a rigid, non-negotiable position;
- initiated communications, made proposals and punctually responded to communications;
- organised and attended meetings, facilitated and engaged in discussions, made counter-proposals, sent properly authorised negotiators;
- demonstrated a genuine desire to reach accord with the native title parties from the outset;
- discharged its duty fairly and conscientiously—at [24] and [26].

It was significant to the court that these indicia going to show good faith were identified by the Tribunal despite PKKP's contention (which the Tribunal rejected) that FMG had 'engaged in disingenuous conduct amounting to obfuscation and pettifoggery'—at [25].

While this is correct, it should be pointed out that, shortly before it made that finding, the Tribunal noted that:

> A reasonable and honest grantee party negotiator would, when seeking simultaneously to reach a claim wide accord and expedite the grant of individual tenements, disclose those tenements to, and seek to reach an accord with, the native title party. The grantee party did this with respect to various prospecting and exploration tenements. A reasonable native title party would expect that a similar approach would be adopted in the future unless the grantee party otherwise indicated. ... The contentions ... [FMG made to the Tribunal] to the contrary could lead ... to a view ... that it was engaging in unsatisfactory and potentially misleading behaviour. The Tribunal does not make such a finding, but the contentions of the grantee party paint, ex post facto, a less than satisfactory picture about the manner in which the grantee party was approaching negotiations—Cox/WGAC/WA/FMG at [70].

However, based upon the Tribunal's findings, the court was of the view that:

> [T]here could only be a conclusion of lack of good faith within the meaning of s 31(1)(b) ... where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct—at [27].

The difficulty facing PKKP, according to the court, was that the Tribunal 'quite reasonably' concluded that FMG had, in the 'conventional sense', negotiated in good faith during the six month period with a view to reaching the relevant agreement and: 'There is nothing more under the statute that it was required to do'. In these circumstances, the fact that negotiations were at a preliminary stage when FMG made application under s. 35(1) 'could not constitute a failure to negotiate in good faith for the purposes of' s. 31(1)(b)—at [28] and [30].

It was noted that much of the six-month negotiation period was taken up settling a negotiation protocol rather than in substantive negotiations. However, the court saw the development of the protocol as being 'clearly directed' at attempting to reach agreement 'for the purposes of' s. 31(1)(b)—at [28].

Incorporating negotiations about a specific future act in broader discussions

The Tribunal was of the view that FMG could not claim it fulfilled its duty to negotiate in good faith by relying on the failed LAA negotiations because those negotiations never substantially addressed the specific mining lease the subject of the s. 29 notice.

According to the court, there was no suggestion that the native title parties were unaware that:

- the broader negotiations for each LAA contemplated the grant of mining leases;
- the mining lease that was the subject of the s. 29 notice (the proposed future act) was included among those leases—at [36].

Further:

- the evidence was that FMG provided information about the proposed future act and made it clear that negotiations for both the negotiation protocol and the draft LAA with PKKP included negotiations for the proposed future act;
- neither of the native title parties raised any objection to the negotiations proceeding on a whole of claim, or project wide, basis—at [36].

The court noted the Tribunal 'correctly accepted ... the desirability of whole of claim or project negotiations' and concluded that it was 'appropriate' for FMG to negotiate on that basis—at [37], referring to *Western Australia/Thomas/Anaconda Nickel Ltd* [1998] NNTTA 8.

However, the Tribunal's finding that, if those negotiations broke down, the parties must revert to negotiating specifically about the proposed future act imposed 'an additional requirement' under s. 31(1)(b) that was not to be found in the section: The Act does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith ... with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied—at [36].

It was noted that the criteria set out in s. 39, upon which a Tribunal future act determination must be based, 'may provide some guidance as to those that may reasonably be expected to form part of the negotiations'—at [35].

ILUA negotiations v negotiation in good faith

It was intended that any agreement reached would take effect as an Indigenous Land Use Agreement (ILUA) under the NTA (which the court characterised as 'a voluntary but binding agreement as an alternative to more formal native title machinery')—at [2] and [40].

The court rejected WGAC's contention that, in this case, ILUA negotiations could not also be relied upon as negotiations conducted in good faith within the meaning of s. 31(1)(b). FMG negotiated in good faith for a period in excess of six months in order to reach an ILUA and those negotiations included the proposed future act. In these circumstances, this 'can only be' conduct within the requirements of s. 31(1)(b)—at [42].

Decision
For the reasons summarised above, the court declared that, on the facts found by the Tribunal, FMG had fulfilled its obligation to negotiate in good faith and so the Tribunal had power to conduct an inquiry and make a future act determination under s. 38. Therefore, the appeal was allowed and the Tribunal's decision set aside. There were no orders as to costs, with the court referring to s. 85A of the NTA.

Comment
In practice, six months is a relatively short period of time for the conduct of such negotiations if the expectation is that they will bear fruit in the form of a concluded agreement. This is compounded by the fact that, if no native title claim has been made to the area in relation to which a s. 29 notice issues, those who wish to exercise the right to negotiate must make a claimant application pursuant to ss. 13(1) and 61(1) within three months of the notification day and have it registered within four months. In practice, this often leaves only two months of the prescribed six-month period available to the native title party to engage in those negotiations before the other parties are empowered to make application to the Tribunal to determine the matter. Further, the fact that a native title party has not negotiated in good faith does not prevent a s. 35(1) application being made by the other parties, provided the other preconditions are met—see ss. 30 and 36(2).

One factor that the court saw as ameliorating the effect of six months being a reasonable time to conclude negotiations is that s. 35(3) provides that the parties may continue to negotiate 'with a view to obtaining an agreement of the kind mentioned' in s. 31(1)(b) after an application for a future act determination has been made pursuant to s. 35(1).