

# Future act—evidence of death in consent determination proceeding

*Hughes/Western Australia/West Oil NL* [2003] NNTTA 122

Franklyn DP, 12 December 2003

## Issue

This decision concerned a proposed consent determination where one of the persons comprising the registered native title claimant had died prior to the commencement of the right to negotiate process and no death certificate had issued. The National Native Title Tribunal considered evidentiary issues relating to affidavit evidence of a representative comprising largely hearsay and an affidavit of a registered native title claimant who could not read or write English.

## Background

A s. 29 notice relating to the grant of a petroleum exploration licence was issued in November 2001. The negotiating parties reached agreement that the act may be done subject to conditions to protect the native title party's cultural heritage and the native title party and grantee party executed a site clearance agreement.

In August 2003 the native title party applied pursuant to s. 35 of the NTA for a future act determination under s. 38. The native title party subsequently filed an amended application on the basis that, because of the death of one of the persons comprising the registered native title claimant (RNTC), they were not able to execute a state deed in accordance with s. 31(1)(b) of the NTA (deed) to give effect to the agreement. No death certificate had issued in respect of the deceased.

As a minute of consent determination signed on behalf of each of the negotiating parties was lodged, the Tribunal was required to hear the parties to satisfy itself that a consent determination was appropriate—at [7].

The Tribunal conducted a preliminary hearing into the application, as it was concerned as to the adequacy of two affidavits lodged on behalf of the native title party for the purpose of the proposed consent determination, namely:

- affidavit of the native title party's consultant negotiator which was comprised largely of hearsay (consultant affidavit); and
- affidavit of one of the persons comprising the RNTC confirming the death of the deceased (RNTC affidavit)—at [8].

The Tribunal was concerned because the deponent's signature was represented by an 'x' without any information being given as to whether the deponent could read or that the contents of the affidavit had been explained to her and that she confirmed its truth—at [8].

At the hearing, testimony was given by another of the persons comprising the RNTC and referred to as the RNTC coordinator in the consultant affidavit (RNTC coordinator). The RNTC coordinator confirmed that the deponent of the RNTC affidavit could not read or write English and that the contents of that affidavit had been read and explained to the deponent prior to her affixing her mark by way of signature. Testimony was also given about the explanation given to, and signing of the site clearance agreement and deed by the RNTCs other than the deceased.

### **Evidentiary issues**

The Tribunal was satisfied that the member of the RNTC who had not executed the deed was deceased and that the other persons comprising the RNTC had understood and consented to the site clearance agreement and the consent determination—at [15].

### **Decision**

The determination was made by consent that the future act could be done.