Western Australia/Gordon/Pilbara Livestock Depot [2010] NNTTA 152

Sumner DP, 23 September 2010

Issue

In this future act matter, the National Native Title Tribunal was asked to make a determination in relation to the compulsory acquisition of land situated near the town of Port Hedland under s. 165 of the *Land Administration Act 1997* (WA) (LAA) to enable the issuing of a lease for the purpose of 'Stock Holding Yards'. As not all of the non-native title interests were going to be acquired, the Tribunal found the acquisition was subject to s. 24MD(3)(a) and so the non-extinguishment principle in s. 238 would apply to the acquisition.

Background

Notice of the State of Western Australia's intention to compulsorily acquire the land was given in accordance with s. 170 LAA and s. 29 of the *Native Title Act* 1993 (NTA) on 22 November 2006. The area concerned was also subject to a non-exclusive pastoral lease (as defined in s. 247B of the NTA) held by BHP Direct Reduced Iron Pty Ltd and was being used as stock holding yards pursuant to a sub-lease. It was completely overlapped by miscellaneous licence held by Fortescue Metals Group Ltd. The purpose of the proposed compulsory acquisition was to enable a lease for the purpose of 'stock holding yards' to issue over the area to Christopher and Carey Rae Paterson trading as Pilbara Livestock Depot (the grantee party).

The compulsory acquisition of native title rights and interests was covered by s. 26(1)(c)(iii) of the NTA, i.e. the area concerned was being acquired in order to grant rights to someone other than the government party but not for the purpose of providing an infrastructure facility. The area was landward of the mean high water mark and it was not within a 'town or city' as defined in s 251C: see ss. 26(2)(f) and (3). Therefore, it was a future act to which Pt 2, Div 3, Subdiv P applied and it attracted the right to negotiate.

On a date more than six months after the notification day specified in the s. 29, the state applied to the Tribunal pursuant to ss. 35 and 75 of the NTA for a future act determination under s. 38 because there was no agreement as to the doing of the future act. The native title party argued the Tribunal had no power to deal with the application because the grantee party had not negotiated in good faith (see ss. 31(1)(b), 36(2) of the NTA). The Tribunal rejected this argument—see *Western Australia/Gordon/Pilbara Livestock Depot* [2010] NNTTA 55).

No invalidity for failure to comply with s. 24MD(2)(b)

The native title party then contended the Tribunal was not empowered to deal with the application because of a failure to comply with s. 24MD(2)(b), i.e. because not all non-native title rights and interests in the land would be compulsorily acquired. The notice of acquisition stated that rights held pursuant to the miscellaneous licence would not be acquired.

The Tribunal noted Chief Justice Gleesons's comment in *Griffiths v Minister for Lands, Planning & Environment* (2008) 235 CLR 232; [2008] HCA 20 at [3] that:

> The evident concern of these ... conditions of the operation of the substantive provisions of s. 24MD(2) relating to extinguishment of native title rights and interests, and compensation, is to avoid racial discrimination.

Deputy President Sumner found (among other things) that:

- the compulsory acquisition would need to proceed in accordance with s. 24MD(3) because, since there was not a compulsory acquisition of 'the whole, or the equivalent part of all non-native title rights and interests', s. 24MD(2) did not apply;
- if the compulsory acquisition was done in accordance with s. 24MD(3), there was no question of it being a discriminatory acquisition because native title was not extinguished, i.e. s. 24MD(3)(a) applies the non-extinguishment principle found in s. 238 to such an acquisition—at [39] to [43].

It was noted that the Tribunal's conclusions on the interpretation of s. 24MD were supported by Justice Mildren's comments in *Minister for Lands, Planning & Environment v Griffiths* (2004) 14 NTLR 188; [2004] NTCA 5 at [74].

Absence of a current notice of intention to take

The original notice of intention to take (NOITT) given under s. 170 of the LAA had expired pursuant to the provisions of the LAA. The native title party contended that, unless there was a valid NOITT, the government party could not be proposing to take any interest in land and, therefore, that there was no proposed future act to attract the Tribunal's jurisdiction. The Tribunal found it had before it both a valid s. 29 notice and clear statements from the government party about the nature of the future act which confirmed the information contained in the s. 29 notice. Therefore, the Tribunal could proceed to hold an inquiry and make a future act determination—at [50].

Whether notice was invalid due to the misstated purpose in the NOITT

The native title party contended the NOITT was invalid because it did not comply with s. 171(1)(c) of the LAA, alleging the information in the NOITT was not accurate, particularly with respect to its purpose. It was contended that, without a valid NOITT, there could be no taking order and without the possibility of a taking order, there could be no future act. The Tribunal found it was concerned with the validity of the notice under s. 29 of the NTA and, on the basis of the clear statements of intention made by the government party, the purpose of the proposed compulsory acquisition did not extend beyond the purposes stated in that notice—at [53].

Failure to negotiate in good faith – whether to re-open the issue

The native title party sought to re-open the issue of whether the grantee party had negotiated in good faith on the basis that the information provided during the negotiations was false or misleading and the grantee party did not, therefore, act honestly and reasonably during negotiations. These contentions concerned the extent to which the grantee party proposed to expand its operations and the nature and profitability of those operations. The Tribunal held that, as the expansion plans were not contemplated by the future act and would not be permitted by the lease, and there was no proposal to grant freehold to land, the statements did not mislead the native title party during the negotiations—at [58].

Decision

After considering the requirements of ss. 39(1) and 39(2) of the NTA, DP Sumner made a determination that the future act, (i.e. the compulsory acquisition of the whole of lot 3003 on deposited plan 46738 for the purpose of enabling the issuing of a lease for the purpose of 'Stock Holding Yards') may be done.