

Future act inquiry — negotiation in good faith

Townson Holdings Pty Ltd/Harrington-Smith/Western Australia [2003] NNTTA 82

DP Sumner, 9 July 2003

Issue

The main issue before the National Native Title Tribunal was whether or not the grantee party had negotiated in good faith prior to making an application for a future act determination.

Background

A notice relating to the grant two mining leases was issued under s. 29 of the *Native Title Act 1993* (Cwlth) (NTA) in 1996. Negotiations conducted between the native title parties, the government party and the grantee party as required under s. 31(1)(b) of the NTA ceased in 1997. In 2001, negotiations resumed but no agreement was reached. In January 2003, the grantee party made an application to the Tribunal under s. 75, pursuant to s. 35, for a future act determination under s. 38 in relation to the grant of the proposed mining leases. Negotiations continued, with the government party requesting mediation by the Tribunal under s. 31(3). Mediation took place between February and May 2002 but it was terminated because there remained fundamental issues that could not be resolved — at [33] to [44].

Late challenge to jurisdiction

The Tribunal is not empowered (or has no jurisdiction) to make a future act determination if it is satisfied that the government or grantee party did not negotiate in good faith — at [7]. See also ss. 31(1)(b) and 36(2).

Shortly before the hearing of this matter, one of the native title parties submitted the grantee had failed to fulfil its obligation to negotiate in good faith and contended that the future act determination application should be dismissed on that basis. This raised a jurisdictional issue that would usually be dealt with much earlier in proceedings of this kind. The government party submitted that such a late challenge raised the question of whether there was a point at which the opportunity for raising a jurisdictional issue was no longer available — at [11].

While the Tribunal was of the view it was unsatisfactory to raise the question of a lack of good faith negotiations at this late stage with no adequate reason to explain the delay, the situation was novel. Reference was made to the discussion of the Tribunal's obligations in relation to jurisdiction found in *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116 at [21] to [69].

It was determined that, despite any inconvenience it may cause, the Tribunal usually has no alternative but to consider and resolve a challenge to its jurisdiction or

authority, such as a failure by the grantee or government party to negotiate in good faith, whenever it is made before the Tribunal has made and delivered its determination in relation to the matter. The only possible exception noted was where a late challenge irreversibly prejudices another party—at [12] to [15].

After considering the native title party's contentions, the Tribunal held the grantee party had fulfilled its obligation to negotiate in good faith and, therefore, that the Tribunal had jurisdiction to conduct an inquiry and determine the matter.

Lack of evidence of effect on native title

In considering the s. 39 criteria, the Tribunal noted:

- the lack of evidence from the native title parties relevant to the criteria; and
- that current and historical mining and pastoral interests would have affected the manner in which the registered native title rights and interests are exercised.

Given the lack of particularity in the evidence, the Tribunal was unable to make findings on the particular effect on the proposed mining leases on the enjoyment of native title or any other s. 39(1) matters—at [83] to [95].

Payment into trust

The Tribunal determined that the lack of evidence as to the effect of the future act on native title meant there was no basis for imposing a trust condition—at [98]. On payment into trust, see *Anaconda Nickel Ltd/Western Australia/Thomas* [1998] NNTTA 8.

Determination

The determination was made that the future acts could be done.