

Negotiation in good faith — split in claim group

Mt Gingee Munjie Resources Pty Ltd/Victoria/Thorpe [2003] NNTTA 125

Sumner DP, 22 December 2003

Issue

This decision considered the preliminary issue of whether a faction within the persons comprising the native title party were a native title party with authority to assert that the grantee and government parties did not negotiate in good faith. The National Native Title Tribunal also considered the requirements in respect of the obligation to negotiate in good faith where a native title claim group has split into two factions.

Background

A s. 29 notice relating to the grant of a mining lease was issued in September 1997. In July 2003 the grantee party made an application to the Tribunal under s. 35 of the NTA for a future act determination. The native title claim group in this matter was split into two factions, known as the Gunai and Kurnai factions. The Kurnai faction alleged that the government and grantee party had not negotiated in good faith as required by s. 31(1)(b) of the NTA.

Preliminary point

The Tribunal considered the preliminary point of ‘whether the Kurnai faction only was a native title party with authority to assert that the other parties did not negotiate in good faith’ — at [10] and [13].

The government party contented that the native title party is a single entity and must act jointly and relied on earlier Tribunal decisions in which the Tribunal found that a native title party was the registered native title claimant (RNTC) acting on behalf of the claim group collectively, and not each individual person named as comprising the applicant and RNTC.

The Kurnai faction sought to distinguish the ‘native title claim group’ under s. 61(1) of the NTA, a collective non-severable entity, from the native title party in the right to negotiate provisions.

The Tribunal did not accept the Kurnai faction’s submission, noting that:

- the sections of the NTA relating to making a claimant application and the right to negotiate are inextricably linked. It is indisputable, having regard to the definitions of ‘the applicant’ (s. 61(2)), ‘registered native title claimant’ (s. 253) and ‘native title party’ (ss. 29(2)(b) or 30(1)(a)) that the status of ‘native title party’

- depends on there being a native title claim and a person or persons who are authorised to make the application on their behalf who are ‘the applicant’;
- allowing individuals named on an application to require separate negotiations and agreements would impede the workability of the NTA;
- the Tribunal’s interpretation has been supported in the Federal Court decision (Stone J) of *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for NSW* [2003] FCA 981—at [22], [24] and [26].

It follows, the Tribunal found, that if any of the persons comprising the native title party is not acting with the authority of the claim group, then it is not permissible to make a contention about a lack of good faith—at [29].

The Tribunal held that:

- individuals comprising the applicant or factions within it are not a native title party and do not have standing to contend that another party did not negotiate in good faith unless they have been authorised to do so by the claim group;
- there was no evidence of such authorisation, and the other persons comprising the native title party did not contend there was a lack of good faith; and
- as a consequence it could not be accepted that the native title party contests that the other parties negotiated in good faith—at [36].

Good faith

The Tribunal summarised the law in respect of the obligation to negotiate in good faith and concluded that the split in the native title party was a highly relevant factor to whether the other parties had negotiated in good faith. The Kurnai faction had insisted on separate negotiations and the Tribunal found this position untenable and unacceptable in right to negotiate proceedings and to mean that the native title party had not negotiated in good faith. The Tribunal expressed the view that, having obtained the benefits of the registration test, the persons comprising the native title party must act in a cooperative way consistent with the basis for the registration when exercising the right to negotiate about future acts—at [42] to [48] and [50] to [55].

On this basis, the Tribunal found that the government party and grantee party had negotiated in good faith as required by s. 31(1)(b) and stated:

In the circumstances of this case I find that the content of the obligation is minimal. Where a Government party or grantee party have shown an intention to negotiate in good faith, commenced steps to do so and made proposals in relation to the matter and are confronted with a refusal by the native title party to negotiate unless those negotiations take place separately with persons named as the applicants or factions within the group the Tribunal is entitled to conclude in an almost summary way that the obligation has been fulfilled—at [55].

In case the Tribunal had erred in its interpretation of the law relating to who is ‘the native title party’, it went on to consider the negotiations over the period 1998 to 2003 and the Kurnai faction contentions—at [56] to [94].

The Tribunal noted that, since mid-2000, the right to negotiate process in Victoria had been operated by a system of dual pro forma deeds and the policy of the native title representative body for the area (Mirimbiak) which discouraged the government party from active involvement in negotiations between the native title party and the grantee party (Mirimbiak policy)—at [73] to [77].

The Kurnai faction contended, amongst other things, that the government party had not participated in the negotiation process. The Tribunal considered that it was entitled to have regard to the specific practice which had developed in Victoria in relation to negotiation in good faith in assessing the extent of the government party's obligations and found that the content of the government party's obligation was understandably conditioned by that practice—at [84], [92] and [93].

Decision

The Tribunal found that the government and grantee parties had fulfilled their obligation under s. 31(1)(b) and the Tribunal had jurisdiction to conduct an inquiry.