

***Jax Coal Pty Ltd/Birri People/Queensland* [2011] NNTTA 46**

DP Sosso, 17 March 2011

Issue

The National Native Tribunal determined that a lump sum payment and an employment package could be made conditions on the grant of a mining lease under a future act determination made pursuant to s. 38 of the *Native Title Act 1993* (Cwlth) (NTA). The issue resolved was whether those conditions were compensation for the effect of the grant on native title. If they were, the Tribunal had no power to impose them. Deputy President Sosso decided the conditions should not be characterised as compensation. The Tribunal made it clear this decision turned on the facts of this case.

Background

During negotiations conducted in good faith as required by s. 31(1)(b) of the NTA, the native title party accepted the grantee party's offer. However, rather than entering an agreement, the native title party wanted the matter finalised via a Tribunal determination that the future act may be done subject to conditions made by consent under s. 38. In making such a determination, the Tribunal must (among other things) take any agreement reached during the negotiations into account—see s. 39(4).

However, as DP Sosso noted: 'the fundamental issue ... is whether the form of the conditional determination sought by the grantee and native title parties is open to the Tribunal'. The State of Queensland contended a lump sum payment of \$100,000 and a requirement to employ two members of the native title claim group should be characterised as compensation and that, as such, the Tribunal had no power to make these elements of the agreement conditions of the grant—at [31], [42] and [45].

Consent determination

The Tribunal noted that a practice has developed in Western Australia whereby, if an agreement could not be executed for technical or practical reasons, the Tribunal makes a future act determination under s. 38 with the consent of all the negotiation parties 'to facilitate the completion of the negotiations'. The request in this case was similar and 'provided the grantee and government parties agreed, there was, on its face, no impediment to the making of a consent determination of the type sought'. However, since the government party 'was not prepared to join' the other parties in seeking a consent determination, 'it was not possible to make a conditional determination applying the principles outlined' in *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361; [2001] NNTTA 50 and *Foster v Copper Strike Ltd* (2006) 200 FLR 182; [2006] NNTTA 61—at [39] and [42].

Characterisation of the conditions

As was noted, the 'threshold issue' was whether the payment or benefit in question could be properly identified as 'compensation'—at [47], referring to *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 [46]; [2009] NNTTA 49 at [196]. According to DP Sosso:

The awarding of compensation is payment for a loss sustained or injury done ... by the deleterious impact of ... the future act on registered native title rights and interests. Consequently, a payment or benefit can be characterised as “compensation” if the primary reason for the payment or conferral of the benefit is an attempt to recompense those persons claiming or holding native title for the likely disruption and damage of the doing of the future act on the exercise of those persons’ native title rights and interests—at [47].

It was found that:

It is too broad a proposition that a payment of money agreed by the negotiation parties must invariably be characterised as “compensation”. ... The primary question that must be asked is this: was the benefit agreed to primarily or calculated solely on the basis that it was a fair payment for the likely injurious ramifications of the doing of the future act on the native title party’s registered native title rights and interests?—at [50]

The question was answered in the negative because:

- the ‘uncontroverted material before the Tribunal’ demonstrated that the proposed payment and the employment benefits ‘flowed from broad ranging and vigorous negotiations’;
- the Tribunal ‘is not constrained by the nomenclature used by the parties’ i.e. a reference to the payments as a ‘compensation package’ did not inhibit the weighing up of all the evidence and the reaching of a conclusion ‘based on the facts as distinct from the terminology of the parties in the course of negotiations’;
- in this case, the evidence indicated the financial and employment package put forward by the grantee party, ‘and very reluctantly accepted by the native title party’, was the ‘price’ that the grantee party was ‘prepared to pay and the native title party was prepared to accept for the agreement of the native title party to the doing of the proposed future act’—at [52] to [54].

The Tribunal noted that:

It would be entirely unrealistic and artificial to characterise what appear to be basic and less than amicable negotiations, as an attempt by them to rationally and objectively calculate a compensation package for the likely injurious affection to native title occasioned by the doing of the future act. The financial and employment package negotiated here, was ... a commercial settlement based on a range of factors, with native title being only one of those factors. The “right to negotiate” process provided the platform and opportunity to reach a settlement. ... I have formed the view... that the composition of the package was almost totally unrelated to issues pertaining to injurious affection. In these circumstances, it is open to the Tribunal to make a conditional determination along the lines requested by the grantee and native title parties—at [54].

However, DP Sosso was careful to point out that determination ‘should be read strictly in accordance with the facts before the Tribunal, and particularly the fact that the financial package was eventually agreed by the grantee and native title parties’. The situation would have been ‘quite different if the parties had not agreed on the quantum of their deal. In such a circumstance a more forensic approach ... would be required’—at [55].

Decision

After considered the criteria specified in s. 39 of the NTA (to the extent required) and taking into account the parties’ submissions, the Tribunal decided it was appropriate to make a determination that the act could be done subject to the conditions requested by the grantee and

native title parties, including the lump sum payment and the employment package—at [61] to [89].