

**INDEPENDENT PERSON UNDER SECTION 24MD(6B)
NATIVE TITLE ACT 1993 (CTH)
WESTERN AUSTRALIA**

[2005] WAIP 1

IN THE MATTER of an objection by:

THALANYJI NATIVE TITLE CLAIM GROUP (WC99/45)

Objector

and

THE STATE OF WESTERN AUSTRALIA

Government Party

**DECISION IN RESPECT TO OBJECTION BY THALANYJI NATIVE TITLE CLAIM
GROUP TO NOTICE OF INTENTION IN RESPECT OF ALL INTERESTS NECESSARY
FOR THE PURPOSE OF THE WIDENING OF THE DAMPIER TO BUNBURY NATURAL
GAS PIPELINE CORRIDOR**

Section 24 MD(6B) of the Native Title Act provides:

"If the act is:

- (a) the compulsory acquisition of native title rights and interests for the purpose of conferring rights or interests in relation to the land or waters concerned on persons other than the Commonwealth, the State or the Territory to which the act is attributable; or
- (b) the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining;

the following consequences also apply:

- (c) the Commonwealth, the State or the Territory to which the act is attributable must notify each of the following:

- (i) any registered native title claimant (a claimant) in relation to the land or waters; and
- (ii) any native title body corporate (a body corporate), in relation to the land or waters; and
- (iii) any representative Aboriginal/Torres Strait Islander body in relation to the land or waters;

that the act is to be done; and

- (d) any claimant or body corporate may object, within 2 months after the notification, to the doing of the act so far as it affects their registered native title rights and interest; and

- (e) either:

- (i) in a paragraph (a) case – the Commonwealth, State or the Territory; or
- (ii) in a paragraph (b) case – the person who requested or applied for the doing of the act;

must consult any claimants, and bodies corporate, who object, about ways of minimizing the act's impact on registered native title rights and interests in relation to the land or waters, and if relevant, any access to the land or waters or the way in which any thing authorised by the act might be done; and

- (f) if any claimant or body corporate objects, as mentioned in paragraph (d), to the doing of the act and so requests, the Commonwealth, the State or the Territory must ensure that the objection is heard by an independent person or body; and
- (g) if the independent person or body hearing any objection as mentioned in paragraph (f) makes a determination upholding the objection, or it contains conditions about the doing of the act that relate to registered native title rights and interests, the determination must be complied with unless:
 - (i) The Minister of the Commonwealth, the State or the Territory responsible for indigenous affairs is consulted; and
 - (ii) the consultation is taken into account; and
 - (iii) it is in the interest of the Commonwealth, the State or the Territory not to comply with the determination."

By a notice of intention to take interest in land dated 19 June 2000 ("the Notice") the DBNGP Land Access Minister in the name of and on behalf of the State of Western Australia gave notice of its intention to acquire all interests in land, registered and unregistered interests (including any native title rights and interests) that may exist in the land, other than the interests of the Crown, such as to enable the DBNGP Land Access Minister to hold State corridor rights under the Dampier to Bunbury Pipeline Act 1997. The purpose specified in the Notice was "bringing additional land in the DBNGP corridor, the DBNGP Land Access Minister holding State corridor rights and the conferral of rights on pipeline operations, under the Dampier to Bunbury Pipeline Act 1997".

The Objector is the registered applicant of a native title claim. The land the subject of the Notice passes through the area of the objector's native title claim. The area in question forms a corridor approximately 100 metres wide and 125 kilometres long. The Objector objected to the intention to take the land.

The Objector submitted that the independent person did not have jurisdiction with respect to this matter on the basis that the act was not for the purpose of conferring rights or interest in relation to the land on persons other than the State to which the act is attributable. It submitted that under the compulsory acquisition all interests would vest in the DBNGP Land Access Minister and that in the absence of a specific agreement between the Minister and a third party it could not be said that the acquisition was for the purpose of conferring rights or interests on persons other than the State.

The Government party referred to the evidence of Richard Alexander Austin whose witness statement provides in part:

- "10. The DBNGP is currently operating near to full capacity and, given present rates of increase, the demand for natural gas in the south west of the State will soon exceed the capacity of the DBNGP.
11. The State Government is widening the corridor containing the DBNGP to enable the development of additional gas transmission pipelines to cater for this increasing future demand for natural gas. Once the widened corridor is in place, the development of the new pipelines by private companies becomes much easier and the lead-in time to the commencement of pipeline construction is considerably reduced.
- ...
33. The interest being acquired to establish the widened corridor are those interests of freeholders, leaseholders and other landholders, including any native title holders, which must be acquired in order for the Minister to hold State corridor rights over the relevant land. State corridor rights are defined in Section 28 of the Dampier to Bunbury Pipelines Act 1997.

34. State corridor rights are registered against Certificates of Title (similar to, for example, an easement) and the freeholder or leaseholder or other landholder retains the right to access and use the land within the corridor. The State may only use the corridor land for the transmission of gas."

The Dampier to Bunbury Pipelines Act 1997 clearly envisages the conferral of rights on pipeline operators.

In my view the compulsory acquisition in this case is for the purpose of conferring rights or interests on persons other than the State. Section 24MD(6B) applies and as the independent person I have jurisdiction to determine this matter.

The Act requires the State to consult the Objector about ways of minimising the act's impact on registered native title rights and interests in relation to the land, any access to the land, and the way in which any thing authorised by the act might be done.

At paragraphs 26 to 32 of his witness statement Mr Austin gives evidence of some involvement with the Objector prior to the lodging of the objection. He also gives evidence:

- "35. Since the objection was made, the GPWG has consulted that the Thalanyji claimant group about ways of minimising the effect the compulsory acquisition on their registered native title rights and interest and about access to the land following the compulsory acquisition. A summary of the main correspondence and meetings between the parties follows."

There follows in Mr Austin's statement details of letters and meetings between the Government Party and the Objector. It appears from the materials annexed to Mr Austin's statement that the main areas of concern were in relation to a heritage management protocol and an employment and training strategy. At some point there was also mention of monetary compensation.

In the affidavit of Glenys Hayes lodged on behalf of the Objectors there is a reference to a right to negotiate rather than to lack of any consultation. The affidavit suggests a concern as to the lack of consultation with respect to the items referred to in a letter from a Mr Goodall of the Gas Pipeline Working Group dated 16 November 1999 and in particular:

- "(a). the need for equitable distribution of employment opportunities;
- (b). completion of training programs before construction starts;
- (c). contracting opportunities for aboriginal businesses to bid for tenders;
- (d). need for contractors to honour Aboriginal employment targets; and
- (e). roll of heritage monitors during construction."

These matters are not the items in respect to which consultation is required by the Act. Such issues are in addressed in her affidavit where she states:

"34. I contend that the rights of the Minister are such that the Minister is able to: fence the area (for example, for security reasons) – possibly bisecting the land, restrict access to the area, construct installations in relation to pipeline activities, and deny the Thalanyji complete access to the land, if deemed necessary for security or other reasons.

35. This needs to be understood in the context of the information provided by Mr Dick Austin (8 April 2003) in his third point, where he indicates that "these pipelines are constructed below the surface and do not prevent Aboriginal people's access to the land". If the Minister so requires, in exercising Ministerial rights the Minister could prevent Aboriginal entry to the land."

This does not suggest that there has not been consultation with respect to these matters nor is there any suggestion that the Objector suggests that there are other ways of minimising the act's impact on access to the land. Rather it appears that the act is proposed to be done in a manner which minimizes any restriction on access even though the right exists to restrict access. The Objector's complaint seems to be directed towards lack of consultation with respect to matters other than those which the Act specifies.

The objection having been lodged it is necessary to determine what the independent person can take into account. The Objector was unable to assist me in this regard. The Government Party in its submissions suggested that while there is no nexus between the occurrence, nature or extent of consultation under Section 24 MD (6B)(e) and the determination made by the independent person it is relevant in defining the role of the Independent Person in making recommendations about the doing of the act. The Government Party submits that although subsections 24 MD (6B) (f) and (g) do not explicitly set out the criteria upon which a determination by the independent person is to be made, the logical conclusion is that it is the criteria in subsection 24 MD (6B)(e) which must inform the decision making of the independent person. That is, the independent person should take into account ways of minimising the act's impact on the registered native title rights and interests and any access to the land and the way in which anything authorised by the act may be done.

The Government Party further submits that the provision in subsection 24 MD (6B)(g) for a determination of an objection to include conditions about the doing of the act would confirm that the independent person's focus is intended to be on the practical questions of minimising the impact and access and other issues relating to the way the act is implemented.

I accept the Government Party's submission that the relevant matters for consideration by the independent person are the matters on which consultation is required by the Act. The Government Party notes that Section 24 MD (6B) does not contain any requirement for the consultation to occur in a particular way or be of any particular extent or quantity and that there is no explicit requirement as to its quality but in my view these are factors which must be taken into account by the independent person. It would appear that if there has been insufficient or inappropriate consultation in relation to the matters identified in the Act then this would be basis upon which an objection could be upheld.

The precise nature and content of the Objector's native title rights have yet to be identified. The Government Party annexed a copy from the register of Native Title Claims. The Objector's rights and interests claimed as set out in the extract are:

- "(a) rights and interests to possess, occupy, use and enjoy the area;
- (b) the right to make decisions about the use and enjoyment of the area;
- (c) the right to access to the area;
- (d) the right to control the access of others to the area;
- (e) the right to use and enjoy resources of the area;
- ...
- (i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and
- (j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area."

It is not in dispute that the doing of the act will result in the extinguishing of any native title rights and interests that exist which are inconsistent with the existence of State corridor rights under the Dampier to Bunbury Pipeline Act 1997. There is an existing Dampier to Bunbury natural gas pipeline and the act is designed to permit widening of the corridor. It does not appear that there is any scope for the Government Party to move the area required. The evidence of Mr Austin is that the area of land required is necessary for the expansion and efficient operation of the DBNGP. Mr Austin also gave evidence as to the nature of the construction:

- "20. The GPWG has engaged environmental and heritage specialist to undertake studies to determine ways to minimise the environmental and social impacts of the widening project.

21. Consultants Dames and Moore were engaged to carry out an environmental assessment of the widening project for submission to the Environmental Protection Authority. As a result of that assessment, the EPA approved the project and made recommendations to the Minister for Environment regarding steps that must be taken by proponents to protect and rehabilitate the natural environment in developing pipelines within the corridor. Those recommendations must be followed by any future proponents."

Mr Austin's evidence was that up to eight pipelines may in future be buried in the land at the depths of between 750mm and 2000mm below the surface. There would be some surface infrastructure such as valves and compressor stations but these would be relatively widely spaced and occupy only small areas of the corridor land. His evidence was that the land above the pipelines would be rehabilitated with the aim of returning it to its pre existing use as much as possible. Mr Austin also gave evidence that McDonald Hales and Associates were engaged to carry out an Aboriginal Heritage survey of the proposed expanded corridor area and that they reported that there were no ethnographic sites within the area of the DBNGP corridor that falls within the Thalanyji Native Title Claim area.

The only matter directly relating to these matters in the affidavit of Glenys Hayes is that previously referred to in relation to the Minister's power to fence the area. This addresses the potential power of the Minister but there is no evidence of any past or future indication that this would occur. The evidence of Mr Austin suggests that the Government Party would intend to proceed in a way that would minimize any restriction on access to the land following the act. There is nothing in the affidavit of Glenys Hayes which addresses ways of minimising the act's impact on the Objectors rights or access to the land or the way in which anything authorised by the act might be done. There is nothing in the affidavit to suggest that the Objector's concern with respect to consultation relate to these matters. The Objector's concerns with respect to consultation relate to matters other than those specified in the Act. Rather they are the matters referred to in the letter from the Department of Resources Development dated 16 November 1999 signed by Mr Goodall and referred to earlier.

The Objector also relies upon alleged errors on the part of the Government Party in suggesting firstly that the non extinguishment principle applied and secondly in suggesting that it was for the Objector to refer the matter to the independent person. In my view if these were ever grounds for upholding the objection the fact that the position has subsequently been clarified and rectified, in that the matters are before the independent person in accordance with the Act, this is no longer a basis upon which to uphold the objection.

The Objector contends that it is unfair for the Government Party to have said that the non extinguishment principle applied to its intended action then later say that it did not. Given that there has been advice of the change and subsequent dealings I do not accept that this conduct is either unfair or prejudicial.

The Objector also submitted that it was unfair, prejudicial and possibly illegal for the Government Party to conduct its dealings in the ways complained of because the Objector had a legitimate expectation the State would comply with all international human rights treaties to which Australia is a party and all relevant international humanitarian law in its dealing with the Objector. Although it is alleged that the State did not comply with these treaties or laws the Objector provided no particulars or evidence in support of this contention. It appears that the Government Party has complied with the requirements of Section 24 MD.

The Objector submits that they have acquired a legitimate expectation that they would be afforded the same right to negotiate in relation to the proposed construction of the pipeline as the native title claimant parties in the Burrup and adjacent areas. Again however there was no additional evidence or argument to support this contention. In the absence of any assistance with respect to these arguments I am unable to understand how these expectations could arise in the face of the clear provisions of the Act contained in Section 24 MD.

In my view the Government Party has consulted with the Objectors in relation to the matters specified in Section 24MD (6B)(e). Although the Objector has concerns with respect to lack of consultation in other areas there is no evidence before me that there was a need for any additional consultation with respect to Section 24MD (6B)(e) matters. The grounds of objections specified in the Objector's Statement of Contentions relate to a failure to consult with respect to the items specified in the November 1999 letter, none of which are relevant to the decision of the independent person.

I am satisfied that the manner in which the pipeline has been managed and operated to date and the restrictions that are imposed by the EPA are such that, as far as possible, the Government Party has minimised the act's impact on the Objector's rights and interest in relation to the land and access to the land and the way in which things authorised by the act might be done.

I therefore dismiss the objection.

S. A. Heath
Independent Person