

- (c) any other matters for the EPA to take into account when deciding applications for progressive certification (which may be prescribed under an environmental protection policy or regulation: ss 266K(1)(b)(v) and 266K(2)(c)).

The level of detail and types of controls set out in these administrative guidelines will play a key role in determining whether mining companies will, in fact, adopt the progressive approach facilitated through the new provisions

SOUTH AUSTRALIA

CONSENT CONJUNCTIVE DETERMINATIONS*

Charlie Moore & Ors (Yandruwandha/Yawarrawarrka) and David Mungeranie & Ors (Dieri)/Eagle Bay Resources NL/South Australia ([2005] NNTTA 53 (John Sosso))

Native title – future act – consent conjunctive determination – petroleum exploration licence – three of seven persons comprising the applicant in one native title party fail to sign agreement

Background

This case involved the proposed grant of a tenement to petroleum company Eagle Bay Resources (“Eagle Bay”) in the Coongie Lakes region of South Australia, located within the boundaries of two registered native title claims – the Dieri claim (“Dieri”) and the Yandruwandha/Yawarrawarrka claim (“YY”). Eagle Bay, Dieri and YY (“the Negotiation Parties”) sought to enter into a Land Access Deed (the “Deed”) to enable operations within the proposed tenement area (“the Operations”) to take place.

While there was no issue with the consent of the Dieri claim, three of the seven persons representing YY refused or otherwise failed to execute the Deed. The Negotiation Parties then sought a consent determination by the National Native Title Tribunal (“the Tribunal”), pursuant to s 38 of the *Native Title Act 1993* (Cth) (“the Act”), to reflect the agreement reached by the Negotiation Parties enabling the Operations to take place.

Consent Determination

The Tribunal took into account the proper means of resolving an issue when divisions exist within a claim group, namely an application pursuant to s 66B of the Act – replacing the applicant. The Tribunal considered this process to be unavailable to YY in the circumstances due to the expensive and time consuming nature of the process.

The Negotiation Parties sought a consent determination based on the notion that YY had, with full knowledge, given its consent to the making of such a determination. The Tribunal took into account, amongst other things, the following considerations:

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- YY had engaged in substantive good faith negotiations with Eagle Bay;
- YY had previously negotiated approximately 19 agreements of a similar nature;
- the Deed was in similar terms to previous agreements, except that it was more financially generous to YY;
- there were no sites of particular significance or community, social or cultural activities on the subject land about which concern had been expressed should the proposed tenement be granted;
- the subject area had previously been the subject of petroleum exploration;
- YY had already carried out a heritage survey and agreed to Eagle Bay drilling on five sites in the first year of the term of the exploration licence;
- no opposition had been expressed by YY to the substance of the agreement reached with the Negotiation Parties;
- the failure by three of the seven persons representing YY to execute the Deed was brought about by factors entirely separate from, and not relevant to, the Deed (two of the parties appeared to be totally disinterested in the entire process and the other's conduct was, in the words of Tribunal member John Sosso, "to put it in fairly frank terms, a vindictive act by him" in insisting that factors wholly unrelated to the Deed be considered); and
- YY's administrator and legal representative had explained the terms of the Deed to YY, and no expression of opposition to the grant of the proposed tenement was received.

Conjunctive Determination

The second issue requiring determination was the request by the Negotiation Parties for a consent conjunctive determination. This would be the first conjunctive determination made by the Tribunal since the introduction of the 1998 amendments to the Act made such a determination possible.

Subsection 26D(2) of the Act enables the Negotiation Parties, at the exploration stage, to reach a comprehensive settlement for the whole of a project from the exploration stage through to the mining or production stage. Such a settlement has the effect of exempting a variety of future acts from the right to negotiate.

Two questions arose: firstly, whether the reference to "later act" in s 26D(2) of the Act can apply to multiple future acts; and secondly, are there limitations on the area of land and waters in respect of which those later acts may be done as exempted acts?

The first question was answered with reference to s 23 of the *Acts Interpretation Act 1901* (Cth) – with no contrary intention in the legislation, words in the singular number include the plural. In relation to the second question, the Tribunal took the view that s 26D(2) of the Act only applies to later acts that are to be done in respect of land and water *wholly* within the area covered by the original act, as a contrary reading of the section would potentially deprive adjacent claimant groups of the valuable right to negotiate.

Oil and Gas vs. Hard Rock Mining

A major factor in the making of the Tribunal's decision was that the proposed tenement related to petroleum exploration and not hard rock mining. The Tribunal saw the real benefit of conjunctive determinations as lying with petroleum exploration and production, as opposed to hard rock mining, as the major expenditure in petroleum operations occurs at the exploration stage. Further, the Tribunal considered that any disturbances to land and environment occur principally in the exploration phase for petroleum operations, with the opposite being true for hard rock mining, where land disturbing operations tend to expand considerably in the production phase.

Decision

After taking the Consent Determination considerations into account, the Tribunal was satisfied that YY had, with full knowledge, given its consent to the making of the determination sought by the Negotiation Parties.

Further, the Tribunal considered a conjunctive determination to be appropriate in these circumstances, especially given that the proposed tenement related to the exploration and production of petroleum and not hard rock mining.

RIGHTS OF FIRST REFUSAL – CAN THEY BE INVALID AS BEING A RESTRAINT ON ALIENATION?*

John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc [2004] SASC 128 (South Australian Court of Appeal – Full Court; 6 May 2004; Mullighan, Gray and Besanko JJ)

Appeal from decision of trial judge – right of first refusal – pre-emptive right – unlawful restraint on the alienation of property – Hall v Busst

Facts and Nature of the Action

In 1994, John Nitschke Nominees Pty Ltd (“Nitschke”) as vendor and Hahndorf Golf Club Inc (“Hahndorf”) as purchaser executed a contract for the sale of land. The contract included a number of special conditions, including:

- (1) a right of first refusal by John Nitschke, should Hahndorf subsequently decide to sell the land; and
- (2) should Nitschke decide not to exercise its right of first refusal, Hahndorf would only be entitled to sell the land, subject to the proviso that any future sale by the purchaser would be subject to the same right of first refusal by Nitschke as attached to Hahndorf's interest.

Hahndorf argued that each of these conditions constituted an unlawful restraint on the alienation of property, and as such were void and unenforceable.

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