National
Native Title
Tribunal

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GETTING THE MOST OUT OF THE FUTURE ACT PROCESS

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The law and practice is summarised in:
Guide to future act decisions made under the Commonwealth right to negotiate scheme
(www.nntt.gov.au – Future Act – Information Material)

Future Acts – Right to Negotiate (RTN) – Policy Objectives Prime Minister Keating – 16 November 1993

- Recognition and protection of native title
- Just and practical regime for future acts affecting native title
- Justice and certainty for Aboriginal & Torres Strait Islander people, industry and community
- Generally can make grants over land only if grant could be made over freehold (freehold equivalent test)
- RTN based on a right to be asked but is not a veto
- Timeframes are 'tight but fair'
- Provisions for expedited procedure
- Maintain integrity of land management systems while respecting profound Aboriginal connection to the land
- Not lock away land or set up complicated barriers
- Compensation based on existing State & Territory regimes

Future Acts – Functions of Tribunal

- Mediate if requested (s 31(3))
- Conduct RTN inquiries
  - expedited procedure
  - future act determination (including whether parties have negotiated in good faith)
- Mediate in relation to an inquiry (section 150 conference)
- Facilitate ILUA negotiations whether claim is in mediation or not (Olympic Dam expansion – BHP Billiton & Kokatha, Barngarla & Kuyani Peoples)

RTN – Jurisdiction based on existence of a Future act

- Future act is one which affects native title (s 233)
- Cannot assume the existence of a future act simply because there is a registered claim (*Mineralogy v NNTT* [1997] 150 ALR 467)
- If jurisdiction is challenged the Tribunal must satisfy itself that it is dealing with a future act (i.e. one which affects native title)
- May involve an inquiry into whether native title has been extinguished (*Anaconda Nickel Ltd & Ors v Western Australia* [2000] NNTTA 366; (2000) 165 FLR 116)

Expedited Procedure (s 237)

- Attracted if the future act is not likely to
  - interfere with community or social activities
  - interfere with sites of particular significance or
  - involve major disturbance to land
- Predicative assessment - is likely to occur (a real chance) (*Little & Ors v Oriole Resources* [2005] FCAFC 243; (2005) 146 FCR 576
- Intention of grantee party relevant
- Protective provisions of State based regulatory regime also relevant (i.e. site protection regime and consultation procedures)
- Expedited procedure generally applies to exploration and prospecting but this is not inevitable

Expedited Procedure – Practical Operation in Western Australia

- Guidelines for acceptance require more than mere recitation of s 237 but are not onerous
- Defacto RTN – 16 weeks minimum to negotiate
- Most objections are resolved by agreement.
  - 2005-2006 - Objections withdrawn in 931 of 1,037
- Contested objections 2005-2006: 13 (10 expedited procedure attracted, 3 not attracted)

Future Act Determination Application (FADA)
Good faith negotiations

- No obligation to negotiate
  - about matters unrelated to native title rights and interests (s 31(2)) and matters in s 39
  - about matters which exceed legal rights
  - on Government about compensation where responsibility has been transferred to grantee
- Must consider a proposal for royalty type payments s 33(1))
- No obligation to agree
- Griffin Coal case study (below)

FADA – Substantive inquiries

- Section 39 criteria
  - affect on enjoyment of registered native title rights and interests, sites of particular significance etc
  - economic significance, public interest
- Determination that act may be done with or without conditions, or may not be done
- Royalty type payments prohibited (s 38(2))
- Compensation cannot be determined
- A trust amount on account of future compensation can be made
- Compensation under the NTA is based on entitlements to freeholders under State Law, eg WA s 123 of *Mining Act*

FADA – Consent Determination

- Consent Determination can be made with agreement of all parties
- Consent Determination process now used commonly for
  - logistical reasons – difficulty in obtaining signatures to an agreement
  - where persons comprising the native title party refuses to sign but the native title party as a whole consents
- Simple, effective means of giving effect to agreements
- Reduces resources required by Representative Bodies

Professor Ciaran O'Faircheallaigh's criticism (1)
- Many native title agreements are inadequate

- Accepted that *Native Title Act* contains strong incentive for native title party to agree
- Concern that analysis does not take adequate account of
  - the legal environment (is there a future act)
  - comparison of agreement reached and legal entitlement under NTA
  - most Aboriginal people are not opposed to mining
  - comparison of agreements pre and post Mabo
- Avoid trap of assuming there is a standard level of entitlement (Rio Tinto, BHP compared to smaller companies)

Professor Ciaran O'Faircheallaigh's criticism (2)

- No incentive on grantees to reach agreement because Tribunal does not decline requests for mining tenements to be granted (Tribunal bias)

- General response
  - conclusion drawn from only 17 cases
  - misunderstanding of law – worst case scenario
  - must be evidence of
    - a future act
    - the enjoyment of native title rights and interests
    - other matters in s 39
  - grantee parties do not immediately lodge FADAs after 6 months. Of 213 matters, 44 were lodged between 6-12 months, 33 between 12-18 months and 136 after 18 months

Professor Ciaran O'Faircheallaigh's criticism (2) (continued)

- some cases involved Wongatha, Larrakia
- some cases involved Madawongga & Gubrun no longer registered
- says Tribunal has only rejected good faith once negotiations but overlooks major WA test case (Njamal – *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211)
- says Tribunal refused a request for conditions for socio-economic impact statement but overlooked *Koara No.2* conditions (*Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274)

Professor Ciaran O'Faircheallaigh's criticism

Overall my concern is that the article is selective in the cases it uses, inaccurate in some respects, takes a statistical approach (i.e. the Tribunal has never refused a grant) without taking account of the evidence produced or law applied. The article seems to have been put together by quoting evidence which supports a pre-determined position. It may be that if grantee parties in some cases have nothing to fear from the Tribunal this is because of the terms of the NTA, the nature of the project and lack of evidence of native title rights and interests or sites or other s 39(1)(a) factors.

Professor Ciaran O'Faircheallaigh's criticisms

- Practical concerns for Representative Body lawyers
  - may assume there is some ideal national standard to which all native title parties are entitled
  - may ignore the legal context
  - may accept the 'political' analysis but ignore the law which the Tribunal is obliged to administer
  - the law includes significant Federal Court decisions which bind the Tribunal
- Important for lawyers to understand the law and legal entitlements available in negotiations
- Use experts (such as Professor O'Faircheallaigh) to provide expertise on the contents of agreements but not give legal advice

The Griffin Coal/Nyungar (Gnaala Karla Booja) Case Study

The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia, NNTT WF05/10, [2005] NNTTA 100 (23 December 2005), Hon C J Sumner (good faith decision)

The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia, NNTT WF05/10, [2006] NNTTA 19 (28 February 2006), Hon C J Sumner (determination)

- Prof O'Faircheallaigh used to support claim of bias

Griffin Coal - Facts

- Mining leases to be part of existing coal mining operations dating back to 1898 for Collie Power Station (WA)
- Four mining leases over State forest, subject to logging - One 80% freehold, another 25% freehold
- The mining leases to be used for stockpiling waste and infrastructure with only limited mining.

Griffin Coal - native title party's negotiating position

- Based on coal mining precedents elsewhere
- refused to make a submission under s 31(1)(a)
- Trust fund for scholarships, cadetships, Noongar business
- Employment opportunities
- Supply and service provisions contract
- Cash
  - royalties
  - annual retainer for life of MLs
  - on grant
  - on commencement of mining
  - ex-gratia payment to each member negotiating team

Griffin Coal - native title party's negotiating position

- Cultural centre
- Equity in future power station
- Environmental protection rehabilitation
- Aboriginal heritage protection protocol
- Land access generally

Griffin Coal – grantee's position

- Offered
  - $80,000
  - non monetary commitments (traineeships)
  - small contribution to legal costs
- Not prepared to make royalty type payments
  - mining leases not to be used for resource extraction
  - freehold extinguishment
  - State forest and logging

Griffin Coal – issues to be considered

- How relevant are other coal mining agreements?
- What about the particular facts of this case?
  - affect on native title (extinguishment)
  - already existing mine
  - how is native title currently exercised or enjoyed
- Was the offer adequate?
- Was the offer inadequate by Prof O'Faircheallaigh's criteria?
- Was there any entitlement to compensation under s 123 of the *Mining Act?*

Lessons from Griffin Coal

- Offer not accepted
  - Inquiry conducted
  - native title party tendered no evidence
  - act may be done without conditions
- A national standard may not be applicable
- Must look at specific projects
- Is there any impact on native title - extinguishment
- Scope of negotiation in good faith
- Legal entitlement to compensation?
- Should a native title party make a submission under s 31(1)(a)