Future act application —appeal from good faith decision

Hicks v Western Australia [2002] FCA 1490

French J, 22 November 2002

Issue

This case concerns an appeal under s. 169 of the *Native Title Act 1993* (Cwlth) (NTA) against the Tribunal's determination that good faith negotiations had taken place in relation to a future act application: see *Western Australia/Daniel/Holborow* [2002] NNTTA 230. It was brought by Mr Hicks on behalf of the Wong-Goo-TT-OO group (the native title party)

The issues were whether:

- the State of Western Australia:
  - was entitled to take as its negotiating position that native title did not exist over the area concerned;
  - had failed to negotiate with one of the native title parties and thereby failed to negotiate in good faith;
- the Tribunal:
  - breached procedural fairness in failing to permit cross-examination of those who gave affidavit evidence relied upon by the State of Western Australia;
  - had asked itself the wrong question by asking whether the conduct of the State showed bad faith, when the proper question was whether the State had negotiated in good faith;
  - wrongly had regard to confidential and without prejudice communications made in the course of mediation and private meetings between the native title party and the state;
  - had made directions in relation to the filing of contentions and documents that were contrary to procedural fairness and contrary to the character of the good faith hearing as a threshold jurisdictional question;
  - ought to have found that it had not negotiated in good faith;
- a statement in Parliament by the Deputy Premier was admissible as evidence of lack of good faith by the State in its negotiations with the native title party—at [8].

The native title party also sought a stay of the s. 35 hearing of the future act application by the Tribunal under O 52 r 17 of the FCR until the appeal was heard and an order for abridgment of the time limited for bringing the motion on for hearing. Justice French made the abridgment order.

Stay application

French J reviewed the relevant statutory framework, noting that the jurisdiction conferred on the Federal Court by s. 169(5) of the NTA is an original jurisdiction. The

rule the applicants sought to reply upon, O 52 r 17, 'relates to appeals proper in the exercise of the appellate jurisdiction of the Court'—at [12].

'Appeals' from decisions or determinations of the Tribunal are dealt with under O 78 r 22 to r 33 of the FCR. The only source of power for a stay order is in s. 170(2) NTA, conditioned upon the requirement the court considers the stay order 'appropriate for securing the effectiveness of the hearing and determination of the appeal'—at [13].

The native title party's application 'puts into contention the authority of the Tribunal to conduct a substantive inquiry into whether or not the future act in question should be done'. The main contention was that, absent a stay, the substantive hearings would proceed, and the benefit sought, a return to negotiations, would be lost:

> It might be said ... that the Court should not risk rewarding a breach of the obligation to negotiate in good faith by allowing a hearing to proceed in spite of a challenge to the finding that such negotiation has not occurred. That is a risk which may be assessed in part by reference to the strength of the applicants' case on appeal. While the reasons for decision of the Tribunal on the good faith question prima facie raise some serious and important questions of law, they are comprehensively and on the face of it, attractively reasoned—at [16].

His Honour noted that judgments about the strength of appeals for the purpose of a stay application 'must be essayed cautiously' but was not satisfied that refusing a stay:

> [W]ould run a high risk of rewarding a failure by the State to negotiate in good faith having regard to the facts found by the Tribunal and bearing in mind that the appeal is limited to questions of law only—at [16].

Subsection 170(2)

In relation to the s. 170(2) of the NTA, French J was not satisfied that:

> [T]o refuse a stay would ultimately affect the effectiveness of the hearing and determination of the appeal ... . It is, of course, open to the applicants to seek a stay of the ultimate determination of the Tribunal, as an incident of this appeal or as an incident of an appeal against the ultimate determination of the Tribunal. The refusal of the stay at this time would not result in any extinguishment of native title rights and interest.

French J noted the burden upon the applicants to participate in the continuing inquiry which may be wasted in the event the appeal is upheld. On the other hand, it was necessary to balance the statutory framework and legislative purpose of 'reasonable expedition' of future act matters. To grant the stay would have introduced 'a degree of fragmentation into the arbitral process that is unwarranted having regard to the legitimate interests of the parties'—at [20] to [21].