

Future act application — call for public submissions, effect of Burrup agreement

***Western Australia/Daniel/Holborow/Hicks* [2003] NNTTA 4**

DP Sumner, 21 January 2003

Issues

Whether the Tribunal had the jurisdiction to continue an inquiry following the filing of a s. 31 (s. 41A) agreement and whether s. 37 of the *Native Title Act 1993* (Cwlth) (NTA) applied. The decision also covered procedural matters that arose in the proceedings, including whether the Tribunal should publish a public notice calling for submissions in relation to matters covered by an inquiry.

Background

This decision concerned three future act determination applications for compulsory acquisition of native title rights and interests pursuant to the *Land Administration Act 1997* (WA) and s. 26(1)(c)(iii) of the NTA. The land in question, which was in the vicinity of Dampier and Karratha, on the Burrup Peninsula and on adjacent islands, was the subject of three claimant applications. The Tribunal had previously decided that the government party had fulfilled its obligation under s. 31(1)(b) NTA to negotiate in good faith with the native title parties: see *Western Australia/Daniel/Holborow* [2002] NNTTA 230 and the appeal in *Hicks v Western Australia* [2002] FCA 1490 (*Hicks*), summarised in *Native Title Hot Spots* Issue 5.

The agreement under s. 31

A comprehensive set of agreements, referred to collectively as the implementation deed, had been signed by all of the native title parties. The Tribunal was satisfied that the implementation deed was a s. 31(1)(b) agreement. As a consequence, s. 37 applied so that the Tribunal must not make a decision. Therefore, no further action was required and s. 35(3) of the NTA provides that the applications are taken to be withdrawn—at [16].

Stay application

An application to stay the proceeding was refused. The Tribunal's determination on this point was unsuccessfully appealed to the Federal Court: see *Hicks*.

Application that member disqualify himself

The submission that the member hearing the matter should be disqualified, as he had had regard to confidential information in hearing the good faith negotiations matter, was refused. The Tribunal determined that:

- the NTA does not specify that different members should decide the two issues;
- the native title party did not provide any basis for a reasonable apprehension that a member conducting the substantive hearing would be biased;

- the native title party did not point to any findings of fact or decisions on the credibility of witnesses in the good faith decision which could be seen to be prejudicial to the substantive proceedings—at [21] to [22].

Evidence in good faith hearings

The Tribunal ruled that evidence tendered in the good faith hearing would not be evidence in the substantive hearing unless a party sought to adduce it—at [23].

Publication of a public notice calling for submissions

The Tribunal decided to publish a public notice calling for submissions in relation to the substantive inquiry and held it was within its power to do so. Following submissions from the parties, the notice was limited to two of the criteria in s. 39 of the NTA, namely economic or other significance (s. 39 (1)(c)) and public interest (s. 39(1)(e)) in the doing of the act. The Tribunal noted the call for public submissions was not a precedent for all future matters of this kind—at [26].

The Tribunal rejected a submission by the government party that the public submissions should only be taken into account as evidence of the opinions held by the authors and not as proof of their contents unless the contents were verified on oath and by government party given leave to cross-examine the authors. The Tribunal is not bound by rules of evidence and has a preference for making decisions based upon written statements and documentary evidence. The Tribunal referred to comments made in the good faith decision and pointed out that the contents of a substantial number of the government party's documents had not been verified on oath—at [26] to [28].

The weight and relevance of documentary evidence received will depend on the circumstances in each inquiry. The Tribunal should exercise care in accepting evidence vital to a decision solely on the basis of a document where the issue is in dispute. Procedural fairness would usually require such evidence to be verified on oath and subject to cross-examination—at [28].

Decision

The Tribunal determined that s. 37 applied and the application is taken to have been withdrawn: see s. 35(3).