NATIONAL NATIVE TITLE TRIBUNAL

Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd, **[2009] NNTTA 35 (17 April 2009)**

Application No: WF08/29

IN THE MATTER of the *Native Title Act* 1993 (Cth)

- and –

IN THE MATTER of an Inquiry into a Future Act Determination Application

Mr Kevin Cosmos, Mr Robert Boona and Ms Valerie Holborow on behalf of the Yaburara Mardudhunera People (WC96/89) **(first native title party)**

- and -

Mr Jack Alexander, Mr Mark Lockyer, Mr Neil Finley, Ms Jean Lockyer and Ms Gloria Lockyer on behalf of the Kuruma Marthudunera People (WC99/12) **(second native title party)**

- and -

State of Western Australia **(government party)**

- and -

Mineralogy Pty Ltd **(grantee party)**

FUTURE ACT DETERMINATION - TRIBUNAL JURISDICTION TO DETERMINE MATTER

Tribunal: **John Sosso**
Place: **Brisbane**
Date: **17 April 2009**

Hearing dates: 12 December 2008 and 13 March 2009

Representatives:-

Grantee Party:	Ms Baljeet Singh and Mr Bill Haseler, Mineralogy Pty Ltd
First Native Title Party:	Mr Paul Marsh
Second native Title Party:	Ms Sarah Burnside and Ms Penelope Muecke, Pilbara Native Title Service
Government Party:	Mr Domhnall McCloskey, State Solicitor's Office Mr Dave Thomson, Department of Mines and Petroleum

Catchwords: Native title – future act determination application – proposed exploration licence – jurisdiction – whether grantee party has negotiated in good faith – evidentiary onus – no challenge to good faith negotiations of government party – grantee party has not negotiated in good faith – no jurisdiction to make a determination pursuant to s.38.

Legislation:

Native Title Act 1993 (Cth) ss.29, 30A, 31, 32, 33, 35, 36, 37, 38, 39, 75

Cases:

Brownley v Western Australia (No1) (1999) 95 FCR 152

Coppin v Western Australia (1999) 92 FCR 472

Dempster/Bayside Abalone Farm Pty Ltd/Western Australia WF99/1 [1999] NNTTA 235 (27 August 1999) Deputy President Franklyn

Down/Barnes & Ors (Wongatha People)/Western Australia [2004] NNTTA 91 (1 October 2004) Deputy President Franklyn

Doxford v Barnes (2008) 218 FLR 414

Fejo v Northern Territory (1998) 195 CLR 96

Griffin Coal Mining Co v Nyungar People (2005) 196 FLR 319

Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation (2005) 196 FLR 52

Hicks & Ors (Wong-Goo-Tt-Oo) and Lockyer & Ors (Kuruma Marthudunera)/Western Australia/Mineralogy Pty Ltd WO06/732, WO07/204 and WO07/205 [2008] NNTTA 3 (14 January 2008) Deputy President Sumner

Lockyer/Western Australia/Mineralogy Pty Ltd [1998] NNTTA 259 (28 October 1998) Member Sumner

Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008] WAMW 3

Placer (Granny Smith) v Western Australia (1999) 163 FLR 87

Strickland v Minister for Lands for Western Australia (1998) 85 FCR 303

Walley v Western Australia (1996) 67 FCR 366

Walley v Western Australia (1999) 87 FCR 565

Western Australia/Champion & Ors/Resolute Ltd WF97/8 [1998] NNTTA 6 (27 July 1998) Member Lane

Western Australia v Dimer (2000) 163 FLR 426

Western Australia/Evans & Ors/Anaconda Nickel WF98/267-270 [1999] NNTTA 203 (15 July 1999) Member Sumner

Western Australia v Taylor (1996) 134 FLR 211

Western Australia/West Australian Petroleum Pty Ltd & Anor/Hayes & Ors on behalf of the Thalanyji People WF00/07 [2001] NNTTA 18 (9 March 2001) Deputy President Sumner

REASONS FOR DECISION ON WHETHER THE TRIBUNAL HAS JURISDICTION TO CONDUCT AN INQUIRY

Background

[1] The issue to be determined in this matter is whether Mineralogy Pty Ltd ("the grantee party") has fulfilled its obligations under s. 31 of the *Native Title Act 1993* (Cth) ("the Act') and negotiated in good faith with the registered native title claimants for the claimant applications brought on behalf of the Yaburara Mardudhunera People (WC96/89) ("the first native title party") and the Kuruma Marthudunera People (WC99/12) ("the second native title party"). Neither the grantee party nor either of the native title parties formally contended that the State of Western Australia ("the government party") has not negotiated in good faith. For the purpose of this matter I have accordingly proceeded on the basis that the only issue in contention is the question of whether the grantee party has negotiated in good faith. The issue of good faith goes to the jurisdiction of the Tribunal to make a s. 38 determination, and once raised must be dealt with prior to a consideration of the s. 39 criteria – *Walley v Western Australia* (1996) 67 FCR 366.

[2] On or about 4 March 1998, being prior to the commencement of the 1998 amendments of the Act, the government party gave notice under s. 29 of the 'old' Act of its intention to grant Exploration Licence E08/1023 ("the proposed tenement") under the *Mining Act 1978* WA to Mineralogy Pty Ltd and included in that notice a statement that it considered the grant attracted the expedited procedure (that is one which can be done without the normal negotiations required by s. 31 of the Act).

[3] The proposed tenement, comprising some 107.04 square kilometres, is located approximately 50 kilometres north of Pannawonica, situated at Latitude 21º 07' S, Longitude 116º 11' E within the Shire of Roebourne. It is completely overlapped by both the first and second native title parties' determination application areas. Significant underlying tenure includes Mardie Pastoral Lease 3114/1027 (94.1%), the De Grey Mullewa Stock Route (3.9%), Vacant Crown Land (0.8%) and State Onshore Pipeline Licence PL40 (0.2%). A search of the Register of Aboriginal Sites under the *Aboriginal Heritage Act WA* reveals 114 sites located within E08/1023 - 5 open access mythological/historical sites (identified as Camps/Water Sources), 108 open access archaeological sites (identified as engravings,

artefacts/scatter and/or structures) and one closed access archaeological site (identified as an engraving site).

[4] The first native title party lodged its native title determination application (WC96/89) on 1 August 1996 and was entered on the Register of Native Title Claims on the same date. The second native title party's original native title determination application (WC96/73) was lodged and registered on 24 June 1996. On 26 March 1999 an application was made to combine WC96/73 into a new native title determination application WC99/12. On 24 June 1999 WC99/12 was registered and on the same date WC96/73 was removed from the Register of Native Title Claims. The second native title party therefore retains the right to negotiate by way of the combination.

[5] On 30 April 1998 an expedited procedure objection application was lodged with the National Native Title Tribunal (the Tribunal) on behalf of the second native title party (WO98/379). No objection was lodged by the first native title party. On 28 October 1998, with the consent of the second native title party, the grantee party and the government party, the Tribunal made a determination that the expedited procedure did not apply to the proposed tenement, requiring all the parties to negotiate in good faith with a view to obtaining an agreement pursuant to s. 31(1)(b) of the Act – *Lockyer on behalf of the Kurama and Marthudenera People/Western Australia/Mineralogy Pty Ltd* [1998] NNTTA 259 (28 October 1998) Member Sumner.

[6] Negotiations were initiated on 12 December 2006 by the government party consistent with its usual process for mineral tenements to which s.31 of the Act applies. The approach of the government party has been outlined at some length in two previous determinations of the Tribunal – *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 196 FLR 52 at 62-64/[32]- [34] and *Griffin Coal Mining Co v Nyungar People* (2005) 196 FLR 319 at 325-327/[20]-[25]. In its letter of 12 December 2006 the government party wrote to each of the other negotiation parties (see s.30A) enclosing the following documents:

- a copy of the tenement application;
- a TENGRAPH plan of the proposed tenement;
- a topographical plan of the proposed tenement;
- a copy of the search of the Register of Aboriginal Sites;

- an extract of s.39(1) of the Act;
- a copy of the draft conditions and endorsements for the proposed tenement in accordance with the Mining Registrar's recommendations;
- a copy of four additional conditions for discussion;
- a copy of '*Administration and Operation of Exploration Licences, Prospecting Licences, Mining Leases, General Purpose Leases and Miscellaneous Leases in Western Australia*';
- '*Fees and Charges: Information on Mining Tenements*';
- a summary of approvals and responsibilities required by the government party before activities can commence on mining tenements in Western Australia;
- a guide to what constitutes 'negotiations in good faith' and
- a copy of the government party's Negotiation Protocol.

The government party also specifically requested the grantee party to provide to each of the native title parties within 14 days of the date of its correspondence, by registered mail, the following documents:

- an outline of the proposed work program for the proposed tenement area, if available;
- copies of the grantee party's last annual report, if available;
- advice as to whether Aboriginal heritage surveys within the proposed tenement area are proposed, or have been completed;
- any company policies or information which might be relevant to the native title parties; and
- a suitable map of the project area (if applicable).

[7] On 30 January 2007 the grantee party wrote to each of the native title parties enclosing:

- an outline of the proposed work program;
- a map of the proposed tenement and that of archaeological and ethnographic heritage surveys completed in 2001 and

- extracts from "*DIA Aboriginal Heritage Inquiry System identifying the relevant surveys."*

The address of the first native title party was "Australian Interaction Consultants PO Box 90 Osborne Park WA 6917." Material filed by the second native title party included a copy of this letter which was marked with a "Date Received" stamp of "01 Feb 2007".

[8] On 11 March 2008 a s.31(3) request for mediation assistance was made by the government party. When any of the negotiation parties requests mediation assistance, the Tribunal *must* mediate among the parties to assist in obtaining their agreement – s.31(3). The request for mediation assistance was limited to the second native title party. The following matters were outlined in the request letter:

> "*A formal negotiation letter was issued on 12 December 2006 and the grantee lodged a submission on 31 January 2007. The native title party lodged it's submission on 12 March 2007.*
>
> *The grantee advised that they had held a meeting with PNTS [Pilbara Native Title Service] in June 2007 and had been invited to attend a Kuruma Marthudunera working group meeting to discuss various matters.*
>
> *In accordance with the State Government's Negotiation Protocol, where negotiations between any of the parties stall, the matter will be referred to the NNTT for mediation assistance. In this instance, the grantee party has not yet attended at the working group meeting nor has a date been scheduled for the attendance and therefore the Department of Industry and Resources considers that negotiations have stalled*"

[9] Tribunal Member John Catlin was appointed to mediate, and conferences were convened on 23 May 2008, 11 July 2008, 17 July 2008 and 23 September 2008. One of the outcomes of the 23 September 2008 mediation was that Mr Haseler, of the grantee party, was to seek instructions as to whether the grantee party would be making a counter-offer to the second native title party or requesting termination of mediation. On 13 October 2008 Mr Haseler emailed the Tribunal and the second native title party stating: "*Mineralogy considers that the mediation process has run its course and has not been successful in progressing the application and now Mineralogy will be seeking a s.35 Determination."* On 17 October 2008 the mediation was terminated by Member Catlin on the basis of non-participation by the grantee party.

[10] On 20 November 2008, the grantee party lodged with the Tribunal, pursuant to ss.35 and 75 of the Act, an application for a determination under s.38. As at least six months had passed since the notification day, the grantee party was entitled to make this application – s.35(1)(a).

[11] On 25 November 2008 I was appointed the presiding Member to constitute the Tribunal for the purposes of conducting the inquiry into the future act determination application. At the preliminary conference on 12 December 2008, the second native title party submitted the Tribunal did not have jurisdiction to conduct the inquiry on the basis that the grantee party has not negotiated in good faith as required by s.31. The first native title party reserved its right to make submissions. On 22 December 2009 I made directions for the lodgment of submissions.

Contentions and Evidence

[12] Both the native title parties and the grantee party have provided extensive written contentions on the issues germane to the jurisdictional challenge. The government party advised by letter dated 17 February 2009 that it did not propose to file any contentions as neither native title party contended that the government party had failed to negotiate in good faith. The contentions received from the native title parties and the grantee party are as follows:

First native title party contentions:

- Submissions of the Yaburara and Mardudhunera People that Mineralogy Pty Ltd has not negotiated in good faith regarding proposed Exploration Licence E08/1023 dated 12 February 2009 (*SNTP 1*);
- Affidavit of Janice Brettner sworn 9 January 2009 with annexures 1-2;
- Affidavit of Robert Boona sworn 23 January 2009;
- Affidavit of Kevin Cosmos sworn 23 January 2009; and
- Submissions of the Yaburara and Mardudhunera People in response to the submissions of Mineralogy Pty Ltd dated 3 March 2009 (*RNTP 1*)

Second native title party contentions:

- Submissions in support of the native title party's contention that the grantee party has not negotiated in good faith in relation to the grant of Exploration Licence E08/1023 dated 6 February 2009 (*SNTP 2*);

- Affidavit of Sarah Elizabeth Burnside sworn 6 February 2009 with annexures 1-30; and
- Submissions on behalf of the Second Native Party in Response to Submissions of the Grantee Party dated 3 March 2009 (*RNTP 2*).

Grantee party contentions:

- Statement of Contentions of Mineralogy Pty Ltd dated 24 February 2009 with annexures A-V (*SGP*).

The Contentions of the Native Title Parties

[13] The first native title party made the following contentions (*SNTP 1*) in relation to its allegation that the grantee party had not negotiated in good faith:

> *"1 No negotiations between the Yaburara & Mardudhunera People (Y&M) and Mineralogy Pty Ltd have occurred.*
>
> *2 The Y&M were not aware that Mineralogy Pty Ltd was seeking to negotiation [sic].*
>
> *3 The absence of response to their correspondence should have alerted Mineralogy Pty Ltd there was a failure in communication.*
>
> *4 The service of the Notice of Appointment of a Solicitor and a new address for service should have alerted Mineralogy Pty Ltd as to how to establish communication.*
>
> *5 No such attempt was made.*
>
> *6 It may reasonably be inferred that Mineralogy Pty Ltd knew that its business associate Citec Pacific Mining Management Pty Ltd was in frequent contact with Y&M over the relevant period and could have used that means of communication to contact Y&M.*
>
> *7 There has not been any refusal to negotiate by Y&M.*
>
> *8 Mineralogy Pty Ltd has not made any reasonable effort to open negotiation.*
>
> *9 There has not been any negotiation in good faith"*

[14] The second native title party, inter alia, made the following contentions (*SNTP 2*):

> ***"Conduct of the Grantee Party - Failure to Make Proposals in the First Place***
>
> *6. Representatives from the Grantee Party attended mediation conferences on 23 May, 11 July, 17 July and 23 September 2008, and a Working Group meeting on 4 July 2008. On none of these occasions did the Grantee Party put forth any proposals to the Native Title party, nor did it supply any meaningful responses to the Native Title Party's suggestions regarding heritage protection...*
>
> *7. At the Working Group Meeting on 4 July 2008, The Grantee Party made a presentation about its proposed activities on the Licence, but at no time made proposals as to how the parties might reach agreement as to its grant,,,*
>
> ***Conduct of the Grantee Party – Unreasonableness....***
>
> *14. The Grantee Party did not engage with the Native Title Party on the question of the terms and conditions upon which it would be prepared to agree to the grant of the*

Licence. Neither did the Grantee Party 'aim' to reach an agreement. The only 'offer' made by the Grantee Party, or 'condition' it was prepared to accept, was an undertaking to comply with the Aboriginal Heritage Act 1972 (WA) and Native Title Act 1993 (Cth).

15. *Given that compliance with these Acts is required in any event, the above cannot be considered a proposal, offer or condition. This was not 'bargaining as such': Public Sector, Professional Scientific, Research Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (1995) 31 AILR 372 (at 421), Full Bench, Australian Industrial Relations Commission ... .*

18. *The Native Title Party submits that the 'offer' in this instance does assist in assessing the Grantee Party's negotiating behaviour, as it illustrates the Grantee Party's failure even to consider any commitment beyond its minimum legal obligations ... .*

Conduct of the Grantee Party – Failure to Respond to Requests for Information within a Reasonable Time

20. *The Grantee Party failed to comply with the Native Title Party's request for large detailed maps of the Licence area to be presented at the Working Group meeting on 4 July 2008 ... .*

21. *The Grantee Party failed to comply with the Native Title Party's request for a copy of the presentation made at the Working Group meeting on 4 July 2008, which presentation was in any event inadequate ... .*

Conduct of the Grantee Party – Sending Negotiators with no Authority to do more than Argue or Listen

22. *The representatives from the Grantee Party who attended the working Group meeting on 4 July 2008 were seemingly unable to respond to suggestions give undertakings or make commitments. Instead, the representatives stated that they were present to 'hear' the Native Title Party's concerns and undertook to pass comments on to the Grantee Party's Board of Directors. At no time did the Native Title Party receive a response from the Board...*

23. *The Grantee Party sent a representative to mediation on 23 September 2008 with instructions not to sign, discuss or read through the Draft Agreement provided by the Native Title party. The Grantee Party failed to present an alternative draft of its own...*

No Genuine Attempt to Reach Agreement

24. *The Grantee Party made no serious attempts to come to an agreement with the Native Title Party. Instead its representatives suggested on two occasions that the Grantee Party would seek a determination under section 35 NTA as an alternative course of action. These suggestions imply that the Grantee Party regarded a determination as an alternative means of having the Licence granted, rather than a last resort in the event of inability to reach agreement ... .*

25. *The Grantee Party's refusal to provide comments on the Draft Agreement, and its failure to provide its own draft, further illustrates the lack of genuine attempt to reach agreement. In fact its conduct had the effect of obstructing an agreement ... .*

Conduct of the Grantee Party – Rigid Non-Negotiable Position....

28. *The native title party does not argue that the Grantee Party was obliged to undertake surveys or enter into a heritage agreement. However, the Native Title Party submits that the Grantee Party's failure to even consider or discuss an agreement regarding future surveys constituted a lack of good faith.*

29. *By failing to consider or negotiate about any written agreement with the native title Party – instead merely 'offering' compliance with existing legislation - and by failing to give consideration to the conduct of any further heritage surveys, the Grantee Party adopted a rigid non-negotiable position.*

Conduct by the Native Title Party – Specific Submissions and Proposals

31. *A failure of the Native Title Party to put any specific submissions regarding the proposed future act or to make a specific response to the other parties' proposals can be found to*

negate any finding of failure to negotiate in good faith by the other party: Pajingo v Queensland QF00/2 29 September 2000 at 11 – 27.

32. *The Native Title Party put forth specific proposals: that the Native Title Party be given a copy of the Grantee Party's Aboriginal Heritage Management Plan; that further surveys be carried out over the area of the Licence prior to any ground-disturbing work; that payment for surveys be set at $500 per participant per day; and that any agreement include a specific process by which application under section 18 of the Aboriginal Heritage Act 1972 (WA) are to be carried out. Consistent proposals were put to the Grantee Party on the following occasions:*

    A. at a working group meeting on 4 July 2008;

    B. in a letter dated 7 July 2008;

    C. at a mediation conference on 11 July 2008;

    D. at a mediation conference on 17 July 2008; and

    E. in a comprehensive draft heritage agreement provided on 18 August 2008 ... ."

The contentions of the grantee party

[15] In reply to the first native title party, the grantee party contended (*SGP*):

"10. The address used by the Grantee Party to send correspondence to the First Native Title Party was used by the former Department of Industry and Resources to send correspondence regarding the proposed tenement.

12. The First Native Title Party has not disputed that the Government Party has negotiated in good faith.

13. Paragraph 3 of the First Native Title Party's submissions provide that '(t)he absence of response to their correspondence should have alerted Mineralogy Pty Ltd that there was a failure in communication. 'The 'absence of response' from the First Native Title Party in relation to the proposed tenement is not, based on the circumstances, so unusual as to warrant the assumption of a failure in communication. The First Native Title Party has not objected, under either the Mining Act (WA) 1978 or the Native Title Act (Cth) 1993, to the grant of General Purpose Lease 08/63 (G08/63) to the Grantee Party despite that that application covers 100% of the land the subject of these proceedings.

14. The Grantee Party's application for G08/63 is for the construction of infrastructure facilities associated with mining.

15. The Grantee Party submits the First Native Title Party's objection against the grant of the proposed tenement (an exploration licence involving low impact exploratory activities covering only a small area at any one time) is trivial given the absence of any objection by the First Native Title Party to the grant of G08/63 (a general purpose lease involving tailings dams, mineral storage facilities and other infrastructure facilities over a substantial part of the area of the proposed tenement).

16. Paragraph 11 of the affidavits of Janice Brettner, Robert Boona and Kevin Cosmos are false. Attached as Annexure I is an attendance list from a YM Working Group Meeting attended by representatives of the Grantee Party to consult regarding miscellaneous licences 08/22 and 08/23 dated 26 July 2007. Janice Brettner, Robert Boona and Paul Marsh are all recorded as attendees at that meeting.

21. The first native title party have made no submissions about the doing of the future act despite the Government and Grantee Party's invitation to do so."

[16] In its reply, the first native title party conceded, in the context of paragraph 16 of the grantee party contentions, that the relevant affidavits were incorrect in placing the informal meeting in July 2006, as it in fact occurred in July 2007, and that the discussions were limited to the granting of Miscellaneous Licences 08/22 and 08/23 – *RNTP 1* at paras 14 and 15.

[17] In reply to the second native title party, the grantee party contended:

> "*19. On 4 July 2008, representatives of the Grantee Party attended a working group meeting with members of the Second Native Title Party and their legal representatives the Pilbara Native Title Service....*
>
> *20. By correspondence dated 11 July 2008, the Grantee Party provided to the Second Native Title Party, a number of maps of the proposed tenement area (including a detailed topographical map showing existing sites and other pre existing impacts) and advised as follows:*
>
> *a. There will only be low impact exploration activities that will be conducted under this tenement and we will avoid all sites that have been identified and registered at the DIA register (para 3),*
>
> *b. The (proposed tenement) activities will be along existing corridors to minimize disturbance (para 8),*
>
> *c. The applicant proposes to conduct such low impact exploration activities covering only small areas of the proposed tenement at any one time (para 8),*
>
> *d. Mineralogy has and will continue to comply with all obligations it may have under the AH Act which include procedures to protect sites not recorded on the DIA register (para 10),*
>
> *e. The DIA has (by correspondence dated 13 September 2006) (written) on Mineralogy's attitude towards heritage protection and stated that Mineralogy's actions and intents demonstrates a responsible approach to heritage protection (para 12), and*
>
> *f. Sarah Burnside continuously interrupted and continued to distract attention of the KM People from my presentation (para 13)….*
>
> *22. The Second Native Title Party have failed to provide submissions as to the effect of the proposed Future Act other than to refer to general concerns about the possibility of disturbances to Aboriginal cultural heritage sites….*
>
> 25. *Contrary to paragraph [20] of the Second Native Title Party's submissions ,the Grantee Party has, provided the Second Native Title Party with colour topographical maps of the proposed tenement area… The Grantee Party submits that the Second Native Title Party's request for "large" maps is trivial."*

[18] In relation to both the native title parties, the grantee party contended:

> *"26. The Native Title Party's [sic] have not provided evidence to demonstrate the existence of unregistered Aboriginal heritage sites of significance.*
>
> *28. The process of explorative drilling is inherently low-impact and does not require major disturbance of land, or erecting significant infrastructure.*
>
> *36. Together, the Mardie Pastoral Lease and the DGM [De Gray Mullewa] Stock Route encroach upon approximately 98% of the area of the proposed tenement.*

37. *There is no evidence that the impact of the activities carried out over the proposed tenements as a result of the activities arising from the Mardie Pastoral Lease and the DGM Stock Route have adversely impacted the native title claimants.*

38. *The Grantee Party is bound by, and commits to observe fully, the provisions of the Aboriginal Heritage Act 1972 ("Aboriginal Heritage Act")…*

39. *An Archaeological survey of Aboriginal Sites covering 100% of the area of the proposed tenement was conducted on or about 1 May 2001…*

40. *An Ethnographic survey of 320 square kilometres of land in the Cape Preston area was conducted on or about 1 June 2001. This survey covered 100% of the area of the proposed tenement…*

41. *The Department of Industry and Resources has stated that the Grantee Party's Aboriginal Heritage Management Plan' is an adequate approach to the management of the heritage values of the Cape Preston development area', and further, that the Grantee Party's 'actions and intents demonstrates a responsible approach to heritage protection'…*

42. *The Native Title Party's [sic] have not suggested that the ongoing pastoral activities have had any adverse impact on the carrying out of community and social activities of the native title party. Given that the process of explorative drilling is inherently low-impact and does not require major disturbance of land, or erecting significant infrastructure, it is clear that the exploration activity permitted by the grant of the proposed tenement would be highly unlikely to have any further or more significant deleterious impact…*

43. *The Grantee Party has negotiated with the State, and the State has ratified amendments to the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 to, amongst other things, provide a Fund with a total $100,000,000 (one hundred million) of benefits and grants for, amongst other things, the support of indigenous communities in Western Australia...*

44. *In the circumstances, having particular regard to the nature of the proposed tenement, the proposed low impact exploratory activities, the pre existing impacts on the proposed area (including a pastoral lease covering over 90% of the area of the proposed tenement), the Grantee Party submits it has negotiated in good faith with the First and Second Native Title Party's [sic] for the grant of the proposed tenement."*

Legal Principles

[19] The obligation to negotiate in good faith is prescribed by s.31 of the Act:

"31 Normal negotiation procedure

(1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:

(a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and

(b) the negotiation parties must negotiate in good faith with the view to obtaining the agreement of each of the native title parties to:

(i) the doing of the act; or

(ii) the doing of the act subject to conditions to be complied with by any of the parties.

Note: The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned: see subsection 41(2).

Negotiation in good faith

(2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.

Arbitral body to assist in negotiations

(3) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement."

If any of the negotiation parties satisfies the Tribunal that any other negotiation party (other than a native title party) has not negotiated in good faith, then the Tribunal must not make a determination on the application – s.36(2).

[20] The practical effect of s.36(2) is to place an "evidential burden" on the party (or parties) alleging lack of good faith. In common parlance this would, in the normal course of events, require the party or parties alleging lack of good faith to produce evidence to support this contention. The mere allegation of lack of good faith unsupported by evidence is not sufficient: see *Doxford v Barnes* (2008) 218 FLR 414 at 423/[34]. In those instances where a party alleges lack of good faith negotiation by another negotiation party without providing evidence to substantiate the contention, the Tribunal will determine it has jurisdiction to make a determination under s.38 see, for example, *Dempster/Bayside Abalone Farm Pty Ltd/Western Australia* [1999] NNTTA 235 and *Down/Barnes & Ors (Wongatha People)/Western Australia* [2004] NNTTA 91 at [25] per Deputy President Franklyn. In this matter the Tribunal has been presented not only with comprehensive contentions by the parties, but also primary evidence in the form of Affidavits as well as supporting documentation.

[21] A very useful explanation of what constitutes negotiating in good faith is provided by Deputy President Sumner in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at 93-94. It should be noted that references to the government party having an obligation to negotiate in good faith should now be read to apply to all negotiation parties; subject to that caveat I adopt the following statement of law for the purpose of this matter:

"Negotiation involves 'communicating, having discussions or conferring with a view to reaching an agreement': Western Australia v Taylor (1996) 134 FLR 211 at 219. Good faith requires the Government party to act with subjective honesty of intention and sincerity but this, on its own, is not sufficient. An objective standard also applies. The Government and grantee parties' negotiating conduct may be so unreasonable that they could not be said to be sincere or genuine in their desire to reach agreement. The Tribunal must look at the conduct of the Government party as a whole but may have regard to certain indicia which were outlined in Western Australia v Taylor as a guide to whether the obligation has been fulfilled.

One of these indicia is whether the negotiation party has done what a reasonable person would do in the circumstances. There is no requirement that the Tribunal be satisfied that the Government party has made reasonable offers or concessions to reach agreement but it is permitted to have regard to the reasonableness or otherwise of them if it assists in the overall assessment of a party's negotiating behaviour. Lack of good faith in the negotiations by the native title party will be relevant to whether the parties have fulfilled their obligation and may impose a lesser standard on them."

[22] The Tribunal outlined indicia of whether a party has not negotiated in good faith in *Western Australia v Taylor* (1996) 134 FLR 211(at 224-225). It is important to emphasise that the indicia outlined are only helpful signposts for evaluating conduct; they are only a guide. The indicia cannot be applied in a mechanistic manner: so if a party has, for example, exhibited one of the forms of conduct outlined below, it does not necessarily follow that there will be a finding that the party has not negotiated in good faith. Nonetheless as checklist they provide some guidance to parties and to the Tribunal in evaluating conduct. The indicia are as follows:

(i) Unreasonable delay in initiating communications in the first instance;

(ii) Failure to make proposals in the first place;

(iii) The unexplained failure to communicate with other parties within a reasonable time;

(iv) Failure to contact one or more of the other parties;

(v) Failure to follow up a lack of response from the other parties;

(vi) Failure to attempt to organize a meeting between the native title and grantee parties;

(vii) Failure to take reasonable steps to facilitate and engage in discussions between the parties;

(viii) Failing to respond to reasonable requests for relevant information within a reasonable time;

(ix) Stalling negotiations by unexplained delays in responding to correspondence or telephone calls;

(x) Unnecessary postponement of meetings;

(xi) Sending negotiators without authority to do more than argue or listen;

(xii) Refusing to agree on trivial matters e.g. a refusal to incorporate statutory provisions in an agreement;

(xiii) Shifting position just when agreement is in sight;

(xiv) Adopting a rigid non-negotiable position;

(xv) Failure to make counter proposals;

(xvi) Unilateral conduct which harms the negotiating process, e.g. issuing inappropriate press releases;

(xvii) Refusal to sign a written agreement in respect of the negotiation process or otherwise; and

(xviii) Failure to do what a reasonable person would do in the circumstances.

[23] The indicia were endorsed by Member Lane in *Western Australia v Dimer* (2000) 163 FLR 426 at 445/[102] who pointed out that the indicia involved:

(a) an obligation to communicate with other negotiation parties;

(b) an obligation to make proposals with a view to reaching agreement;

(c) an expectation that parties will make due inquiries of other parties in order to make informed choices; and

(d) an obligation to seek commitments and/or concessions in relation to either or both the process of negotiation or the subject matter of the negotiations.

Member Lane also pointed out that the overarching principles governing good faith negotiations are honest and reasonable behaviour (at 446/[108]). What is reasonable in any given context depends on a range of factors and circumstances. The capacity of the parties, the external environment in which they are operating, the behaviour exhibited during the negotiations and even the past history of their relations, are all relevant in ultimately assessing whether a negotiation party had engaged in good faith negotiations. In every case the Tribunal is required to evaluate the material presented in a commonsense fashion to determine if the party or parties who are alleged not to have negotiated in good faith have in fact engaged with an open mind and acted honestly and reasonably. The concept of reasonableness does not require a grantee party to engage in altruistic behaviour or to make concessions not warranted by standard commercial practices. To impose on a grantee party a

standard of negotiating which bears no relation to the wider commercial environment in which that party operates would be inappropriate and counter-productive.

[24] The indicia were considered by Lee J in *Brownley v Western Australia (No 1)* (1999) 95 FCR 152, and His Honour said (163/[26]): "*It was not suggested in this case that in that matter the Tribunal misinterpreted the relevant law."*

[25] In its letter of 12 December 2006 referred to above, the government party wrote to each of the other negotiation parties enclosing a number of documents including a copy of its "Negotiation Protocol". Included with the Protocol is a document entitled "Summary of how to negotiate in good faith." That document is two pages in length and sets out each of the 19 indicia set out above. In other words, each of the negotiation parties in this matter had before them at all relevant times information on the indicia of good faith. Apart from setting out the indicia, the document also provides the following information:

> *"The National Native Title Tribunal (NNTT) has said that 'negotiation' can be understood by its dictionary definitions, and 'involves communicating, having discussions or conferring with a view to reaching an agreement.*
>
> *'Good faith' means 'honesty of purpose or intention, sincerity', and 'dong what is reasonable in the circumstances' – in this context, in order to negotiate and reach agreement with the native title parties."*

[26] A very useful summary of the other legal principles that guide the Tribunal when evaluating whether a negotiation party has negotiated in good faith was set out by Deputy President Sumner in *Gulliver v Western Desert Aboriginal Corporation* (2005) 196 FLR 52 at 58-60/[14]–[19]. I adopt those statements of the law for the purposes of this determination.

[27] It must be emphasized that the obligation to negotiate in good faith is not an open-ended one. Subsection 31(1) requires the parties to negotiate with a view to obtaining the agreement of each of the native title parties to the doing of the proposed future act. The scope of that obligation is clarified by subsection 31(2) which provides:

> *"(2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph."*

[28] The Tribunal has previously determined that the focus of the statutorily mandated good faith negotiations is about the possible effect of the proposed future act on the registered native title rights and interests of the native title party - see *Western Australia/Western*

Australian Petroleum Pty Ltd & Anor/Hayes & Ors on behalf of the Thalanyji People [2001] NNTTA 18 at [19] per Deputy President Sumner. Nonetheless the parties are at liberty to negotiate about a range of other matters that go beyond and are unrelated to the possible effects of the proposed future act on registered rights and interests. The sort of matters that can logically form the basis of such negotiations are set out in s.39, but are not limited to such matters – see *Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319 at 329/[33]-[35]. For example, the Act specifically contemplates that the parties may reach agreement on profit sharing conditions (s. 33(1)), but that the Tribunal cannot make a determination under s.38 to like effect – s.38(2). Further, the Act also contemplates that existing non-native title rights and interests in relation to the relevant land and waters, the use of such land and waters and the practical effect of the exercise of those rights and those existing uses on any native title rights and interests can also be taken into account – s.33(2).

[29] To sum up, the Act clearly contemplates that the negotiation parties are at liberty to negotiate about a range of matters of mutual interest and concern. The High Court stated in *Fejo v Northern Territory* (1998) 195 CLR 96 that the right to negotiate is "*a valuable right"* and is an "*important aspect of the protection that the Act gives to native title"* - per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 121. Nonetheless, the clear wording of s. 31(2) should alert the parties that the refusal by one of the negotiation parties to negotiate about those broader issues will not necessarily result in a finding that such refusal constituted lack of good faith. Each matter has to be dealt with on the particular facts presented, and the only clear principle is that the *starting point* and *focal point* of all negotiations has to be the possible effect of the proposed future act on the registered rights and interests of the native title parties. Whether the refusal by one party to negotiate about broader matters demonstrates bad faith cannot be answered in the abstract. All that can be said with certainty is that a failure to negotiate about broader issues or the nature of those negotiations may in some circumstances be taken into account *with evidence of the negotiations in relation the registered rights and interests of the native title party* in ascertaining if there have been negotiations in good faith. However, the refusal to negotiate such broader matters of and by itself will not automatically result in a finding that the party so refusing has failed to negotiate in good faith.

[30] There is one further issue which needs to be addressed. In *Doxford v Barnes* (2008) 218 FLR 414 I made the following observation (at 424-5/[37]):

> *"When the Tribunal has to determine if a grantee party has negotiated in good faith it is incumbent on the Tribunal to assess the overall conduct of that party in the context of that party's capacity to negotiate, the attitude and actions of the other parties and the general negotiating environment faced by each of the negotiation parties. In short a contextual evaluation is required. In this matter it is relevant to consider the financial circumstances of the grantee party and his overall capacity to engage in negotiations. A negotiation party with considerable resources, access to professional advice and the ability to organize and attend meetings will be required to act reasonably having regard to its ability to negotiate. Conversely the conduct of a negotiation party with limited resources, little or no access to professional services and difficulties in attending, let alone organising meetings, will be evaluated in that context. Reasonableness does not connote an inflexible and static standard of negotiating conduct."*

[31] In *Doxford v Barnes* the primary focus of the contextual analysis was the relative bargaining strengths of the grantee and native title parties. In that matter the native title party was represented by the representative body (see Part 11 of the Act) for that region, whereas the grantee party was an unrepresented individual with few resources. However, when assessing the conduct of the parties there are other contextual issues that can be taken into account. It is not irrelevant to have regard to the rights that may be exercised by the grant of the proposed tenement when evaluating negotiations, as the exercise of such rights may have varying impacts on the registered native title rights and interests of the native title party or parties.

[32] Carr J said in *Walley v Western Australia* (1999) 87 FCR 565 at 577/[14]: "*when assessing whether a Government party has complied with its obligations under s 31(1)(b) to negotiate in good faith, its conduct should be judged in the context of the matters related to or connected with the doing of the particular future act in question."* The greater the possible impact of the "*doing of the particular future act*" on registered native title rights and interests, the greater the obligation imposed on the non-native title parties to negotiate about those possible impacts. If "*the doing of the particular future act*" may result in deleterious impacts on registered native title rights and interests, a non-native title party negotiating in good faith would be keen to minimise or remedy the deleterious impacts and bring to the negotiating table an offer or a package of proposals designed to address the concerns of the native title party. While it is not appropriate for the Tribunal to assess the "reasonableness" of offers, Lee J pointed out in *Brownley v Western Australia* (1999) 95 FCR 152 at 165: "*In the context of conduct as a whole, failure to advance reasonable proposals may be shown to be part of a pattern from which an inference may be drawn that a government has not engaged in a genuine attempt to negotiate."* When ascertaining if a grantee party has advanced "*reasonable proposals"*, the nature of the future act and its possible impact on

registered native title rights and interests are key factors. In *Western Australia/Western Australian Petroleum Pty Ltd & Anor/Hayes & Ors on behalf of the Thalanyji People*, Deputy President Sumner when finding that the grantee party had negotiated in good faith with respect to the grant of a Petroleum Production Licence over Thevenard Island noted (at [49]) "*given the nature of the future act proposed, the lack of evidence of its impact on native title rights and interests, the expectations of the native title party were unrealistic"*.

[33] This proportionate analysis does not take place in a vacuum. A negotiation party may exhibit such unsatisfactory behaviour that irrespective of the possible impact of the proposed future act, the party has negotiated in bad faith. Consequently a negotiation party who acts dishonestly, or who negotiates in a perfunctory manner with no intention of reaching agreement, will obviously not have negotiated in good faith irrespective of the nature of the proposed future act. A minimum standard of behaviour is required: the nature of the future act is relevant when evaluating the quality and nature of the negotiations undertaken.

[34] Finally, it must always be borne in mind that the focus of the Tribunal's inquiry is the efficacy and reasonableness of a negotiation party's or parties' conduct during a statutorily mandated process, namely the obligation to negotiate in good faith. The Tribunal is not required to evaluate the reasonableness of proposals or the merits of offers and counter-offers. While these matters can be taken into account, they are only relevant insofar as they shed light on the conduct of a particular negotiation party or parties.

Findings

Generic Submissions of the Grantee Party

[35] Before turning to the contentions and evidence of the first and second native title parties, it is appropriate to deal briefly with the contentions and evidence of the grantee party which were generically directed to both of the native title parties.

[36] The thrust of the contentions and evidence presented by the grantee party in this regard was focused on the type of considerations that are relevant to an expedited procedure objection inquiry, namely the matters outlined in s.237 of the Act. The contentions and evidence of the grantee party were directed towards issues such as whether the doing of the proposed future act were likely to interfere directly with the carrying of community or social

activities of the native title parties, were likely to interfere direct with areas or sites of particular significance or were likely to involve major disturbance to relevant land or waters.

[37] In this regard, the second native title party made the following submissions (*RNTP 2* at paras 9-10):

> *"9. The Second Native Title Party submits that the information provided and the assertions made by the Grantee Party in its submissions at paragraphs [26-43] (relating to, inter alia, its heritage practices, its proposed exploration activities, the underlying tenure of the Licence area, previous surveys and its plan to establish a charitable fund), are irrelevant to the question whether it has negotiated in good faith with the Second Native Title Party to obtain its agreement to the grant of the Licence. The Second Native Title Party does not propose to respond to these assertions.*
>
> *10. As stated above, the Second Native Title Party submits that the information and assertions contained in paragraphs [26-43] of the Grantee Party's submissions do not relate to good faith negotiations. The information and assertions included in [26-43] seem more relevant to a determination on the substantive merits of the Licence according to the criteria set out in s.39 NTA. The Second Native Title Party notes that the NNTT is only empowered to make such a determination if it is satisfied that the Grantee Party has negotiated in good faith."*

[38] When evaluating if a party has negotiated in good faith, the likely impact of the grant of the proposed future act on the registered native title rights and interests of native title parties is relevant. In this context, some of the issues central to an expedited procedure objection inquiry may also arise in a good faith jurisdictional challenge. However, the extent of the overlap between the two inquiries is partial and the focus of each is different.

[39] It is not, prima facie, relevant in evaluating good faith negotiations for the grantee party to rely upon the underlying tenure of the area of the proposed tenement (grazing lease and stock route), or that archaeological and ethnographic surveys were undertaken. Nor is it particularly pertinent for the grantee party to contend that the native title parties have not demonstrated the existence of unregistered sites of significance.

[40] The sort of matters raised by the grantee party in paragraphs 26 to 43 of its contentions are only relevant in the context of demonstrating that it had negotiated in good faith, and that the particular way in which it negotiated was appropriate having regard to certain matters. Most of the matters raised, and the manner in which they were raised, are not germane to an evaluation of negotiations, and I agree with the tenor of the submissions of the second native title party outlined in [37] above.

Did the Grantee Party Negotiate in Good Faith With the First Native Title Party?

[41] The contentions of the first native party are short, but fundamental. It is contended that the grantee party has not negotiated in good faith because there have been no negotiations. As a general rule where a party has not negotiated at all, that party cannot be said to have negotiated in good faith. This would arise where a negotiation party has failed to contact, or attempt to contact, one or more of the other parties, including the native title party, or has failed to respond to communications from another party. However, when evaluating negotiations, the actions and responses of one party cannot be analysed in a vacuum. It is critical to such an evaluation to assess the actions of all of the parties and to consider the broader environment that the parties are working in.

[42] The grantee party does not contest that there were no negotiations with the first native title party but submits that this omission was not its fault.

[43] First, it is not contested that the grantee party did write to both the first and second native title parties on 30 January 2007 in response to the correspondence forwarded by the Department of Industry and Resources of 12 December 2006. At page 3 of the Department's letter the following address is provided for the first native title party:

> "*Mr Kevin Cosmos, Mr Robert Boone, Ms Valerie Holborrow*
> *For the Yaburara & Marduhunera People*
> *Australian Interaction Consultants*
> *OSBORNE PARK WA 6917*
> *PH: 08 9182 1038*
> *Fax: 08 9162 1570"*

[44] It is also not contested, that the first native title party did not respond to this letter (*SNTP 1* at para 3). The first native title party contended (*STNP* 1 at para 2) that it was unaware of the correspondence.

[45] The grantee party again wrote to the first native title party on 15 June 2008 requesting a meeting to negotiate the grant of the proposed tenement. The address used in this correspondence was the same as that outlined in [42]. It is not contested that the first native title party again did not respond to this letter.

[46] Ms. Janice Brettner deposed (at para 18 of her Affidavit) that on 28 April 2008 a "Notice of Appointment of Solicitors and Change of Address for Service" was filed at the Federal Court on behalf of the first native title party. Ms. Brettner also attached to her

Affidavit a copy of correspondence dated 20 June 2008 forwarded to Ms Bronwyn Hall of the grantee party by Bruce Havilah & Associates providing a copy of the "Notice of Change of Solicitor" and confirming that they acted for the first native title party.

[47] The grantee party has not disputed that this letter, with the attached Notice, was sent by the legal representatives of the first native title party. In short, approximately five days after the grantee party sent its second letter, it was forwarded correspondence alerting it to the correct postal address of the first native title party.

[48] In response the grantee party refers (*SGP* at para 9) to a mediation progress report provided by Member O'Dea to the Federal Court, dated 24 September 2008, in which Member O'Dea states on page 7 that the legal representative of the first native title party is "Australian Interaction Consultants". The grantee party also notes that the report disclosed that Mr Paul Marsh was listed (at page 5) as being the barrister representing the first native title party. This report was circulated to the grantee party by the Tribunal.

[49] The first native title party contests the relevance of the mediation progress report and submitted (*RNTP 1* at paras 6-7):

> *"6. The Mediation Report of the NNTT Member cannot have [sic] be relied upon by the Grantee Party as a source of address used in the letter of 15th June 2008 because that letter is about three months prior to the National Native Title Tribunal Mediation Report.*
>
> *7. Further, by their own reference, that mediation report refers to the name of the counsel representing the First Native Title Party in that mediation, but the Grantee Party does not claim to have any attempt to contact that counsel (nor in fact have they done so)."*

[50] The grantee party drew the attention of the Tribunal to the fact that the address used by it to send correspondence to the first native title party was also used by the former Department of Industry and Resources (*SGP* at para 10) and that the Department of Mines and Petroleum "Quick Appraisal" Report of 19 February 2009 stated that the address of the first native title party was "Messrs. Williams and Co Lawyers" etc. The first native title party conceded that this was the case, but submitted it was "*irrelevant except to show that the former Department of Industry and Resources failed to keep its address base up to date"* (*RNTP* at para 8).

[51] The reliance by the grantee party upon the documentation of both the Tribunal and the government party is not convincing. The mediation progress report did contain an outdated address, but it did correctly identify one of the legal representatives of the first native title

party. It has not been suggested that the grantee party actually relied upon the mediation progress report as an authoritative guide for obtaining addresses of parties, and no reasonable person could make such an assertion. Further, the report was submitted to the Federal Court approximately three months after the grantee party was notified of the correct address of the first native title party by its lawyers. As to the government party material, reliance can be placed on the incorrect address in the initial letter of 12 December 2006. No fault can be attributed to the grantee party for relying on the accuracy of the address outlined in that letter. Indeed, if the grantee party had not subsequently been alerted to a different address by the legal representative of the first native title party, it would have been in a strong position to assert it had negotiated in good faith. This aspect will be further elaborated on below.

[52] The grantee party also contests (*SGP* at para 13) the suggestion that the failure of the first native title party to respond to correspondence forwarded should have alerted it that there may have been a failure in communications. It was submitted that the first native title party had also not objected under either the *Mining Act 1978* (WA) or the *Native Title Act 1993* to the grant of General Purpose Lease G08/63 to the grantee party even though it totally overlaps the proposed tenement. In addition the grantee party highlights (*SGP* at para 15) that General Purpose Lease G08/63 is for the construction of infrastructure facilities connected with mining, and that, in effect, the likely impacts of the proposed tenement are trivial in comparison with the possible impacts of the General Purpose Lease (tailings dams, mineral storage facilities etc). The first native title party conceded (*RNTP 1* at para 12(a)) that it had not lodged an objection to the grant of G08/63.

[53] The first native title party contended that this submission should be rejected on a number of different bases. With respect to the assertion that there was a failure to object to the grant of the General Purpose Lease, the first native title party submitted (*RNTP1* at para 11):

(a) there is no evidence before the Tribunal that either the grantee party or any government departments sent any correspondence to the first native title party in respect of General Purpose Lease G08/63;

(b) there is no evidence that if such correspondence was sent, it was sent to the address for service upon which the grantee party relies; and

(c) the failure to respond is equally well explained by a failure in communication as by any other circumstance.

[54] Before dealing with the second response of the first native title party, it is necessary to point out that the Tribunal does not have sufficient evidence before it to form a considered judgment about the failure of the first native title party to object to the General Purpose Lease. Nonetheless there is evidence before the Tribunal that the government party wrote to the first native title party on 13 December 2007 notifying it of the application for G08/63. The address this notice was sent to was "Australian Interaction Consultants Unit 1, 211 Main Street, Osborne Park, WA 6017."

[55] The first native title party drew the attention of the Tribunal to paragraphs 8 and 9 of the Affidavit of Ms Brettner, which are set out below:

> "*8. During 2008 negotiations with Citec Pacific Mining Management Pty. Ltd. were conducted by the Corporation [referring to the Yaburara and Coastal Mardudhunera Aboriginal Corporation]*
>
> *9.Those negotiations related to the intention of Citec Pacific Mining Management Pty. Ltd. to carry out mining activities on mining leases held by Mineralogy Pty. Ltd. and involved matters requiring the agreement of Mineralogy Pty Ltd."*

The first native title party has also contended (*RNTP 1* at para 12(b)) that an agreement has been reached with Citec Pacific Mining Management Pty Ltd in relation to the General Purpose Lease. In conclusion, the first native title party contended (*RNTP 1* at para 13): "*the premise of the submission* [i.e. that of the grantee party] *fails because the failure of the First Native Title Party to object is explained by the negotiations mentioned above at 12(b).*"

[56] The material before the Tribunal dealing with the General Purpose Lease does not lend itself to the grantee party's contentions. The uncontested material before the Tribunal is that the first native title party has been negotiating about the grant of that tenement and an agreement of some type has been reached. In these circumstances the admitted "failure" of the first native title party to "object" to the grant of that tenement is readily explained by the consensual engagement by the first native title party and Citec Pacific Mining Management Pty Ltd in negotiations.

[57] It must be emphasised that the material submitted on this aspect of the inquiry is scant, and the Tribunal is not prepared to draw adverse inferences against the first native title party

when there is uncontested evidence that is supportive of the contentions it had lodged with the Tribunal.

[58] The first native title party made the following submissions (*RNTP 1* at para 16):

> *"16. The inferences to be drawn from the submissions made by the Grantee Party are as follows:*
>
> *(a) The Grantee Party regards its potential interference with the use and enjoyment of their lands by the First Native Title Party to be trivial.*
>
> *(b) The Grantee Party contends that accordingly its obligation to enter into good faith negotiations with the First Native Title Party are trivial and it may be inferred holds that belief itself.*
>
> *(c) The contentions of the Grantee Party reveal no serious effort to attempt to contact the First Native Title Party.*
>
> *(d) Receipt of the Notice of Change of Address for Service and appointment of solicitors which, being then relatively recent and current, plainly would have afforded a good opportunity to open communications with the First Native Title Party and should have alerted the Grantee Party to the possibility of recent mail not being passed to the new representative."*

[59] In *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 R D Nicholson J said (at 319): "*The requirement to 'negotiate' is to be understood in its ordinary and natural meaning. In its reasons the Tribunal, after citation of dictionary definitions, concluded negotiation 'involves communicating, having discussions or conferring with a view to reaching agreement'. That understanding is not in contention in this appeal."* As His Honour explains, a negotiation party must take positive steps to engage. Each of the actions outlined, namely communicating, discussing or conferring, connote an active and positive engagement.

[60] The indicia of lack of good faith negotiations set out in *Western Australia v Taylor* refer to both a failure to contact one or more of the other parties and a failure to follow up a lack of response from the other parties. Another factor is the failure to take reasonable steps to facilitate and engage in discussions between the parties. Of assistance in this respect is the analysis of what constitutes "negotiation" provided by Member Lane in *Western Australia v Dimer* (2000) 163 FLR 426 at 443-444. As she points out (at 443-444): "*communication between the parties is central to discharging that obligation."* After discussing the indicia she concludes (at 445): "*If the parties do not negotiate because they fail to communicate at all, it is impossible to conclude that they have negotiated in good faith."* I would agree with that proposition subject to one caveat. A failure to actually communicate is not an indication of lack of good faith if the party who is the subject of the allegation of bad faith has used their

best endeavours to engage. "Best endeavours" in this context is evaluated according to their capacity, resources and the environment they operate it. For example, in *Doxford v Barnes* (2008) 218 FLR 414 although substantive negotiations never eventuated, this was not the fault of the grantee party, a small miner who used his best endeavours in very difficult circumstances.

[61] In this matter there have been no negotiations about the doing of the future act. The grantee party contends that it has discharged its obligation to negotiate in good faith because it wrote to the first native title party on two occasions, and was never contacted. It also points out that when it wrote to the first native title party it relied on the address provided by the government party. This reliance was made in good faith, and there is no suggestion that the grantee party at the time it sent both letters had any other information.

[62] If this was all the material before the Tribunal a difficult evaluation would have been required. The question would have to be asked whether the grantee party should have made further inquiries of the first native title party. There is evidence, for example, of contact between the grantee party and the first native title party in the context of negotiations about other tenements. Should the grantee party have attempted to telephone the address for service of the first native title party? Should the grantee party have queried the government party about the address? Should other inquires have been made when no response was received? Should the absence of a response have alerted the grantee party that there had been a breakdown in communications? What would a reasonable person have done in the circumstances?

[63] On the balance, the grantee party would have satisfied the Tribunal that it had negotiated in good faith, and the first native title party not met the evidential burden of contending that the grantee party had not negotiated in good faith, if this was all the material before the Tribunal. The key problem that the grantee party faces is that there is uncontested evidence before the Tribunal that it was informed by Bruce Havilah & Associates by letter dated 20 June 2008 of the "Notice of Change of Solicitor". The first native title properly contended that this should have alerted the grantee party of how to establish communications with the first native title party.

[64] Although the grantee party in its Contentions has very comprehensively, and capably, responded to the Contentions of the first native title party, it provides no response to the

contention that it was sent a letter on 20 June 2008 enclosing a copy of the "Notice of Change of Solicitor" or any response that this put the grantee party on notice as to the correct address for contacting the first native title party.

[65] As previously explained, the obligation to negotiate in good faith is not an open-ended one. The Act does not require that the parties negotiate continuously until a request is made, pursuant to ss.35 and 75, for arbitration – *Western Australia/Champion & Ors/Resolute Ltd* [1998] NNTT 6 (Member Lane). Moreover, the Tribunal recognises that negotiations can go through various stages, and it may be that a party's conduct at some stages exhibits bad faith, but overall if that party has acted honestly and reasonably, the Tribunal may still find that the party has negotiated in good faith – see *Western Australia v Dimer* (2000) 163 FLR 426 at 446.

[66] When the grantee party was notified, only a very short time after sending its second letter, of the change in address, it was then obliged to make contact with the first native title party's new legal representative. The fact that the grantee party did not do so is fatal to its contention that it was negotiating in good faith. The grantee party's conduct throughout this matter could be described as brief and to the point. It did not go out of its way to make contact with the parties or to engage in negotiations that could be described as either complex or innovative. A grantee party is not required to do more than the law requires. It is not required to negotiate in a non-commercial manner. But it is required to act fairly and reasonably and with an open mind.

[67] The proposed tenement was initially notified by the government party on or about 4 March 1998 and included a statement that the expedited procedure was attracted (s. 32). The second native title party lodged an objection with the Tribunal against the inclusion of the statement (s. 32(3)) and on 28 October 1998, by consent, the Tribunal determined that the expedited procedure was not attracted (see also [5]). From the date of that determination, each of the negotiation parties was required to negotiate in good faith. However such negotiations were not initiated until 12 December 2006, and then by the government party. It was not until 20 November 2008 that a request for arbitration was made by the grantee party. In short it was almost nine years after this tenement was notified before any negotiations were commenced. Further, between 20 June 2008 and 20 November 2008, a period of five months, the grantee party was formally apprised of the address for service of the first native

title party, but apparently made no attempt to contact the legal representatives of the first native title party.

[68] The grantee party did not request Tribunal mediation assistance to negotiate with the first native title party. A request for mediation assistance (though not determinative) is ordinarily consistent with the obligation to negotiate in good faith – *Western Australia/Evans & Ors/Anaconda Nickel* [1999] NNTTA 203 per Member Sumner. There was Tribunal convened future act mediation with the second native title party, but the request for mediation assistance in that instance was made by the government party.

[69] The scenario thus presented is that apart from writing two letters the grantee party has done nothing to advance negotiations with the first native title party. Obviously the obligation to negotiate is not limited to the grantee party, and a similar obligation is imposed on all negotiation parties, including the native title party. However, the grantee party is the project proponent and it was the grantee party whom the government party requested in its letter of 12 December 2006 to make contact with the native title parties. The grantee party was provided with a copy of the government party's Negotiation Protocol which summarises the indicia of good faith negotiation set out previously. Furthermore, the grantee party is a substantial organisation with a long history of engaging in native title negotiations and litigation. The potential size and capacity of the grantee party is illustrated by this statement in its Contentions (*SGP* at para 43):

> "*The Grantee Party has negotiated with the State, and the State has ratified amendments to the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002, to amongst other things, provide a Fund with a total of $100,000,000.00 (one hundred million) of benefits and grants for, amongst other things, the support of indigenous communities in Western Australia."*

In short, the grantee party is not a small miner with financial and operational pressures which negatively impacted on its capacity to engage and negotiate – see *Western Australia v Dimer* at 446. It is an experienced and well financed organisation with a long track record of engagement with native title claimants. An organisation with this type of history and experience would know the best means of engaging with native title parties, and would know from its long experience what obligations are imposed on it by the operation of s.31.

[70] The material presented by both the first native title party and the grantee party to the Tribunal raises a further issue. It is clear that during the same time period the grantee party wrote to the first native title party about the proposed tenement, negotiations were proceeding

between the first native title party and Citec Pacific Mining Management Pty Ltd, a business associate of the grantee party. Further, there is also uncontested evidence that representatives of the grantee party attended an informal meeting of the Governing Committee of the Yaburara and Coastal Mardudhunera Aboriginal Corporation in July 2007 to discuss the grant of Miscellaneous Licences 08/22 and 08/23 (see *SGP* at para 16 and *RNTP* at paras 14 and 15). Present at that meeting were some of the registered native title claimants of the first native title party (see Affidavits of Robert Boona and Kevin Cosmos). Consequently there is evidence before the Tribunal that during the period 2007/2008 negotiations or discussions were proceeding with the first native title party involving either the grantee party or business associates of the grantee party about other tenements. Although I make no adverse finding against the grantee party, this state of affairs raises further questions as to why no negotiations occurred with the first native title party about the proposed tenement.

[71] I find that the grantee party has not negotiated in good faith with the first native title party.

Did the Grantee Party Negotiate in Good Faith With the Second Native Title Party?

[72] Although by finding that the grantee party has not negotiated in good faith with the first native title party has resulted in the Tribunal no longer having jurisdiction, it is desirable to deal with the jurisdictional challenge of the second native title party. This may assist the parties in their future dealings.

[73] There are some considerable differences between the status of negotiations between the grantee party and the second native title party and those with the first native title party.

[74] Unlike the negotiations with the first native title party, the uncontested material before the Tribunal is that the second native title party did receive the grantee party's letter of 30 January 2007 (Attachment 9 to the affidavit of Ms. Burnside). Moreover, on 24 January 2007 Ms. Baljeet Singh of the grantee party emailed Sunil Sivarajah on behalf of the second native title party requesting information on all outstanding issues involving the grantee party. On 25 January Sunil Sivarajah responded in the following terms after indicating that PNTS was not in a position to resend everything, and requested information on tenement numbers and a short summary of what information the grantee party had:

> "*PNTS has been trying (unsuccessfully) to get Mineralogy to meet with the Kuruma Marthudunera ("KM") working group for an extraordinarily long period of time. I hope that*

you can make this a real priority for Mineralogy. At present, the KM people are unaware about what Mineralogy is doing, and/or is planning to do, on their country. This is obviously quite distressing for them."

On the same day Mr. Vimal Sharma, the Managing Director of the grantee party responded as follows:

"I am sure you do not appreciate our long history of communication and working together with all the Claimant Groups in Pilbara having interest on the development that is taking place on our project site for the benefit of everyone of them and the larger community in Pilbara and the State of Western Australia.

For sure, Mineralogy has cooperated and will continue to cooperate with PNTS if PNTS can take the initiative to respond amicably to Mineralogy's requests, and give that respect to Clients it so represents to resolve any outstanding issues that they may have.

Your non-cooperation to our requests implies you only interested in paper trails, instead of getting down to work."

Sunil Sivarajah replied almost immediately as follows:

"I am aware of the history between Mineralogy and the traditional owners. Unfortunately, I have seen no evidence of any cooperation from Mineralogy.

Regarding my previous email, it is not possible for me to respond to such general requests for information. What I suggested in my last email, was that you properly list the relevant Mineralogy tenements, and then provide a brief outline of the information you have relating to these tenements. I believe this is reasonable, given the very general nature of your initial request.

I note that you have not responded to the important issue of meeting the KM working group. As stated in my last email this is a real priority. Can you please confirm whether Mineralogy will finally come and talk to the KM Working group?"

The final email was from Mr. Sharma on 29 January 2007 in the following terms:

"Your accusation on cooperation is totally baseless. I remind you to refrain from such type of remarks. I see it clearly the requests Ms Singh has made you have totally ignored and now wish to delve in unhealthy dialogues.

What is expected from PSNTS is your responsibility towards your clients as they are the objectors. We need to know exactly what their intentions are in relation to the meeting you so request, the areas and issues that we can respond to make it achieve a meaningful outcome.

For your information, the Mineralogy tenements are listed on the DOIR website.

Unless you take responsibility from PSNTS as facilitator for your clients and advise us the date, time and venue of the meeting, it will be difficult for us to confirm our attendance.

Your response we await per the above requested information. Could you please contact Ms Baljeet Singh and confirm."

The extended nature of the quotes from this email exchange is intended to give an appreciation of the tenor of discussions between the grantee party and the representatives of the second native title party. As is readily seen they are testy, somewhat aggressive and

indicative of a less than amicable working relationship. Ms. Sarah Burnside, a solicitor with the Yamatji Marlpa Aboriginal Corporation and its Pilbara service arm PNTS, deposed from her experience representing the second native title party that the relationship with the grantee party was "*poor"* (para 5). She made references to previous Tribunal determinations as well a decision of Warden Calder where the difficulties in the relationship between these parties were discussed. In particular she commented on the adequacy of heritage surveys conducted by Austeel Pty Ltd, a wholly owned subsidiary of the grantee party. Ms. Burnside's submissions about the adequacy of these surveys, from the viewpoint of the second native title party, are comprehensively analysed by Deputy President Sumner in *Hicks & Ors (Won-Goo-Tt-Oo and Lockyer & Ors (Kuruma Marthudunera)/Western Australia/Mineralogy Pty Ltd* [2008] NNTTA 3 at [94] – [112].

[75] There is a lengthy history of poor relations between the grantee party and the second native title party, some of which concerns the adequacy of the 2001 heritage survey and some the manner in which both parties have interacted since that time. In *Lockyer & Ors on behalf of the Kuruma Marthudunera People/Western Australia/Mineralogy Pty Ltd* [2006] NNTTA 133 I was presented with detailed affidavit evidence in an expedited procedure objection inquiry about this troubled relationship which was marked by poor communications and made a number of observations in reaching my determination – see [49]. In *Hicks* Deputy President Sumner made the following finding (at [95]):

> *"The second misleading aspect of Mr Sharma's evidence is his assertion that following the Cape Preston surveys the grantee was not contacted or made aware of any outstanding issues. The most generous interpretation of the evidence is that no issues were raised immediately after copies of the report were made available to the Kuruma Marthudunera native title party (presumably sometime after 2001 as they were not released until a Freedom of Information request for them had been made by PNTS). However, it has been clear to the grantee party since at least 2003 that the Kuruma Marthudunera native title party had concerns with the Cape Preston surveys."*

[76] The second native title party also specifically drew the attention of the Tribunal to the decision of Warden Calder in *Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants* [2008] WAMW 3. This decision concerned the application by the grantee party for General Purpose Lease 08/63, which was specifically referred to in the grantee party's contentions. Some of the issues and evidence submitted in this matter were also submitted to the Mining Warden. In particular, Warden Calder was presented with copious evidence and material concerning the adequacy, or otherwise, of the 2001 heritage survey.

[77] Warden Calder found (at [55]): "*Mr Sharma's evidence was generally not convincing and in many respects he is an unreliable witness."* This finding must be understood in the context of the findings that he made in relation to the *Aboriginal Heritage Act.* So far as is relevant Warden Calder found [135] – [137] and [141]:

> *"135 … Mineralogy, through, in particular, Mr Sharma, does not have, and has not in past had, a genuine desire to consult in an appropriate manner with the Kuruma Marthudunera People in respect of the cultural and environmental concerns of the latter….*
>
> *136. Mr Sharma has repeatedly said in his affidavits that Mineralogy will comply with all of its obligations under the NTA and AHA. In my opinion, in order to be able to comply with both of those Acts it is necessary and fundamental that the Applicant engage in a genuine and appropriate consultation process in respect of all matters that are or may be relevant to the implementation of both of those Acts. The evidence of the Objectors' witnesses makes it clear that it has not done so….*
>
> *137 …There has not been appropriate consultation in this case. There has not been on the part of Mineralogy a genuine desire or attempt to consult and negotiate with the Kuruma Marthudunera People as a whole or as a native title claimant group or with any of their duly appointed representatives…. My opinion is in part derived from what I considered to be the clearly expressed view of Mr Sharma that it is sufficient that Mineralogy do no more than give notices pursuant to s 18 of the Aboriginal Heritage Act. In broad terms, his evidence in general, including his repeated assertions that Mineralogy's project involves billions of tones of ore and billions of dollars, suggest to me that he, and therefore Mineralogy, considers that such commercial matters overwhelm and should be taken as overwhelming the legal rights of the Objectors as Native Title claimants, and overwhelming the provisions and purposes of the AHA and the legitimate concerns of the Objectors and their desires to protect and preserve their claimed interests in the ground applied for….*
>
> *141 All of that is to viewed in the context of what I consider to be the applicant's demonstrated attitude towards the Objectors of 'take it or leave it' in relation to proper consultation with the Objectors and the attitude that I perceive emerges from the affidavits of Mr Sharma, namely, that little more needs to be done in respect of the Objectors' concerns and in respect of Aboriginal sites that are or will become known to Mineralogy than to seek approval under s 18 of the Aboriginal Heritage Act. Such an approach ignores the fact that a proper survey conducted in the spirit of proper co-operation with the Objectors concerning Aboriginal cultural issues has not been undertaken and that s 18 of the Aboriginal Heritage Act is not designed or intended as a means of discovering the existence of relevant sites that must be preserved and protected."*

[78] I have quoted at some length the findings of Warden Calder as the type of evidence he received is not markedly dissimilar to what the Tribunal has before it. In particular, there is a close similarity between the concerns raised by the second native title party and the rebuttals of the grantee party. The Tribunal did not hear oral evidence and it is neither necessary nor appropriate for the Tribunal, on the basis of the evidence before it, to make findings about the adequacy of the 2001 heritage survey. While the Tribunal, in the context of this jurisdictional challenge, does not need to form a view about the adequacy of the survey, it is relevant that the second native title party regarded the survey as manifestly inadequate and had been seeking to engage with the grantee party about this matter for a number of years. Consequently, the evidence presented to the Tribunal and Warden Calder is of relevance in

assessing the adequacy of the negotiations undertaken by the parties, particularly the grantee party.

[79] It was not until the government party requested Tribunal mediation assistance on 11 March 2008 that any substantial negotiations occurred between the grantee party and second native title party with respect to the proposed tenement. Ms Burnside deposed (at para 20 of her Affidavit): "*I believe that no negotiation regarding the Licence took place in 2007."* As previously noted, the Tribunal convened mediation conferences on 23 May, 11 and 17 July and 23 September 2008. In addition, the grantee party attended a Working Group meeting of the second native title party on 4 July 2008.The Working Group comprises 22 people chosen by the second native title party to represent it in negotiations with mining companies (Affidavit of Ms Burnside at para 23).

[80] The Tribunal has been provided with somewhat different accounts of this meeting. The grantee party lodged an Affidavit of Mr. Vimal Sharma dated 8 July 2008. Mr. Sharma is the Managing Director of the grantee party. It should be noted that this Affidavit although dated "8 July 2008" was in fact sworn on 29 February 2009. Mr. Sharma deposed that he and Mr. Vashil Sharma met with members of the second native title party at Roebourne TAFE and made a Power Point presentation about the proposed tenement. According to Mr. Sharma he outlined the main purpose of the proposed tenement, and provided copies of the proposed work program, survey extract and maps. Mr. Sharma also deposed that he explained the proposed method of exploration and details of the work proposed to be carried out and outlined how, in his opinion, this would impact on registered native title rights and interests. He also discussed aboriginal heritage issues, including the 2001 heritage survey conducted by Austeel. Mr Sharma then deposed about the way in which his presentation proceeded:

> *"13. Sarah Burnside continuously interjected and continued to distract attention of the KM People from my presentation by her repeated verbal's about Warden Calder's view that he rejected DIA's acknowledgment of Mineralogy's responsible attitude towards heritage protection.*
>
> *14. In my view Warden Calder's contrary view as to DIA's on Mineralogy's responsible attitude towards heritage protection goes beyond saying that he completely isolated a responsible department of the Western Australia Government, namely DIA who has been given the full authority in relation to all Heritage matters for the past so many years. I can only infer that by rejecting DIA's support for Mineralogy and information I provided as Senior Key Executive of Mineralogy during cross-examination, this certainly puts a lot of doubt on the administrative duties of a Warden, not only for Mineralogy but for all those companies, including the government who are truly putting in all efforts and resources in the development of the Western Australia economy and for the betterment of its community are being dismissed as not true.*

15. I further advised KM People I have been with Mineralogy for over 10 years now and directly involved in all facets of development of Mineralogy Projects in Pilbara and I understand very truly the sensitive and protective nature of heritage issues. I also advised I had managed the 2001 Heritage Survey and fully understand the KM Peoples concerns.

16. During this negotiation, the following areas of KM People's interests were noted:

- *They have asked the 2001 Heritage Survey is not adequate and there are sites there that are not identified in this survey. Suggested re-do survey.*
- *Ms Kimberely asked a question on the relationship between CITIC, ARH and Mineralogy which I explained Mineralogy is both, the tenement holder and Proponent, and they (CITIC, ARH) are Co-proponents, all working together. Also, that under the agreement with Mineralogy, they only have right to mine iron ore and that Mineralogy has to obtain government approvals for them, working together.*
- *Ms Kimberely also asked about the money Mineralogy was getting and I explained to her and the KM People about the Foundation that has been proposed by Mineralogy Executive Chairman for the benefit of the Indigenous Community in Pilbara. The response from KM People were they need money now and not in future. Also, that they do no want to live in Roebourne, they want to go back to their area of domicile, but not live in Roebourne.*
- *I also advised how Mineralogy has been working hard for over 20 years now to induce investments for all these large projects currently being realized at Balmoral – Cape Preston from which the community of Pilbara will benefit now and in future."*

[81] The second native title party lodged the Affidavit of Ms Burnside which provides a detailed account of this meeting. So far as is relevant she deposed:

"29. From 11:45 am to 12:30 pm, the Grantee Party's representatives discussed the Licence with the KM Working Group and conducted a PowerPoint presentation. Copies of the presentation were not handed out to the Working Group and the Grantee Party's representatives did not provide large and detailed maps of the Licence area as requested.

30. It is my recollection that during the Grantee Party's presentation, several members of the KM Working Group made statements to the effect that further heritage surveys were required within the area of the Licence and that the group were concerned about possible applications under section 18 of the Aboriginal Heritage Act 1972 (WA) by the Grantee Party within the area of the Licence.

31. It is my recollection that members of the KM Working Group also expressed anxiety that the Grantee Party may unknowingly destroy or damage sites within the Licence due to the inadequacy of the Austeel Surveys…..

36. To the best of my knowledge and recollection, at no point n time during the Working Group meeting on 4 July 2008 did the representatives from the Grantee Party make any offers to the KM Working Group regarding the Licence, or respond in any meaningful way to suggestions, questions or concerns put forward by or on behalf of Working Group members. It is my recollection that Mr. Vimal Sharma instead stated that he was at the meeting to "hear' the Native Title Party's concerns.

37. The representatives said words to the effect that the Working Group's suggestions would need to be taken back to the Grantee Party's Board of Directors. To the best of my knowledge and belief, the Native Title Party has not received a response from the Board.

38. At the end of the meeting, Ms. Rosenfeld asked the Grantee Party's representatives to email her a copy of their PowerPoint presentation."

[82] On 11 July 2008 the grantee and second native title parties attended a Tribunal convened mediation conference. A copy of the outcomes of that conference, as prepared by

the Tribunal, was annexed to the affidavit of Ms. Burnside. So far as is relevant, the outcomes indicate that Ms. Burnside stated that there were two outstanding issues arising from the Working Group meeting. The first was the second native title party's assertion that the 2001 heritage survey was inadequate and that a further survey be conducted by heritage consultants chosen by the second native title party as not all sites were covered by the 2001 survey. The second was the request that a s.18 *Aboriginal Heritage Act 1972* (WA) clause be inserted in any agreement. In response Ms Singh of the grantee party advised that the 2001 heritage survey totally covered the proposed tenement, and proposed that a s.35 request for arbitration be made.

[83] The Tribunal convened two further mediation conferences, the next was convened on 17 July 2008 and the last on 23 September 2008. Outcomes of these conferences, prepared by the Tribunal, were annexed to the affidavit of Ms. Burnside. At the 17 July 2008 mediation Mr. Haseler requested Ms. Burnside to provide Mineralogy Pty Ltd with a draft heritage agreement. It was agreed it this document would be provided by 30 July 2008, and a response given by 14 August 2008. The draft agreement was not provided until 18 August 2008. Mr. Haseler emailed the Tribunal on 22 September 2008 in which he stated: "*I have been instructed that mineralogy will not be signing the draft agreement."* The minutes of the 23 September 2008 mediation conference, so far as is relevant, state:

> *"Ms Burnside inquired as to the possibility of going through and discussing issues Mineralogy may have with the draft heritage agreement.*
>
> *Mr Haseler reiterated that his instructions stated only that the company were not willing to sign the draft heritage agreement and on that basis were not willing to provide a counter offer."*

Later the outcomes state:

> "*Mr Haseler requested additional time to seek instructions from the chairperson (recently arrived in Australia) and to advise a definitive answer as to whether Mineralogy will provide a counter proposal to the KM People."*

A further mediation conference was planned for 20 October 2008, but on 13 October 2008 Mr Haseler emailed the Tribunal advising: "*Mineralogy considers that mediation process has run its course and has not been successful in progressing the application and now Mineralogy will be seeking a S. 35 Determination."* It would appear from the documentation before the Tribunal that no counter-offer was ever made by the grantee party.

[84] The evidence presented to the Tribunal demonstrates that:

(a) The grantee party did not initiate any substantive communications or negotiations with the second native title party for many years after the Tribunal determined (28 October 1998), by consent, that the expedited procedure was not attracted to the proposed tenement. An obligation to negotiate in good faith usually arises either once a s.29 notice is given and the native title parties are identifiable, once the assertion of the expedited procedure is withdrawn by the government party or, as in this case, once a determination is made by the Tribunal that the expedited procedure does not apply: *Coppin v Western Australia* (1999) 92 FCR 465 at 472/[21] per Carr J;

(b) Negotiations proper were initiated by the government party on 12 December 2006, and from that point onwards the grantee party made only bare minimum efforts to engage and communicate;

(c) Tribunal future act mediation was requested by the government party on 11 March 2008, when in its opinion "*negotiations had stalled"* and was terminated by the appointed Tribunal Member on 17 October 2008 on the basis of grantee party non-participation;

(d) The grantee party was not pro-active in organizing or requesting meetings;

(e) When the grantee party attended the Working Group meeting its representatives only gave a presentation and made no substantial effort to either engage with the representatives of the second native title party or negotiate with them. I will proceed on the basis that the representatives of the grantee party did not have the necessary authority to do more, however this is a beneficial interpretation of what transpired having regard to the fact that Mr. Sharma is the Managing Director;

(f) The grantee party adopted an unduly confrontational approach when communicating with the second native title party's representatives;

(g) The grantee party failed to make any counter-proposals to the requests of the second native title party, it adopted, to use the terminology of Warden Calder, a 'take it or leave it' strategy; and

(h) The grantee party, overall, made no serious attempt to reach an accord with the second native title party.

[85] The Act does not impose any obligation on the negotiation parties to reach agreement. The object of s.31 is to ensure that the negotiation parties have engaged in genuine negotiations. The overarching obligation is for the parties to engage as reasonable people would do in the circumstances.

[86] There was no obligation imposed on the grantee party to capitulate to the demands of the second native title party – per R D Nicholson *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 312. There was no obligation placed on the grantee party to agree to conduct a new heritage survey on the terms outlined at the Working Group meeting. However, there was an obligation imposed on the grantee party to go beyond merely outlining its position and hearing what the second native title party submitted. The grantee party was obliged to negotiate, namely "*communicating, having discussions or conferring with a view to reaching agreement"* per R D Nicholson J in *Strickland* at 312.

[87] Normally an indicium of good faith negotiating is some "*preparedness to shift position or compromise in order to reach agreement"* per R D Nicholson J in *Strickland* at 312. In this matter the grantee party never shifted it position. It maintained, depending on one's viewpoint, either a consistent or rigid position in its dealings with the second native title party. There may be some rare instances where such an approach may constitute good faith negotiating (see e.g. *Doxford v Barnes* (2008) 218 FLR 414), but this was not such an instance. The stated negotiation position of the grantee party was not so objectively fair and reasonable that a fair person would not have been prepared to at least considering shifting position once the second native title party had outlined its concerns.

[88] The grantee party is not an insubstantial operator. It is an experienced mining entity. It has long experience with negotiating with native title parties in Western Australia. Of even more significance, it was on notice that the second native title party had serious concerns with the 2001 heritage survey. The grantee party knew about these concerns as evidence was produced in two Tribunal expedited procedure objection inquiries, one delivered in October 2006 and the other in January 2008 (e.g. the affidavit of Mr Neil Finlay of 27 July 2006 which is set out at [60] of Deputy President Sumner's determination). The decision of Warden Calder was handed down on 29 May 2008, or some five weeks *before* the Working Group meeting in Roebourne. The grantee party was placed on notice of the concerns of the second native title party for a number of years.

[89] If a reasonable grantee party was placed in the position that Mineralogy Pty Ltd found itself by mid 2008, it would have, and should have, taken the prudent, responsible and reasonable course of actively engaging with the second native title party. The fact that negotiations up until that point of time had been cursory and less than amicable could have been rectified by the grantee party negotiating in a positive and open way. Positive and open engagement requires a flexible and realistic negotiation position. This does not equate with non-commercial negotiations or capitulating to the demands of the second native title party. The Act does not demand that a grantee party negotiate in a position of weakness. It may well have been that even if such an approach was adopted agreement would not have been reached.

[90] It should also be noted that the second native title party raised (*SNTP 2* at para 20) as suggested examples of bad faith negotiating the fact that maps were either not produced at the Working Group meeting or not all (this was rebutted by the grantee party *SGP* at para 25). It is unhelpful when assessing whether parties have negotiated in good faith to produce checklists of every small interaction in the course of negotiations, and then assess each of those interactions in a vacuum. The Tribunal does not place "ticks" and "crosses" in a checklist of actions and then calculate in a mechanistic manner whether a party has passed or failed the test of good faith negotiating. On the contrary, the Tribunal looks at the whole process of negotiating, recognizing that it assessing the actions of parties operating in often difficult circumstances. The Tribunal appreciates that it cannot attempt to evaluate conduct based on theoretical negotiating models, or best practice or what some people may regard as ideal. The task given to the Tribunal is to look a the *process* of negotiation and assess if the parties in question acted reasonably and fairly having regard to the facts before them, their resources, the external environment at the time and their past and present relations. Accordingly, some acts or omissions in the course of negotiations may be of assistance in evaluating conduct, but only in the broader context previously explained.

[91] To sum up, the grantee party has not fulfilled its requirement to negotiate in good faith with the second native title party. It has failed to do so because it adopted a rigid non-negotiable position based on a negotiating premise which itself failed to take account of the legitimate and long held concerns of the second native party concerning cultural heritage issues. The grantee party not only failed to initiate negotiations, but throughout the negotiation process simply 'went through the motions'. Whilst the Tribunal appreciates that,

having regard to the less than satisfactory previous relationship between the grantee and second native title parties it would have been difficult to positively negotiate, nonetheless the grantee party not only failed to engage positively, but, further, exhibited an aggressive approach which was doomed to fail. When the negotiations stalled and arbitration was requested the grantee party then suggested that it had negotiated in good faith. In reality there were never any real negotiations simply set piece meetings, almost none of which were initiated by the grantee party, where each party articulated its bargaining position without any real compromise or attempt at engagement. It cannot be said in these circumstances that there have been real negotiations. The fault lies not solely with the grantee party, but the task of the Tribunal is to assess whether the grantee party has met the standard required of good faith negotiations. The evidence conclusively demonstrates that it has not.

Decision

[92] The grantee party did not fulfill its obligation to negotiate in good faith as required by paragraph 31(1)(b) of the Native Title Act 1993 (Cth) and the Tribunal has no jurisdiction to conduct an inquiry and make a determination pursuant to s.38.

John Sosso
Deputy President
17 April 2009