Attachment F

National Native Title Tribunal

Guide to future act decisions made under the Right to Negotiate Scheme

Edited—Chapter 4 only

As at 21 October 2010

Compiled by Deputy President of the National Native Title Tribunal the Hon. C.J. Sumner with the assistance of the Legal Services unit.

Chapter 4 Negotiation in good faith

Old Act Provisions

'31. Normal negotiation procedure

Government party to negotiate

(1) Except where the notice includes a statement that the Government party considers the act attracts the expedited procedure, the Government party must:

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

(b) negotiate in good faith with the native title parties and the grantee parties with a view to obtaining the agreement 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.

Arbitral body to assist in negotiations

(2) 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.'

Section 35 of the old Act provided that any negotiation party may apply to the arbitral body (the Tribunal) for a determination if there is no agreement within four months (in the case of a licence to prospect or explore) or any other case within six months starting when the s 29 notice is given by the Government party.

New Act Provisions (operative as of 30 September 1998)

'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 a 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.'

36 Arbitral body determination to be made as soon as practicable

'Determination not to be made where failure to negotiate in good faith

(2) If any negotiation party satisfies the arbitral body that any other negotiation party (other than a native title party) did not negotiate in good faith as mentioned in paragraph 31(1)(b), the arbitral body must not make the determination on the application.

Note: It would be possible for a further application to be made under section 35. '

The new NTA differs from the old in that:

- the obligation to negotiate in good faith is imposed on all negotiation parties not just the Government party; and
- section 36(2) did not appear in the old NTA.

Technical amendments (operative from 1 September 2007)

Section 31 was amended by the insertion of ss 31(4):

'If the NNTT is the arbitral body, it must not use or disclose information to which it has had access only because it provided assistance under subsection (3) for any purpose other than:

(a) providing that assistance; or

(b) establishing whether a negotiation party has negotiated in good faith as mentioned in paragraph (1)(b);

without the prior consent of the person who provided the NNTT with the information.'

4.1 *Walley & Ors v Western Australia* [1996] 490 FCA 1; (1996) 67 FCR 366 (Federal Court, Carr J, 20 June 1996)

This case involved AD(JR) Act applications to the Federal Court from decisions of the Tribunal (in WF96/4, 8 March 1996) not to dismiss applications on the basis that the Government party had not fulfilled the obligation to negotiate in good faith imposed by s 31(1)(b). The court held:

- The Tribunal must be satisfied that it has jurisdiction to conduct an inquiry and make a determination (at 569) and the obligation imposed on the Government party by s 31(1)(b) to negotiate in good faith is a jurisdictional pre-condition to the making of a determination. If it has not been complied with the Tribunal should dismiss the application pursuant to s 148 on the basis that a prima facie case has not been made out.
- An agreement of the kind mentioned in s 31(1)(b) may be entered into and lodged with the Tribunal without there having been negotiation in good faith (at 570).

- In considering whether it has jurisdiction the Tribunal must consider whether the NTA has been complied with irrespective of whether the right to negotiate application has been accepted under s 77. Examples of a situation which would (at 571–572) preclude jurisdiction are:

  a. if a s 35 application was made before the expiry of six months from the date of the s 29 notice;

  b. if the government has not complied with the notice provisions in s 29;

  c. if the native title party had not become a registered native title claimant within the prescribed time; and

  d. failure to comply with s 31(1)(b) of the Native Title Act (at 575).

  The decision of Olney J sitting as a Deputy President of the Tribunal in *Associated Goldfields NL and A Koane Exploration NL*, NNTT 94/1, 6 February 1995 that there were no jurisdictional preconditions was disagreed with. In particular, the acceptance of a right to negotiate application by the Registrar does not thereby confer jurisdiction on the Tribunal to conduct an inquiry and make a determination.

- Where the question of negotiation in good faith is not in contention, the Tribunal may be prepared to accept that it has jurisdiction (at 572).
- Whether mediation by the Tribunal when requested under s 31(2) is also a jurisdictional pre-condition may depend on the relative importance of that requirement in the statutory scheme (at 575).
- The behaviour of the native title and grantee parties is relevant to determining whether the Government party has negotiated in good faith (at 576).

4.2 *Minister for Mines WA/Taylor (Njamal People)/Mullan*, NNTT WF96/4, [1996] NNTTA 34 (7 August 1996), Hon. C. J. Sumner (Reported—*Western Australia v Taylor* (1996) 134 FLR 211 (*Njamal*))

The Tribunal found that the Government party had not fulfilled the obligation under s 31(1)(b) to negotiate in good faith and the s 35 application was dismissed. The Tribunal gave consideration to the content of the obligation which is summarised in case note 4.3.

4.3 Summary of propositions from *Minister for Lands, State of Western Australia/Strickland (Maduwongga) & Ors*, NNTT WF97/4, [1997] NNTTA 31 (10 December 1997), Hon. C. J. Sumner (Reported—*Re Minister for Lands, State of Western Australia and Marjorie Strickland & Ors* (1997) 3 AILR 260) (Appealed – see para 4.7)

Based on the decisions of the Federal Court in *Walley v WA* (1996) 67 FCR 366; 137 ALR 561 (*Walley*) and of the Tribunal in *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211 (*Njamal*) the following propositions were enunciated by the Tribunal in this decision (at 7–12):

'(1) Negotiation is central to the future act process (*Walley* at 576). The Preamble to the Act states that every reasonable effort must be made to secure the agreement of the native title holders to future act acts of this kind through a special right to negotiate.

(2) Section 31 of the Act imposes the obligation to negotiate in good faith.

...

Sub-section 31(1) imposes on the Government party (and no other party) two clear obligations. The first, contained in s 31(1)(a), is to give the native title parties an opportunity to make submissions to it (either in writing or orally) regarding the act.

The second obligation, contained in s 31(1)(b), is to negotiate and to do so in good faith with both the native title parties and the grantee parties (if there are any) with a view to obtaining the agreement of the native title parties to the doing of the act with or without conditions.

Negotiation in good faith may be considered to have begun upon a communication from the Government party to the native title party and not only when there is a response to the Government party's initial approach (*Walley* at 576). Whether the opportunity to make submissions which must be given by the Government party to the native title party pursuant to s 31(1)(a) can be regarded as the commencement of negotiations will depend on the circumstances (*Njamal* at 246).

There is no legal obligation to negotiate in good faith after a s 35 application has been lodged although the parties may voluntarily continue to do so (*Njamal* at 216).

(3) The words 'negotiate in good faith' are not defined in the Act and must be given their normal meaning having regard to the statutory context and principles of statutory construction (*Njamal* at 218).

The following definitions are relevant:

"Negotiate"

New Shorter Oxford English Dictionary, 1993 ed. at 1900:

> ... communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; have a discussion or discussions with a view to some compromise or settlement

Macquarie Dictionary, 2nd ed. at 1192:

1. to treat with another or others, as in the preparation of a treaty, or in preliminaries to a business deal
2. to arrange for or bring about by discussion and settlement of terms

Negotiation involves communicating, having discussions or conferring with a view to reaching an agreement

"Good faith "

New Shorter Oxford English Dictionary, 1993 ed. at 908:

> honesty of intention; sincerity

Macquarie Dictionary, 2nd ed. at 754:

1. honesty of purpose or sincerity of declaration: to act in good faith
2. expectation of such qualities in others: to take a job in good faith

While subjective honesty of purpose or intention and sincerity are essential to good faith negotiations, they are not necessarily sufficient ingredients of them. It is necessary to consider whether what is done is reasonable in the circumstances. The Government party must make every reasonable effort to negotiate and reach agreement with the native title parties (*Njamal* at 225).

(4) The dictionary definitions of the word 'negotiate' include discussions or communications towards a compromise or an agreement. Section 31(1)(b) of the Act makes it clear that the negotiations must be 'with a view to obtaining the agreement of the native title parties to the doing of the act...' Some preparedness to shift position or compromise in order to achieve agreement appears to be an important part of good faith negotiations in its ordinary meaning. In *Asahi Diamond Industrial Australia Pty Limited v Automotive, Food Metals and Engineering Union* (1995) AILR 1165; 59 IR 385 the Full Bench of the Industrial Commission in considering the provision in the *Industrial Relations Act 1988* (Cth) which dealt with negotiations in good faith in the context of industrial collective bargaining said in relation to the meaning of the work "negotiate":

> 'An agreement is normally preceded by negotiations. Negotiation normally involves the making of concessions so as to achieve an agreement (at 172). '

(5) In *Public Sector Professional Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1994) 36 AILR 419, the Full Bench of the Industrial Commission in considering provisions in the *Industrial Relations Act 1988* (Cth) which dealt with negotiations in good faith in the context of industrial collective bargaining said:

> 'However, the determination of whether or not a negotiating party is "negotiating in good faith" may depend on the conduct of the party when considered as a whole. For example if a party is only participating in negotiations in a formal sense, but not bargaining as such then they may not be "negotiating in good faith". Negotiating in good faith would generally involve approaching negotiations with an open mind and a genuine desire to reach an agreement as opposed to simply adopting a rigid, predetermined position and not demonstrating any preparedness to shift (at 421). '

In *Njamal* (at 220–221 and 225) this proposition was accepted by the parties and the Tribunal as a reasonable guide to the meaning of negotiate in good faith in s 31(1)(b) of the Act.

This test gives recognition to the fact that each element of a party's negotiation behaviour alone may not indicate whether a party has negotiated in good faith. However, when the overall conduct of the party is examined it may be clear that the party has or has not negotiated in good faith. The relative weight of any individual element of conduct in that overall assessment depends upon the circumstances.

(6) What constitutes good faith negotiations depends on the legislative and factual context and must be considered in the unique circumstances of native title and future act negotiations which are required under the Act (*Njamal* at 222).

(7) Negotiation in good faith does not mean that the Government party has an obligation to capitulate or to accept the other side's position, or mean that a negotiated agreement must be reached between the parties (*Njamal* at 223).

(8) The Government party cannot refuse to enter into negotiations because it believes there is a matter which is fatal to another party's position (*Njamal* at 223).

(9) To determine whether the Government party has negotiated in good faith it is necessary to look at the conduct of the party as a whole. However, to aid in this process it is legitimate to look at certain indicia which may point to whether the obligation to negotiate in good faith has been fulfilled. Such a list cannot be prescriptive or exhaustive and the weight given to any item must depend upon the circumstances of the matter (*Njamal* at 224).

Using a common sense approach to the context and purpose of the right to negotiate provisions in the Act, the following may be useful indicia of whether the Government party has negotiated in good faith:

(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 the 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 organise 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 eg a refusal to incorporate statutory provisions into an agreement;

(xiii) shifting position just as agreement seems in sight;

(xiv) adopting a rigid non-negotiable position;

(xv) failure to make counter proposals;

(xvi) unilateral conduct which harms the negotiating process eg issuing inappropriate press releases;

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

(xviii) failure to do what a reasonable person would do in the circumstances (*Njamal* at 224–225).

(10) The Tribunal may take into account that while the obligation to negotiate in good faith is only imposed upon the Government party, much of the content of the negotiations and any agreement must involve the native title party and depending on the circumstances it may be that the Government party has little that it is able to offer in resolution of the dispute (*Njamal* at 225).

(11) If the native title party acts unreasonably then there may be a lesser standard on the Government party depending on the circumstances of the particular case (*Njamal* at 225). If the other parties refuse to negotiate then all that may be required of the Government party is that it check with the other parties periodically to see if anything has changed (*Njamal* at 250; *Walley* at 576).

(12) The Government party should actively participate in the negotiation process, including providing information in relation to the proposed act (*Njamal* at 48).

(13) Negotiation in good faith may require more than just facilitating discussions. In general it will involve the Government party actively participating in discussions. It may require the Government party to make proposals about things that it is prepared to do in order to achieve an agreement (*Njamal* at 250).

(14) The Tribunal should not set an unrealistic standard for what is required to satisfy the obligation to negotiate in good faith (*Njamal* at 251).

(15) The Tribunal must satisfy itself on the balance of probabilities that the Government party has negotiated in good faith. There is no legal or evidentiary onus on any party in that regard (*Njamal* at 225–226). '

The following is a summary of propositions additional to those derived from *Walley* and *Njamal* which were enunciated in NNTT WF97/4 (at 13–21):

1. 'With respect to propositions (10) and (13), the extent to which the Government party will have little to offer or be required to make substantive proposals will depend on the circumstances and will need to be worked out on a case by case basis over time. There is likely to be a significant difference in what is involved in the obligation to negotiate in good faith between a proposal for a prospecting or exploration licence; a mining lease to be used for further exploration (as the case in Njamal); a mining lease to be used for a known project; or a compulsory acquisition which could be for a large variety of purposes.'

2. 'Proposition (8) is a response to the Government party's submission in *Njamal* (at 223) that negotiation in good faith did not impose an obligation to disregard or ignore a matter which in its view was determinative or fatal to the 'other side'. The Tribunal rejected this submission in so far as it could be interpreted to mean that the Government party does not have to enter into negotiations because it believes there is an issue of fact or law which defeats the other party's case. Specifically, the Tribunal said that the Government party could not refuse to negotiate on the basis that, in its view, native title had been extinguished. Such an attitude would not be consistent with negotiations in good faith involving a willingness to compromise. It would be adopting a rigid predetermined position.

   However, the proposition does not mean that the Government party is obliged to disregard the strong points in its case. These could be deployed in arbitration and can legitimately influence the offers which the Government party is prepared to make in the negotiation phase. The arbitration process establishes the legal framework within which negotiations occur.'

3. The arbitral framework within which the negotiations occur is set out in ss 38 and 39 of the *Native Title Act* but parties may move out of this framework in negotiations (*Njamal* at 250–257) and s 33 which specifically sanctions agreement which include payment to native title parties worked out by reference to the amount of profits made, income derived or anything produced where they are prohibited as a condition of a determination (s 38(2)).

4. The Government party may not be negotiating in good faith if it adopts a position during negotiations which opposes a condition of the kind contemplated by s 33 where that condition has been agreed to by the grantee party (*Njamal* at 250–251).
5. Negotiations can permit parties to resolve issues taking account of mutual interests without necessarily being bound by what a court of law (or arbitral body) may be obliged to decide on the evidence presented and can accommodate interests which go beyond the strict legal rights of the parties. 'However, the Government party cannot be accused of lack of good faith in its negotiations if it uses as a reference point the matters which must be considered in the arbitral phase and the sort of conditions which the Tribunal can impose on any determination that the act can be done' (at 15).
6. 'The fact that the legal parameters within which the parties are working are relatively unknown can be taken into account in assessing whether the Government party has negotiated in good faith. What may to one party be an unreasonable position, may to another be a legitimate position on the relatively unknown state of the law and the facts (at 15).'
7. 'The Government party is entitled to consider the facts as they are known to it. If it has evidence that there are very few native title rights and interests, or no impacts on the way of life, culture and traditions which could be affected by the proposed act, then it is entitled to factor this into its negotiating position' (at 15).
8. Another indicium of good faith negotiations related to *Njamal* indicium (9)(viii) is ' "unreasonably failing to disclose facts or legal argument which the Government party intends to rely on in an arbitral inquiry". Where the Government party is in possession of information or has a view on the law which it intends to use in an arbitral inquiry then it would be consistent with good faith negotiations under the Act for the other parties to be informed of it. These factors may legitimately influence the Government party's negotiating position but if they do then the other parties are entitled to know about it. This is not normal private commercial litigation where tactical gamesmanship may be acceptable. There are public policy considerations which underpin the Act, of which good faith negotiations are an essential part, and support the early and frank disclosure of the Government party's position '(at 16).
9. Once it is conceded that the willingness to compromise or make concession is an ordinary part of a negotiation process, it follows that in order to decide whether there have been good faith negotiations the Tribunal is entitled to look at the substance as well as the procedural aspects of what has occurred. For example, it may be that the party has a strongly and sincerely held belief that it should not make any concessions in negotiations, yet on any objective analysis of the legal and factual issues involved such an attitude is unreasonable in the circumstances. It may be so unreasonable that what the party is doing is not even negotiating (at 19).

   The resolution of issues by discussion will not be encouraged if the Government party is able to make unrealistic substantive offers. The purpose of the Act will be enhanced if the obligation to negotiate in good faith imposed on the Government party involves taking both reasonable procedural steps and making reasonable substantive offers (at 20).

   The Tribunal rejected the Government party's submission that the obligation to behave 'reasonably' (proposition 9 (xviii) applied only to the procedural and not the substantive aspects of the negotiations) (at 16–21).

10. The Government party is required to make every reasonable effort to negotiate and to reach agreement with the native title parties. A reasonable effort to negotiate involves taking necessary procedural steps as well as making realistic substantive offers and concessions in the circumstances (at 21).

Propositions (9) and (10) were disputed by the Government party and the subject of contentions in the Federal Court appeal in *Strickland* (see para 4.7) and further consideration by the Federal Court in *Walley* (see para 4.16) and *Brownley* (see para 4.20).

The Tribunal found that the Government party had fulfilled the obligation imposed on it by s 31(1)(b).

4.4 *Northern Territory/Risk (Larrakia People/Quall (Danggalaba Clan)/Phillips Oil Company Australia*, NNTT DF97/1, [1998] NNTTA 1 (9 February 1998), Prof. D. Williamson QC (Appealed – see para 4.6)

This decision dealt with a number of jurisdictional issues (see also Chapter 6). On the question of good faith negotiations the Tribunal adopted the principles and propositions enunciated by the Tribunal in *Njamal*.

The Tribunal also held that the negotiations must necessarily be about the terms and conditions upon which the native title parties would be prepared to agree to the doing of the act (the compulsory acquisition of native title rights and interests) and there is no obligation to negotiate about terms and conditions of any agreement not to do the act (at 88).

4.5 *Western Australia/Walley (Ngoonooru Wadjari)/WMC*, NNTT WF97/5, [1998] NNTTA 4 (25 March 1998), Hon. C. J. Sumner

The Tribunal applied the propositions from WF96/4 (*Njamal*) and WF97/4 (*Strickland/ Maduwongga*) and concluded that the Government party had fulfilled its obligation to negotiate in good faith. The Tribunal also held:

1. As referral to the Tribunal for mediation is specifically provided for in the Act (s 31(1)(3) new Act) as an option for any negotiating party and enables negotiations to continue, it is difficult to envisage circumstances where referral would amount to evidence of a lack of good faith except where the parties had previously agreed not to refer (at 26).
2. The right to negotiate is about the proposed future act and the Government party's obligation only extends to negotiating about issues which are related to or connected with the doing of the act (at 42).
3. The Government party must make reasonable substantive proposals in the circumstances of the case (at 64).
4. A letter from the Government party inviting the native title party to make submissions (s 31(1)(a)) could be regarded as the commencement of negotiations even though it only contained proposals relating to the procedures the Government partly intended to follow in the negotiations and no substantive proposals (at 22–24). Statement of Carr J in *Walley* (at 576) on when negotiation in good faith begins considered. [Note: In *Walley v Western Australia*, 87 FCR 565 (at 572), the Federal Court (Carr J) held that on the evidence it was open to the Tribunal to find that a letter containing procedural proposals was an integral

part of negotiations and an essential prerequisite to attempting to obtain the agreement of the native title party.]

4.6 *Risk v Williamson and Others* [1998] 640 FCA; (1998) 87 FCR 202 (Federal Court, O'Loughlin J, 10 June 1998)

On an *AD(JR) Act* application from the Tribunal decision in DF97/1 (*Risk*) (9 February 1998) the Court (on the issue of good faith negotiations):

- agreed with Carr J in *Walley* that the obligation to negotiate in good faith was a jurisdictional pre-condition to the making of a s 35 application;
- upheld the Tribunal's decision that the Government party was not obliged to negotiate about alternative proposals which did not involve the doing of the act (FCR 222);
- considered that the absence of 'good faith' requires nothing less than actual knowledge of the Government party's negotiating team or those instructing the team, that it is the Government party's intention not to negotiate with a view to obtaining the agreement of the native title party (FCR 223); and
- commented that good faith negotiations are not required to involve matters which exceed the existing legal rights of the native title party (FCR 224).

4.7 *Strickland & Anor v Western Australia* [1998] 868 FCA; (1998) 85 FCR 303 (Federal Court, R. D. Nicholson J, 24 July 1998)

This case was an appeal by the native title party to the Federal Court against the Tribunal's decision in NNTT WF97/4 *Strickland (Maduwongga)*. The court upheld the Tribunal's decision. However, the court also upheld the Government party's contention that the Tribunal had erred in finding that negotiations in good faith required the Government party to make reasonable substantive offers. The Tribunal's propositions (1) to (15) were generally accepted by the parties. The court said in relation to the meaning of negotiation 'in good faith' that:

1. The words should be interpreted in accordance with their ordinary and natural meaning.
2. While the words have been considered in a variety of statutory and other contexts it is the context of the NTA in particular which is determinative.
3. Negotiation 'involves communicating, having discussions or conferring with a view to reaching an agreement' (FCR 318—319).
4. There is a requirement for subjective honesty of intention and sincerity. The Government party must negotiate with an honest and sincere intention of reaching an agreement.
5. Good faith may be judged objectively in the sense explained in *Royal Brunei Airlines Sdn Bld v Tan Kok Mining* [1995] 2AC 378 at 389 cited by Beaumont and Carr J in *International Alpaca Management Pty Ltd v Ensor* (1995) 133 ACR 561 at 596–597. While generally dishonesty involves conscious impropriety, the standard of what constitutes dishonesty is not subjective. In determining whether a person acted honestly, a court will look at what the person did or did not do, in the light of the circumstances known to the person at the time, and having regard to that person's personal attributes and the reason why he acted as he did.

Lack of objective good faith in this sense could be demonstrated if the Government party acts 'unreasonably' in the sense referred to in *Associated Principal Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223, 186. *Wednesbury* unreasonableness involves conduct which is so unreasonable that no reasonable person would have engaged in it (at 319).

6. It is not for the Tribunal to assess the reasonableness of offers made during negotiations. The test of negotiating in good faith is to be applied in accordance with a common understanding of the words encompassing the subjective and objective elements (in the sense described above) to the total conduct of the negotiations. Requiring reasonable substantive offers to be made adds a further and unnecessary level of complexity and application to the interpretation of the words of s 31(1)(b). It is not necessary to have to resort to any standard outside the words in the section itself (at 321).
7. The reference in the Preamble of the NTA to 'every reasonable effort' being made to 'secure the agreement of native title holders through a special right to negotiate' is no basis for reading down the express words of s 31(1)(b) itself.

The court also held that because there was an entitlement to lodge a s 35 application at the expiration of six months from the giving of the s 29 notice, the s 31(1)(b) obligation cannot be interpreted as an obligation to continue negotiations until some particular point in negotiations has been reached. The statutory right to lodge the s 35 application has the consequence that the act of lodgement cannot be relied upon to establish bad faith in the negotiating process (at FCA 322).

4.8 *Western Australia/Champion (Gubrun) & Ors/Resolute Ltd*, NNTT WF97/8, [1998] NNTTA 6 (27 July 1998), Ms P. Lane

Delay in the formal commencement of negotiations by the Government party writing to the native title party may not be of great significance if the negotiation period is extended by the Government party not making a s 35 application at the expiry of the statutory period (see also WF97/4 (*Strickland* (*Maduwongga*) at 25) (at 14 and 21).

The NTA does not require the Government party to negotiate continuously for the statutory periods referred to in s 35 (at 15).

The unwillingness of a native title party to participate in negotiations is a relevant factor (at 18). Carr J in *Walley* at 576 followed.

The fact that substantive negotiations were going on between the grantee and the native title party is relevant to whether the Government party has negotiated in good faith (at 23).

4.9 *Western Australia/Strickland (Maduwongga) & Ors/Crook*, NNTT WF98/5, [1998] NNTTA 7 (11 August 1998), Mr K. Wilson

The refusal of a native title party to negotiate unless certain pre-conditions are met (in this case the signing of a confidentiality agreement by the grantee party) is a relevant factor. A native title party cannot 'have it both ways' by acting in a way which precludes development of the negotiations and then claiming that the Government party have not negotiated in good faith (at 4–5).

4.10 *Western Australia/Thomas (Waljen) & Ors/Anaconda Nickel*, NNTT WF98/7, [1998] NNTTA 8 (4 September 1998), Hon. C. J. Sumner

In this case the Tribunal made a detailed analysis of the Federal Court decisions in *Risk* (O'Loughlin J, 10 June 1998) and *Strickland* (R. D. Nicholson J, 24 July 1998) and their impact on the indicia established in *Njamal* (at 7–22).

On the question of the reasonableness of the Government party's negotiating behaviour the Tribunal held (at 13–21):

- in determining whether the Government party has conducted itself with the genuine aim of reaching agreement it is not enough that the Government party believes (and believed) that it so conducted itself. The Government party's conduct must be considered in the light of circumstances then known to it, and its reasons for so acting;
- negotiation in good faith does not require the making of reasonable substantive offers unless the failure to do so demonstrates that the Government party had not made a genuine attempt to negotiate with a view to obtaining the agreement of the native title parties. Behaviour which was unreasonable in the *Wednesbury* sense may be an indication that the Government party had not so negotiated;
- that *Njamal* indicium (xviii) (i.e. what a reasonable person would do in the circumstances) remained relevant as one factor which may be considered in the totality of the government parties conduct; and
- the proposition in *Njamal* and applied in other matters that 'the Government party must make every reasonable effort to negotiate and reach agreement with the native title party' is no longer applicable.

The Tribunal also held that it is generally appropriate for one government department (the Department of Mines and Energy) to conduct the negotiations on behalf of the Government party. It is not necessary as a matter of standard practice for the negotiations to be conducted by Cabinet and relevant ministers, although this may be necessary in some cases.

The fact that Department Minerals and Energy negotiations need to obtain instructions on occasions from the Department of Premier and Cabinet does not mean they have no authority to negotiate. (See also WF97/5, 25 March 1998 at 35.)

The Tribunal found that the Government party had negotiated in good faith.

4.11 *Western Australia/Strickland (Maduwongga) & Ors/Glengarry Mining*, NNTT WF98/8, [1998] NNTTA 9 (21 September 1998), Hon. C. J. Sumner

The conduct of the native title party and grantee party is relevant to deciding whether the Government party has negotiated in good faith. A lesser standard may be required if the other parties behave unreasonably or in a manner not conducive to constructive negotiations. The refusal or failure of a native title party to attend negotiations or mediation meetings may be relevant (at 5–6).

Although:

- the Government party had not made any substantive proposals to the native title party; and
- a stalemate between the native title and grantee parties does not absolve the Government party of its obligation to negotiate in good faith by taking steps to see if issues between them can be resolved;

the problem in this case was the refusal or failure of the native title party to enter into discussions. The Tribunal's decision in WF98/5 (see para 4.9) was followed and the Tribunal found that the Government party had fulfilled its obligation to negotiate in good faith (at 11–13).

4.12 *Western Australia/Strickland (Maduwongga) & Ors/Plutonic*, NNTT WF98/9, [1998] NNTTA 12 (30 October 1998), Hon. C. J. Sumner

In circumstances where an interest in a mining tenement is 'sold' to another party after an application for mining lease has been made and s 29 given, it can be inferred that negotiations conducted by that party or the person eventually entitled to be registered as the mining tenement lessee are on behalf of the person who is nominally the grantee party (at 17).

4.13 *Western Australia/Strickland (Maduwongga) Brian and Dave Champion & Ors/WMC Resources Ltd*, NNTT WF97/7, [1998] NNTTA 13 (13 November 1998), Ms P. Lane

The fact that the ultimate decision making authority for the Government party is Cabinet does not mean that government officers do not have the necessary authority to engage in negotiations. The only way negotiations can proceed in any sensible practical fashion is through the nomination of officers.

4.14 *Western Australia/Thomas & Ors/Anaconda Nickel & Ors*, NNTT WF98/267, WF98/268, WF98/269, WF98/270, [1998] NNTTA 17 (17 December 1998), Hon. C. J. Sumner

The fact that a native title party has lodged a s 35 application in relation to mining tenements which are already the subject of s 35 applications by the grantee party does not mean that the native title party has waived the jurisdictional pre-condition (established by *Walley*) that the Government party must have negotiated in good faith (at 4).

The existence of agreements between some of the negotiation parties which have not yet been given to the Tribunal under s 34 (old Act) as agreements of the kind mentioned in s 31(1)(b) does not mean that the Tribunal can decide in a summary way that the jurisdictional pre-condition of negotiation in good faith has been complied with. The existence of such agreement is likely to be highly relevant but an examination of whether the jurisdictional pre-condition has been met is still required.

4.15 *Western Australia/Coppin (Njamal)/Valiant Consolidated*, NNTT WF98/11 & Ors, [1998] NNTTA 16 (17 December 1998), Hon. C. J. Sumner

The obligation to negotiate in good faith imposed on the Government party is a jurisdictional pre-condition even if the s 35 application is made by a native title party (at 7). Carr J in *Walley* (FCR at 378–9) followed.

4.16 *Walley v Western Australia* (1999) 87 FCR 565; ([1999] FCA 3, Carr J, 6 January 1999)

The Federal Court rejected an AD(JR) Act application to review the Tribunal's decision in WF97/5 (*Walley*, 25 March 1998 – see para 4.5):

- The court upheld the Tribunal's decision that the obligation to negotiate in good faith should be judged in the context of matters related to or connected with the doing of the future act. Parliament intended, as a general rule, that an arbitral determination should be made within four or six months of the application and that a wide-ranging enquiry at the start of the arbitral process would not contribute to satisfying the Parliamentary purposes reflected in s 36 of the Act (paras 14–16).
- The reference in the Preamble to 'every reasonable effort' to secure agreement should not be construed as requiring the Government party to make every reasonable effort to secure agreement or as applying a higher obligation on the Government party than that which is imposed by s 31(1), that is, to negotiate in good faith. 'Every reasonable effort' is an apt description of input from all parties involved (and the Tribunal) in the right to negotiate process (para 16).
- The approach of R. D. Nicholson J in *Strickland* ((1998) 85 FCR 303) (see para 4.7) to the reasonableness issue was endorsed with one 'slight reservation' (para 15). The reservation was that the Tribunal may in its overall assessment of the Government party's negotiating behaviour find it useful to consider whether any particular offer (or all offers) appears to be reasonable but is not obliged to do so. Depending on the circumstance the reasonableness or unreasonableness of proposals or offers may be relevant (para 15).
- The fact that the case law on future act determinations and conditions is undeveloped can be taken into account in assessing whether the Government party has negotiated in good faith (para 18).

4.17 *Graham & Ors/Western Australia*, NNTT WF98/275 and WF98/279, [1999] NNTTA 160 (20 May 1999), Hon. E. M. Franklyn QC

The making of a s 35 application seeking a determination that the future act may not be done so as to force the parties back to negotiations is an application for an improper purpose (at 7).

4.18 *Coppin v WA*, 164 ALR 270 [1999] FCA 931, Carr J, 8 July 1999

The Federal Court rejected an AD(JR) Act application made by the native title party to review the Tribunal's decision in WF98/11 (*Coppin*, 17 December 1998) (see para 4.15). The court held that the Tribunal lacks jurisdiction to hear or determine a s 35 application brought by any negotiation party if the jurisdictional pre-condition of the Government party negotiating in good faith is not met (*Walley v Western Australia* (1996) 67 FCR 366; 137 ALR 561; *Risk (on behalf of the Larrakia People) v Williamson* (1998) 155 ALR 393, applied).

The Government party's obligation to negotiate in good faith arises, at the latest, at the expiry of the notice period specified in s 29 (two months in the old Act) because at that time all the native title parties will have been identified. It may arise upon the giving of the s 29 notice with respect to those native title parties already identified (ALR at 277).

4.19 *State of Western Australia/Evans & Ors/Anaconda Nickel & Ors*, NNTT WF98/267 & Ors, [1999] NNTTA 203 (15 July 1999), Hon. C. J. Sumner

The Tribunal considered the comment of Carr J in *Walley* (see para 4.16) on the reasonableness issue and while noting the different approach to that taken by R. D. Nicholson J in *Strickland* (see para 4.7) found it was not necessary to resolve the issue in order to make a decision. At that time the Tribunal did not have the benefit of Lee J's decision in *Brownley* (see para 4.20):

- The fact that an individual native title party has signed a document agreeing to the doing of a future act does not remove as a matter of law, the need to establish the jurisdictional precondition in s 31(1)(b). As a matter of fact, the existence of such agreements is likely to be highly relevant (at 24). WF98/267 (17/12/98) (see para 4.14) followed.
- The obligation on the Government party under s 31(1)(a) to give the native title parties an opportunity to make submissions is a jurisdictional pre-condition to making a determination (at 33).
- Where, because of an administrative oversight the Government party fails to communicate with the native title parties, the obligations under either s 31(1)(a) or s 31(1)(b) have not been satisfied even when the Government party has been informed by the grantee party that an agreement (but not one of the kind mentioned in s 31(1)(b)) exists.
- The referral by the Government party of a matter to the Tribunal for mediation under s 31(2) (old Act) is ordinarily consistent with the obligation to negotiate in good faith. (See NNTT WF98/7 (4 September 1998) at 56–57) (see para 4.10). However, the fact of mediation by the Tribunal does not absolve the Government party of its obligation (at 44–45).
- The Tribunal discussed whether confidential documents and discussions in negotiations and mediations under s 31(2) (old Act) are admissible to determine whether the Government party has fulfilled its obligations under s 31(1)(b). The Tribunal was not called on to make a decision but expressed the view that it would be unrealistic and undesirable for the Tribunal to be prohibited from hearing what on the face of it, is relevant evidence from a Tribunal mediation. Before commencement, parties should clarify whether a mediation under s 31(1)(b) is confidential and without prejudice except in regard to the question of negotiation in good faith (at 45–46).

4.20 *Brownley v Western Australia* (1999) 95 FCR 152; [1999] FCA 1139, Lee J, 19 August 1999

The Federal Court dismissed an AD(JR) Act application to review the Tribunal's decision in WF98/7 (4 September 1998) (see para 4.10):

- With one exception Lee J accepted the Tribunal's analysis of the *Strickland* (R. D. Nicholson J) decision. The Tribunal was in error when it said that it was 'not permitted to consider the reasonableness of offers unless they were so unreasonable or contemptuous of the process that the Government party was not acting honestly or genuinely with a view to achieving agreement' (at 46). Lee J adopted the approach of Carr J in *Walley v Western Australia* (1998) 87 FCR 565 (6 January 1999) outlined above.
- The Government party and a native title party are not on equal terms and under s 31 and are not engaged in making a contract for purposes of trade and commerce. There is a moral duty on the Government party to properly engage in negotiations with a native title party (para 21, 22—*Delgamuuk v British Columbia* [1997] 3 SCR 1010 at 1123–1124, Lamer CJ referred to).
- Section 39 indicates the scope of matters in respect of which negotiations may be conducted (para 24).
- Whether the Government party has negotiated in good faith will be judged objectively, not by whether the Government party believes it has so acted. The standard of honest conduct is not set by subjective belief (at para 27).

  It is not necessary to show that the Government party's negotiating team had 'knowledge' that the Government party did not intend to negotiate in good faith. (*Risk* FCR at 413 not followed).
- The Government party may not be negotiating in good faith if it adopted a policy that it would not sanction an agreement between the native title and grantee parties for payment of the kind described in s 33 NTA (para 54).
- Delay in the conduct of negotiations may not mean that the Government party has failed in its obligation to negotiate in good faith if there have been negotiations for a reasonable period and the delay was not a tactic to exhaust the period referred to in s 35 without engaging in negotiations (para 61).

4.21 *Dempster & Ors/Western Australia/Bayside Abalone & Anor*, NNTT WF99/1, [1999] NNTTA 235 (27 August 1999), Hon. E. M. Franklyn QC

- There is no requirement in the NTA for negotiation in good faith to continue for a period of at least six months (at 7–9).
- The effect of those provisions (ss 30A, 31(1)(b), 36(2) of the new Act) is that the Tribunal is only prohibited from proceeding to a determination if a negotiation party satisfies it that either the state or grantee party did not negotiate in good faith. The negotiation party alleging failure to so negotiate must adduce evidence to that effect (at 4). The effect of s 36(2) is to cast the onus of establishing failure to negotiate in good faith on the person so alleging (at 21).

- In respect of a s 35 application lodged under the new Act (ie on or after 30 September 1998) the obligation to negotiate in good faith is imposed on all parties (not just the Government party). The Transitional Provisions do not provide for an exemption for negotiations commenced under the old Act and continued under the new Act (at 21).

4.22 *Placer (Granny Smith) & Anor/Western Australia/Harrington-Smith & Ors*, NNTT WF99/5, [1999] NNTTA 361 (21 December 1999), Hon. C. J. Sumner (Reported—*Placer (Granny Smith) Pty Ltd & Ors v Western Australia & Ors* (1999) 163 FLR 87)

- The Tribunal formulated the task in deciding whether negotiations in good faith had occurred as follows (note: dealing with s 31(1)(b) as amended by the new Act):

> 'On the assumption that it is normally the native title party that will assert that the other negotiation parties have not negotiated in good faith the position, in summary, is that the Tribunal must be satisfied that the government and grantee parties have negotiated in good faith with the native title parties with a view to obtaining the agreement of the native title parties to the granting of the mining leases with or without conditions. Negotiation involves 'communicating, having discussions or conferring with a view to reaching an agreement' (*Western Australia v Taylor* (1996) 134 FLR 211 at 219 (*Njamal*). 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 *Njamal* 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 other parties have fulfilled their obligation and may impose a lesser standard on them.'

Given that two judges of the Federal Court have ruled that an examination of the reasonableness of substantive offers made by the Government party is permissible, the Tribunal now follows their decisions rather than that of Nicholson J in *Strickland*.

- Section 36(2) does not require the Tribunal as an administrative body, to adopt the strict rules or burden of proof which are utilised by the courts. The principles of a commonsense approach to evidence in *McDonald v Director-General of Social Security* (1984) 1 FCR 354 and *Ward v Western Australia* (1996) 69 FCR 208 referred to. There is an 'evidential burden' on the party alleging lack of good faith negotiations which normally require it to produce evidence to support its contentions (at 6–9). NNTT WF99/1 followed (see para 4.21).
- In the absence of improper motives the taking of judicial review proceedings in the Federal Court contesting the decision of the Registrar to accept a claim for registration is not inconsistent with the obligation to negotiate in good faith (at 13).

- The negotiations must be conducted with persons who were native title parties at the time the negotiations were being conducted. The fact that an applicant in the native title claim group dies or is replaced does not mean that negotiations must recommence with the new applicant (at 15).

4.23 *WMC Resources Limited/Western Australia/Richard Guy Evans (Koara)*, NNTT WF00/1, [2000] NNTTA 259 (7 July 2000), Hon. C. J. Sumner

- As the native title party was unrepresented the Tribunal provided him with an opportunity to comply with the Tribunal's directions made under s 36(2) of the new Act by making an oral presentation at a preliminary conference. Although it could not be said that the native title party's oral submissions strictly complied with the directions, the Tribunal was not prepared to deal with the issue in a summary way, without giving him the opportunity to provide evidence and further submissions at a hearing. The government and grantee parties were directed to provide written contentions and documents in support of their position that they had negotiated in good faith. The Tribunal was not prepared to deal with the matter on the basis that the native title party had not satisfied an onus of proof and that there was no case to answer (at 3–4).
- An information meeting on the site of the tenement can be regarded as part of the negotiations required by s 31(1)(b) and a native title party cannot exclude it from the Tribunal's consideration by asserting that it is not to involve negotiations (at 8).
- Negotiations in good faith must have occurred before the s 35 application is made. Negotiations which occur after the application cannot be taken into account except in limited circumstances. In this case the fact that the grantee party was prepared, at the Tribunal's request, to have discussions with the native title party after the s 35 application had been lodged was evidence that they had acted in good faith in relation to the negotiations generally (at 9).

4.24 *Western Australia/Arthur Dimer & Ors (Ngadju People)/Barnes & Ors (Central East Goldfields People)/Equs limited*, NNTT WF99/10, [2000] NNTTA 290 (9 August 2000), Ms P. Lane (Reported — *Western Australia v Dimer & Ors* (2000) 163 FLR 426)

- The formulation of the content of the requirement to negotiate in good faith under the old Act remains relevant under the new Act. The passage from *Placer (Granny Smith)* (see para 4.22) was cited with approval from which the Tribunal concluded that each party must act both honestly and reasonably with a view to reaching agreement about whether the act can proceed. Whether this has occurred must be judged by what the parties say and do in the circumstances. The parties are not required to capitulate so as to reach agreement or otherwise act contrary to their interests (at 24–25).
- All parties are required to adhere to the same standard of negotiating behaviour, but what they do to satisfy the obligation must be judged by reference to the interests they seek to advance in the negotiations, the behaviour of the other negotiation parties, and the circumstances in which the negotiations take place (at 26).
- The Tribunal summarised the criteria formulated in *Njamal* (see case note 4.3) and its task in the following way (at 31–32):

If we look at those criteria in the light of the kinds of activity that might be undertaken in negotiation, they fall into a series of related, though not necessarily co-extensive obligations. Those obligations appear to me to involve the following:

a. an obligation to communicate with other parties within a reasonable time and a reciprocal obligation to respond to communication received within a reasonable time (*Njamal* (i),(iii),(iv),(v),(vii),(ix));

b. an obligation to make proposals to other parties with a view to achieving agreement and a reciprocal obligation on other parties to respond either by making counter-proposals or by way of comment or suggestion about the original proposal (*Njamal* (ii)(xv));

c. an expectation that a party will make inquiry of other parties if there is insufficient information available to make an informed choice about how to proceed in negotiations and an obligation on those other parties to provide relevant information within a reasonable time (*Njamal* (viii)); and

d. an obligation to seek from other parties appropriate commitments to the process of negotiation or in relation to the subject matter of negotiation and a reciprocal obligation to make either appropriate commitments to process, or appropriate concessions as the case may be (*Njamal* (vi),(x),(xi),(xii),(xiii),(xiv),(xvii)).

The final indicium in *Njamal* seems to express the overarching obligation imposed by s 31(1)(b) to act honestly and reasonably with a view to reaching an agreement on whether or not the act should go ahead.

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. The requirement of 'good faith' sets the standard for behaviour of the parties in carrying out the activities involved in negotiation. It may be that parties participate reluctantly in the process. However, the statute requires their participation, and the Tribunal must have regard to their conduct viewed as a whole.

This analysis recognises that in applying a standard to the performance of negotiation activities, parties will be affected by a variety of external circumstances constraining their ability to act freely in the negotiation. This must necessarily have a bearing on whether what they do is reasonable in the circumstances.

The Tribunal may take into account in determining whether the appropriate standard has been reached the constraints on government to manage the statutory regime for granting mining tenements in the public interest. It may have regard to the individual circumstances of the native title party or grantee party. It is legitimate to take into account resource constraints upon native title parties and representative bodies in determining whether activity, or lack of activity, is reasonable in the circumstances. The Tribunal may also have regard to financial and operational pressures upon the grantee party. However, even allowing for those differing kinds of external constraints, it is nevertheless necessary that each party participate in the negotiation process to the best of their ability in the circumstances.

To determine whether the grantee party and native title parties have negotiated to the required standard, the conduct of each party must be examined in the light of the actual circumstances in each case. It is unrealistic to apply a standard based on an artificial or hypothetical negotiation model, because to do so would suggest that a party need only

follow mechanically a series of steps in order to be in a position to invoke the Tribunal's jurisdiction. This is why decisions of the Tribunal such as *Evans /Western Australia /Anaconda Nickel* NNTT WF98/267 (Hon. C. J. Sumner 15 July 1999 at pp 44–45) emphasise that the fact that parties participate in mediation does not conclusively demonstrate negotiation in good faith.

The fact that at some stages of the negotiation, parties may not have demonstrated good faith negotiation behaviour does not prevent a finding that negotiation in good faith has taken place if, overall, the conduct of the parties shows that they have acted honestly and reasonably. So, for instance, the grantee party may be excused from behaving in an objectively reasonable fashion if faced with unreasonable conduct from the native title party.

- Conduct of the parties after the lodgement of the s 35 application may be relevant to whether a particular party has negotiated in good faith (at 36–38).
- The Tribunal dismissed the application on the basis that the grantee party had not negotiated in good faith. Although acting with subjective honest intent it did not conduct itself reasonably in the circumstances. The grantee party's main objective was to participate in the process so as to enable it to invoke the jurisdiction of the Tribunal after the six months time period had elapsed. It did not engage with the substance of the negotiations (at 42–43).

4.25 *Normandy Pajingo Pty Ltd/Queensland/Colin McLennan & Ors (Birri) and James Reid & Ors (Kudjala)*, NNTT QF00/2, [2000] NNTTA 327 (29 September 2000), Hon. C. J. Sumner

The obligation to negotiate in good faith is in relation to matters related to the doing of the future act and s 39 of the NTA indicates the scope of matters about which negotiations may occur.

The failure of a native title party to make a submission under s 31(1)(a) of the NTA about the effect of the future act on their interests is relevant to whether the Government party has negotiated in good faith (at p. 16, para 13).

4.26 *South Blackwater Coal Ltd/Queensland/Cliff Kina & Ors (Kangoulu People) and Lindsay Kemp (Ghungalu People)*, NNTT QF00/3, [2001] NNTTA 23 (27 March 2001), Hon. C. J. Sumner (Reported—*South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232)

- There is no obligation to negotiate in good faith after a s 35 application has been lodged but the parties may voluntarily do so (at 7–11 [7]–[12]).
- A grantee party is required to negotiate in good faith about proposals relating to the payments specified in s 33(1) of the NTA (ie. payments worked out by reference to profits, income or things produced). A grantee party must receive and consider a proposal from a native title party in a way which has regard to the particular facts of the case and the merit of the proposal in all the circumstances but is under no obligation to reach agreement (at 24–28 [30]–[38]) *Brownley v Western Australia* [1999] FCA 1139, (1999) 95 FCR 152 at 168–170 [50–57] followed. *Risk v Williamson* (1998) 87 FCR 202 referred to.

4.27 *Western Australia/West Australian Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Hayes*, NNTT WF00/7, [2001] NNTTA 18 (9 March 2001), Hon. C. J. Sumner

This determination considered whether a grantee party had negotiated in good faith as required by s 31 of the Act. The Tribunal found that s 36(2) of the Act places an evidential burden on a party alleging lack of good faith negotiations which would normally require that party to produce evidence to support the allegations. The principles relevant to establishing good faith negotiations enunciated under the Act prior to its 1998 amendments were still relevant and are summarised in *Placer (Granny Smith)/Western Australia/Harrington-Smith* NNTT WF99/5, Hon C J Sumner, 21 December 1999 at [9].

The native title party contended the grantee party was engaged in a facade of negotiations and failed to act in accordance with the *Njamal* indicia of negotiating in good faith (see case note 4.3). A grantee party must consider a proposal but was not obliged to reach agreement, rather the grantee party must give genuine consideration to a proposal put forward by the native title party. Further, the scope of the good faith negotiations obligation did not require the grantee party or Government party to negotiate about matters not related to or connected to the doing of the future act [18]. The Tribunal held that the grantee party did genuinely wish to arrive at an agreement and conducted negotiations in good faith, and to that end made a substantial commitment to the process of negotiation [47].

The Tribunal commented that the hearing of this challenge to the jurisdictional pre-condition involved considerable time and expense as had been foreshadowed in *Walley & Ors v Western Australia* (1996) 137 ALR 561, 67 FCR 336 at 378. In future, the Tribunal will, if appropriate, deal with proceedings for good faith hearings on the papers. Prior to the hearing the parties will be required to:

- make submissions on whether the Tribunal should hear the matter on the papers;
- identify the facts which are in dispute and outline how a finding on these issues will be critical to the Tribunal's decision; and
- attempt to clarify any facts in dispute by consultation or correspondence.

4.28 *Western Australia/David Daniel & Ors*, NNTT WF02/17 and 18, [2002] NNTTA 230 (12 November 2002), Hon C J Sumner (Reported – *Western Australia v Daniel* (2002) 172 FLR 168)

The Wong-goo-tt-oo People, one of the three native title parties contended that the Government party had not complied with the s 31(1) (b) *Native Title Act 1993* (Cth) requirement of good faith negotiations. The Tribunal considered whether to combine the good faith hearing with the substantive hearing. It was decided that to involve all three native title parties in a full hearing that may decide the Tribunal has no jurisdiction, would be a waste of resources.

The Tribunal reviewed the legal principles on good faith negotiations both under the old NTA and recent decisions of the Federal Court [34]–[40].

Confidential and without prejudice negotiations evidence

The Tribunal rejected the contention that it could not refer to confidential and without prejudice documents in making its decision. The Tribunal referred to the Tribunal's *Procedures Under the Right to Negotiate Scheme* (issued 10 September 2002), paragraphs 4.6.1 and 4.6.2 which provide that the without prejudice nature of negotiations is subject to the requirements of a s 35 determination inquiry to decide if a government or grantee party have negotiated in good faith [33].

Government party's negotiating position

The Government party's negotiating position of economic benefits for the state was noted [42]. It was also noted that the Government party's position was that native title has been extinguished over the area. The Wong-goo-tt-oo native title party contended the Government party's assessment that they are part of one of the larger native title parties, and their assessment of the likely outcome of the Federal Court proceedings, were irrelevant factors in considering making offers to the three native title parties. The Tribunal expressed the view that these complaints indicated a misunderstanding of the good faith negotiation obligation [46]. The Government party was entitled to assess the strength of the different claims and their views can legitimately influence offers made.

Separate negotiations

The Tribunal summarised the negotiations and found there had been substantial communications, discussions and conferences between the parties with a view to reaching an agreement [67]–[69]. The Wong-goo-tt-oo native title party contended they had a right to negotiate with the Government party separately. The Tribunal accepted the s 31(1)(b) obligation is to negotiate with 'each' native title party [71]. On the evidence before the Tribunal, it found the Government party did negotiate separately with the Wong-goo-tt-oo native title party, however the final Government party negotiating position was for a collective agreement involving all three native title parties [75].

Seeking agreement before the Federal Court determination of native title

The Tribunal held it is contrary to the intention of the NTA to hold up future act negotiations and arbitrations pending a final determination of native title. Right to negotiate procedures should be conducted as far as possible in a timely manner [96]–[98]. Unless there are exceptional circumstances, the Tribunal should fulfil its statutory responsibilities to make a determination within the times set by parliament without awaiting the conclusion of Federal Court proceedings [98].

Parliamentary privilege

The native title party submitted that the Tribunal ought to receive and have regard to the Deputy Premier's statement to the Parliamentary Estimates Committee criticising the Wong-goo-tt-oo native title party's legal representatives. In response, the Government party asserted parliamentary privilege protected the statements from being put into evidence and the Deputy Premier could not be called to give evidence or be cross-examined [123]. The Tribunal reviewed the principle of parliamentary privilege and noted the rationale of the principle is that a member of parliament ought to be able to speak in parliament with impunity and without any fear of consequences (*Sankey v Whitlam* (1978) 142 CLR 1 at 35; *Prebble v Television New Zealand Ltd* (1995) 1 AC 321 at 324). The Tribunal held that the Deputy Premier could not be compelled to appear before the Tribunal to answer questions about what he said in parliament [125]. The

statement could be received into evidence but it is not permissible for the Tribunal to draw inferences from the statement. Even if the Tribunal could draw an inference, it was an isolated statement, and together with the other incident, it did not point to a concerted effort to undermine the native title party's legal representative [123]–[126].

Confidentiality

The native title party contended the Government party breached the confidentiality of the negotiations about the MOU by giving certain information to the Shire of Roebourne. The Government party's explanation was that the release of general principles of the proposed grant of freehold was given for the purpose of informing officers of the shire to assist their understanding of one aspect of the negotiations [127]. The Tribunal was satisfied that the breach of confidentiality was technical and unlikely to have had an adverse effect on the negotiations.

A second breach of confidentiality occurred when details of the Memorandum of Understanding (MOU) were leaked to the media. The Tribunal made no finding about who was responsible for the breach of confidentiality.

Inadequate resources/inequality of bargaining position

The native title party contended that the Government party failed to ensure that the native title party was adequately resourced and that resulted in a fundamental inequality of bargaining position. The definition of negotiation (s 31(1)) did not suggest that one party is obliged to fund one of the others and s 31(2) did not extend beyond negotiation about the effect of the future act on registered native title rights and interests [146]. The Tribunal found that the Government party had contributed funding to the native title party's legal costs and regarded this as an indication of good faith [152].

In response to the other contentions of bad faith negotiations the Tribunal found:

- Adopting a negotiating position did not demonstrate a lack of good faith, unless it could be demonstrated there were improper motives or a position so unreasonable as to indicate a lack of sincerity in the desire to reach agreement [47].
- Given that native title had not been established, that there were three overlapping claimant groups, that the Government party did not accept that native title exists and that the proposed MOU offered substantial benefits to all native title parties, it was impossible to conclude that the Government party's negotiating position exhibited bad faith [75].
- The Government party's failure to accept the native title party as the traditional owners did not demonstrate a lack of good faith [76].
- The delays in the various stages of negotiations did not indicate unreasonableness in the Government party's dealings with the native title party [77]–[82].
- On the facts that were accepted, the native title party was given opportunities to comment or scope to negotiate about the MOU [83]–[88].
- The Government party's timetable for negotiations, alleged to be strict with onerous and unnecessary deadlines, was not unreasonable given the history of the negotiations [94].
- The act of making a s 35 application or referring to an intention to make a s 35 application, once the statutory period has passed, cannot be relied upon to demonstrate a lack of good faith (*Strickland v Western Australia* (1998) 85 FCR 302 at 322) [95].

- The Government party's conduct in taking a lead role in the negotiations, on behalf of the proponents, over the whole area, including areas for which there were specific proposals, did not exhibit bad faith [102].
- The significant changes between earlier proposals and the MOU must be considered in the context of the history of negotiations. The circumstances of the development of the MOU and the changed offers it contained, did not exhibit a lack of good faith [103]–[114].
- The content of informal discussions about the MOU between the Government party's chief negotiator and a member of the Wong-goo-tt-oo native title party was a lapse in the ideal negotiating behaviour expected of a Government party [119]. As it was an isolated incident and not a consistent pattern of behaviour, the behaviour did not weaken the other evidence that the Government party negotiated in good faith [121]. An isolated incident denigrating the Wong-goo-tt-oo native title party's legal representatives was also found not to be a pattern of behaviour [122].
- There were no grounds for finding that the Government party did not engage in genuine discussions about matters described in s 33 NTA [136]–[138].
- Inclusion in the MOU of land that is covered by s 24MD (6B) and not by the right to negotiate provisions was not, in the circumstances, indicative of a lack of good faith [140]–[143].
- It was not incumbent on the government to provide the Wong-goo-tt-oo native title party with relevant information on the industries to be established on the industrial estate given the future act was a compulsory acquisition of all native title rights and interests (*Risk v Williamson* (1998) 87 FCR 202) [145].

The Tribunal determined that the Government party had fulfilled its s 31(1) (b) obligations and that it had jurisdiction to conduct an inquiry and make a determination.

4.29 *Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo)*, NNTT WF02/17, WF02/18 and WF02/27, [2003] NNTTA 4 (21 January 2003) the Hon. C. J. Sumner

The Tribunal decided that the member who had heard and determined the issue of whether the Government party had negotiated in good faith was not thereby disqualified from considering the substantive inquiry [19]–[23].

4.30 *Strategic Minerals Corporation NL/Allan Kynuna on behalf of the Woolgar Group/Queensland*, NNTT QF 03/1, [2003] NNTTA 83 (9 July 2003) the Hon. C.J. Sumner

The native title party asserted that the grantee party had not been honest or reasonable in s 31(1)(b) negotiations and negotiated with the intention to induce the native title party to accept its offer by deceit. Dishonest or deceitful conduct, if established, would amount to bad faith in that the grantee party would not have conducted itself in an open and honest way during the negotiations as required [39]. Where an allegation of this kind is made, the onus of establishing it normally rests with the party making the allegation [7], [40]. It was noted that, while when considering an allegation of dishonesty, the standard of proof is the civil standard (i.e. on the

balance of probabilities), the Tribunal must be conscious of the gravity of the allegations in making its findings (*Briginshaw v Briginshaw* (1998) 60 CLR 336 per Dixon J at 362; *Neat Holdings v Karajan Holdings & Others* (1992) 110 ALR 449 at 449–450, 451.

The Tribunal found that, if the information provided by the grantee party is insufficient to assess any impact on native title rights and interests, then this may impact on whether negotiations in good faith can occur. However, every case must be considered on its merits. The Tribunal noted that:

- It is 'desirable and indicative of good faith in negotiations' for a grantee party to keep a native title party up to date on relevant developments during the course of the negotiations and to disclose any relevant new information to the native title party, such as the company's annual reports or reports to the Australian Stock Exchange
- A failure to disclose relevant information or documents may amount to a failure to negotiate in good faith. For example, deliberately or inadvertently failing to disclose information that is in the sole possession of the grantee may provide such an indication
- Where the relevant information is publicly available, it is not unreasonable to expect representatives acting for the native title parties to search for that information [178]–[182].

4.31 *Townson Holdings Pty Ltd & Anor/Ron Harrington-Smith & Ors on behalf of the Wongatha People and June Ashwin & Ors on behalf of the Wutha People/Western Australia*, NNTT WF03/2, [2003] NNTTA 82 (9 July 2003) the Hon. C.J. Sumner

The Wongatha native title party raised the issue of the lack of good faith at the outset but despite directions to do so did not file any contentions or evidence in relation to it. The matter proceeded on to the substantive issue where ultimately a lack of good faith was alleged [7]–[10]. The grantee party objected to further delay in resolving the matter and the Government party submitted the lateness of the jurisdictional issue raises the question of whether the opportunity for raising the jurisdictional issue ever ends [11]. The Tribunal expressed the view it was unsatisfactory to raise good faith at this late stage with no adequate reason to explain the delay [12]. The Tribunal found the situation was novel and referred to the Tribunal's obligations as discussed in *Anaconda Nickel Ltd & Ors v Western Australia* (2000) 165 FLR 116 at (21–69) [14]. The Tribunal held that despite the inconvenience of the late challenge, normally the Tribunal will have no alternative but to consider and resolve a challenge to good faith whenever it is made. A possible qualification may be where irreversible prejudice has been caused to another party by the failure to challenge at the outset or in accordance with the Tribunal's directions [15]. In this instance the Tribunal dealt with the jurisdictional and substantive question together.

In holding that the grantee had fulfilled its s 31(1)(b) obligations and the Tribunal had jurisdiction to conduct an inquiry and determine the application the Tribunal considered the following matters:

- An offer of compensation based on disturbance to land and not on the value of gold extracted, while not a common way of providing compensation as part of a negotiated agreement, did not indicate a failure to negotiate in good faith. The Tribunal explained that court determined compensation for impairment of native title rights and interests is based on the similar compensable interest test (ss 24MD(3)(b), 51(3), 240 NTA) which has as its basis the compensation payable to owners who hold ordinary title. Under s 123 of the

Mining Act ordinary owners or occupiers are not entitled to compensation based on the value of ore produced [29]–[60].

- The grantee party's proposal to make payment of compensation into trust did not indicate a failure to negotiate in good faith as this is consistent with s 41(3) and s 52 of the NTA. There is no requirement mandating upfront payments. Even if found to be common industry practice it is difficult to see that offers of upfront payments could be a requirement of negotiation in good faith for particular grantee parties [58].
- The grantee party initially proposed a regional agreement dealing with future acts not the subject of the proceedings (including future mining leases) but later compromised on this issue. The Tribunal noted that there would be a serious question about good faith if the grantee party had insisted on a regional agreement when negotiating about particular future acts [56]. The Tribunal also found that the grantee party was not obliged to consider the Goldfield Land and Sea Council's proposal for a separate document dealing with the regional aspect of an agreement covering prospecting and exploration when the substance of that agreement was already included in amendments to the grantee party's original agreement [61]–[63].
- With respect to the alleged failure to consider or provide comment on a draft Goldfields Land and Sea Council agreement the Tribunal found that the grantee party's heritage agreement contained similar clauses about which negotiations had already commenced with other native title parties. The Tribunal found it was reasonable for discussions to continue on that basis and there was no substance in the contentions about which document should have been used in negotiations [49]–[52].
- The grantee party's refusal to negotiate on 'issues already dealt with' was not unreasonable as he believed the issues had been dealt with, even though agreement on those issues had not been reached [64]–[66].
- The grantee party's refusal to execute the grantee party's agreement when the native title party agreed to do so after the s 35 application was made [67]–[71]. The Tribunal referred to earlier Tribunal decisions and held that conduct subsequent to the making of a s 35 application may be relevant in corroborating either good faith or the lack of it prior to the application being made. The Tribunal found that the grantee party's refusal was justified as the agreement which the native title party offered to sign was not the same as that proposed by the grantee party prior to the s 35 application and which it had advised it was still prepared to execute.

4.32 *Mt Gingee Munjie Resources Pty Ltd/Victoria/Graham (Bootsie) Thorp and Ors on behalf of the Gunai/Kurnai People*, NNTT VF03/1, [2003] NNTTA 125 (22 December 2003) the Hon. C.J. Sumner (Reported – *Mt Gingee Munjie v Victoria and Others* (2003) 182 FLR 375)

The native title claim group in this matter split into two factions, the Gunai and Kurnai factions. The Kurnai faction alleged the government and grantee party had not negotiated in good faith as required by s.31(1)(b). The Tribunal considered this preliminary point of whether the Kurnai faction was a native title party with authority to assert that the other parties lacked good faith [10]. (See case note 7.18 Who constitutes a 'native title party'?)

The Tribunal held if any person named as an applicant is not acting with authority of the claim group then it is not permissible to make a contention about a lack of good faith [29].

The Tribunal found:

- Individuals named as part of the applicant or factions within a native title party do not have standing that another party did not negotiate in good faith unless they have been authorised to do so by the claim group.
- There was no evidence of such authorisation, and other named claimants do not contend there was a lack of good faith.
- As a consequence it cannot be accepted that the native title party contests that the other parties negotiated in good faith. [36]

The Tribunal, having received contentions and submissions on both good faith and the inquiry proper proceeded to make a decision on the good faith issue.

Good faith

The Tribunal summarised the obligation to negotiate in good faith [42]–[48]. The Tribunal found the split in the native title party was highly relevant factor to whether the other parties had negotiated in good faith [50]. The Kurnai faction had insisted on separate negotiations and the Tribunal found this position untenable and unacceptable in right to negotiate proceedings. The Tribunal expressed the view that having obtained the benefits of the registration test the persons comprising the native title party must act in a cooperative way consistent with the basis for the registration when exercising the right to negotiate about future acts [53].

The Tribunal found that in the current situation the content of the obligation to negotiate in good faith was minimal [55]. Further the Tribunal found the Government party and grantee party had negotiated in good faith as required by s 31(1) (b).

In case the Tribunal had erred in that finding, the Tribunal considered the negotiations in the period 1998 to 2003 and the Kurnai faction contentions [56], [84]–[95]. Starting in 1998 the Tribunal reviewed the negotiations between Mirimbiak on behalf of the native title party and the grantee including a proposed s 31 deed (between all negotiation parties) and project consent deed (between the native title and grantee parties). In 2002 Tribunal mediation and assistance was sought. Mirimbiak revealed the split in the native title party and its inability to get instructions in mid-2002.

The Tribunal noted the Mirimbiak policy of a s 31 deed and a separate project consent deed agreed to between the native title and the grantee, which actively discouraged the Government party from active involvement in negotiations [73]–[74]. The government's role in the dual pro forma deed system/project was explained and its reliance on the Mirimbiak policy [78], [90]. The Tribunal found there was no evidence the Kurnai faction put any proposal to the Government party or requested their greater involvement [90], [91]. The Tribunal accepted the pro forma deed system did not obviate the Government party's obligation to negotiate in good faith took into account the Victorian future act practice where the Government party did not become involved until the grantee and native title party finalised a project consent deed [92]. The Tribunal found the grantee and Government party fulfilled their obligation under s 31(1)(b).

4.33 *Gregory Wayne Down/Cyril Barnes and Ors on behalf of the Wongatha People/Western Australia*, NNTT WF04/9, [2004] NNTTA 91 (1 October 2004), Hon EM Franklyn QC

The grantee party applied for a s 35 determination. Although not raised from the outset of the inquiry, the native title party alleged that the grantee had not negotiated in good faith [7]. The native title party also contended the grantee party did not own the proposed tenement and had sold it to Liberty Gold NL. The native title party wished to negotiate with Liberty Gold NL and submitted that as the grantee did not own the tenement he had not acted in good faith [21].

The grantee party contended the issue of good faith had been addressed and determined pre-inquiry and the contentions raised by the native tile party (see below) were not now relevant [8]. The Tribunal confirmed that the issue of good faith goes to the jurisdiction of the Tribunal and must be dealt with prior to a s 35 determination application. The native title party conceded that the grantee party was the proper party as the sale was conditional on the grant being made and ministerial approval being given to the sale. The Tribunal was satisfied the matter could be determined on the papers [21].

Contentions

The native title party contentions in support of the lack of good faith considered by the Tribunal included inter alia:

- It was alleged the grantee party had not complied with sections of the *Code and Guidelines for the Technical Assessment and/or Valuation of Mineral and Petroleum Assets and Mineral and Petroleum Securities for Independent Expert Reports* (Valmin code) and 'in particular in accounting for the provisions of Compensation' [12.1]. The Tribunal noted the Valmin code is not a statutory document and has no force of law. Nor is it directed to negotiations but rather directed at preparing expert reports. The Tribunal found there was no obligation on the grantee to provide any report referred to under the Valmin code and any failure to do so was not a failure to negotiate in good faith.
- That by refusing to pay for an Aboriginal heritage survey the grantee party was not acting in good faith. The Tribunal found there is no legal requirement for an Aboriginal heritage survey to be carried out by or paid for by a grantee. Although carrying out a heritage survey is often the subject of negotiations, failure to agree is not of itself evidence of a lack of good faith [12.3].
- The Tribunal did not accept the inference that refusing to agree to the native title party's proposal or commit to costs stalled the negotiation process or showed a lack of good faith, particularly when considered against evidence of mediation meetings called for by the grantee party [12.4].
- It was contended the failure to comply with paragraphs 2, 8, 9, 13, 14 and 19 of the *Summary of How to Negotiate in Good Faith*, 2001 (issued by the then Department of Mineral and Petroleum Resources) showed a lack of good faith [14]. The Tribunal found there was no evidence to support the assertion that the grantee 'shifted his position' as agreement was in sight or that any agreement was in sight. Failure to agree with the applicants' proposal for an annual production fee by way of compensation did not lead to a conclusion of a lack of good faith [14].

Findings

The Tribunal found:

- The facts did not support the contention that the grantee party had not negotiated in good faith and the Tribunal has jurisdiction to make a determination under s 38 [22] and [24]–[25].
- The native title party's contentions were generally based on a misunderstanding of the application of some of the documents relied upon and a misunderstanding of the law, for example as it relates to Aboriginal heritage surveys [23].
- A request for mediation assistance does not necessarily demonstrate good faith has occurred. However, in the circumstances of other discussions, the grantee's evidence of meetings which was undisputed, and the lack of specific evidence from the native title party, the existence of good faith negotiations was not refuted [24].
- The Tribunal affirmed that while it is not required to adopt strict rules on the burden of proof, there is a requirement for the party alleging a lack of good faith to provide evidence to support its contentions [25].

4.34 *Cameron/ Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/ Queensland* NNTT QF05/3, [2005] NNTTA 84 (16 November 2005), John Sosso (Reported – *Cameron v Hoolihan & Others* (2005) 196 FLR 37)

Preliminary issue – existence of s 31 agreement

In this future act determination application the Gugu Badhun People (the native title party) and grantee party signed a s 31(1)(b) state deed and an ancillary agreement/indigenous land use agreement which had not been executed by the Government party when the grantee and its financial backer's business relationship was terminated. The native title party's legal representative was informed there was no longer funding for the terms of the agreement reached between the parties. The native title party's legal representative contacted the Government party and confirmed that the ancillary agreement was withdrawn because it was entered into with a partnership that was now in dispute and the parties are no longer in agreement. The Tribunal took this to be repudiation or the unilateral termination of the agreement by the native title party, [30] and [42].

Did the repudiated agreement mean the Tribunal could not make a determination?

Subsection 37(a) NTA provides that the Tribunal must not make a determination if an agreement of the kind mentioned in paragraph 31(1)(b) has been made.

Both a s 31(1)(b) state deed and an ancillary agreement/indigenous land use agreement had been signed by the native title party, grantee party and Mr Reinalda, the financial backer. Did both or either of them operate to prohibit the Tribunal from making a future act determination? Both agreements provided for consent to the doing of the future act. The Tribunal found that both were potentially within the scope of s 31(1)(b) [23].

However, as the state deed had not been executed by the Government party it was not relevant. The ancillary agreement had been executed by the relevant negotiation parties but abandoned by the native title party before the application for the s 35 application was made to the Tribunal [23].

The Tribunal held that:

- If there is no section 31 agreement in force at the time the section 35 application is made, the Tribunal has jurisdiction to make a section 38 determination.
- However, if at any time after the section 35 application is made, agreement is reached, the jurisdiction of the Tribunal lapses.

The fact that an agreement was reached but then terminated prior to the s 35 application does not prevent the Tribunal reaching a determination. The focus of s 37 NTA is on the existence of an extant agreement, not on a state of affairs which no longer exists [23].

Good faith negotiations

In this future act determination application the Gugu Badhun People (the native title party) raised the grantee's behaviour in previous negotiations as a key issue in the a challenge as to whether the grantee had negotiated in good faith. It was alleged that financial support was given to the grantee during negotiations in 2000 -2002 in relation to the proposed grant of a different mining lease over the same area of land which were ultimately unsuccessful. The application for that tenement was abandoned and payments owed were outstanding. In the present negotiations over the proposed ML10290, the grantee and his financial backer reached agreements with the native title party which were repudiated by the native title party when the grantee's business arrangements broke down [17].

Tribunal observations on good faith negotiations:

- the NTA obliges the parties to good faith negotiations to consider a range of matters but, if they wish to reach a more comprehensive and enduring agreement, that is for them to determine;
- the type of matters that may be addressed are indicated by the criteria set out in s 39 and issues identified in s 33;
- the obligation is to negotiate in good faith. There is no obligation to reach an agreement;
- a party making a s 35 application is not acting in bad faith (*Strickland v Minister for Lands (WA)* (1998) 85 FCR 303 at 322);
- there is an obligation on the negotiation parties to enter into discussions with an open mind and an honest desire to reach a reasonable accord;
- a party alleging dishonesty or deceit has an evidentiary burden, on the balance of probabilities, of substantiating the allegation (*Strategic Minerals Corporation/Kynuna/ Queensland* [2003] NNTTA 83, Hon CJ Sumner at [40]);
- there is no obligation to negotiate after a s 35 request has been made;
- a party's conduct after a s 35 determination application is made may or may not be relevant to whether a party negotiated in good faith before the application was made (*South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232 at 237 to 240). There is no mandate in the NTA for receiving evidence of that conduct [37] - [38].

Past conduct may be considered in good faith negotiations

The Tribunal noted that:

> 'There is no restriction on the Tribunal to receive into evidence past conduct of a negotiation party, if it is relevant to the issue of good faith. It would be wholly artificial to limit material

> to conduct arising after the commencement of good faith negotiations. Clearly parties engaged in such negotiations are influenced by a range of factors, and past negotiations and conduct may well be relevant not only to assessing the negotiations but also the overall tenor of the proceedings...The Tribunal and Federal Court have recognized that relationships do change once negotiations start, and if a party was so influenced by past negotiations that they did not approach the new negotiations with an open mind and a preparedness to reach a reasonable accord, they would be the party failing to negotiate in good faith' [47].

Decision on allegation of lack of good faith negotiations

The previous negotiations between the parties were taken into account but the weight the Tribunal placed on that evidence was tempered as: they occurred some years previously; the negotiations related to a different mining lease; while they involved the grantee they also involved other persons connected with Ebony Ridge Marble [48].

The Tribunal noted that:

- both the now repudiated ancillary agreement and state deed stated that good faith negotiations had taken place;
- both parties had experienced and competent legal representatives and freely and with full knowledge executed agreements after what was clearly a series of fruitful negotiation meetings which met the criteria of good faith negotiations;
- it was the native title party that terminated the agreements without any discussions with the grantee as to possible alternative arrangements;
- the native title party's course of action was not adequately explained, even if previous conduct was considered
- the native title party did not discharge the evidentiary burden to justify its allegations of bad faith [41] to [42], [49].

The Tribunal held the government and grantee parties did negotiate in good faith and it could conduct a further inquiry and make a s 38 determination [52] - [53].

4.35 *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation/ Western Australia*, NNTT WF05/1, [2005] NNTTA 88 (30 November 2005) Hon CJ Sumner (Reported – *Gulliver Productions Pty Ltd & Others v Western Desert Lands Aboriginal Corporation & Others* (2005) 196 FLR 52)

This future act determination application was made by the grantee party in relation to the proposed grant of a petroleum exploration permit under the Petroleum Act 1967 (WA) (Petroleum Act). During the course of negotiations, on 27 September 2002, a determination recognising native title was made in relation to the third native title party's claimant application. On 17 July 2003, the Western Desert Lands Aboriginal Corporation *(Jamukurnu-Yapalikunu)* (WDLAC) was determined to be the prescribed body corporate (PBC) of the third native title party. Pursuant to s 30(1) (c) NTA, WDLAC became the third native title party in these proceedings. The first annual general meeting of WDLAC was held in September 2004.

WDLAC alleged the Government party had not negotiated in good faith. WDLAC did not allege any subjective lack of honesty or sincerity on the part of the Government party but, rather, alleged failure to negotiate in a reasonable manner in the circumstances [26].

Good faith obligations of the Government party to negotiate on compensation

The Tribunal was satisfied that the Government party had generally acted reasonably and in accordance with the good faith indicia set out in *Western Australia v Taylor* (1996) 134 FLR 211 at 224 to 225 (*Njamal*), where the Tribunal anticipated the factual context would be important. In this matter, the Tribunal recognised that:

- the nature of the future act (i.e. the grant of a petroleum exploration licence) meant the Government party had made only limited substantive offers towards settlement;
- the Government party was not necessarily required by the good faith obligation to make reasonable substantive offers [35]- [37].

The Government party's negotiating position in regard to compensation was that s 24A of the Petroleum Act imposes any liability to pay compensation on the grantee party. The Tribunal, referring to s 24MD (3) NTA, was of the view that, by operation of the NTA and the Petroleum Act, there was no obligation on the Government party to negotiate about compensation in s 31(1) (b) negotiations. The Tribunal noted that, on the material before it, at no stage did the third native title party propose the government pay compensation [40] to [47].

Obligation to fund negotiations of a registered native title body corporate

Among other things, WDLAC contended that:

- the Government party was, or ought to have been, aware that WDLAC "like all Prescribed Bodies Corporate in the nation", had no financial resources to carry out its statutory responsibilities set out in the Native Title (Prescribed Body Corporate) Regulations 1999 (Cth) (PBC regulations);
- the Ngaanyatjarra Land Corporation Aboriginal Council (the Ngaanyatjarra Council), the representative body for the area, was prohibited from funding WDLAC though Commonwealth grants;
- where one of the parties (WDLAC) is unable to participate in negotiations due to a lack of resources, and it is reasonably within the means of the other parties to facilitate that participation but they fail to do so, those parties have 'objectively failed to negotiate in good faith' [62] to [65].

In response, the Government party's contented:

- noted that s 203BB(1)(b) and s 203C NTA indicate an intention that representative bodies provide assistance for future act negotiations and placed no obligation on government parties or grantee parties to contribute;
- submitted that earlier Tribunal decisions, where it was found the obligation to negotiate in good faith did not extend to providing financial assistance to a native title party, should apply equally to PBCs as to registered native title claimants because s 203BB(1)(b) made no such distinction, referring to *Western Australia v Daniel* [2002] NNTTA 230 ; (2002) 172 FLR 168; *Mt Gingee Munjie v Victoria* [1999] NNTTA 361 ; (1999) 163 FLR 87;
- pointed out that native title corporations are creatures of a Commonwealth statute and so the Commonwealth is responsible for funding them;
- since the third native title party failed to advise the Government party that it was no longer able to participate in the negotiations due to lack of resources, the issue of funding could

not be relied upon as a ground for a decision that the Government party had not negotiated in good faith [67] and [83].

Commonwealth government policy on funding prescribed bodies corporate

The Tribunal stated that it was not possible to resolve this situation on the basis of the evidence provided, nor is it necessary to do so in order to deal with the principal issue of whether the Government party has negotiated in good faith. It was suggested for the future that this funding issue be clarified in relation to WDLAC and other PBCs [67], [73] - [75]. The costs of complying with the PBC regulations were noted [86] to [87].

The Tribunal was satisfied that:

- the NTA empowered the Australian government to fund representative bodies to assist PBCs to perform their statutory functions and that this power is not restricted in time;
- funding could be applied for after the first annual general meeting of a PBC, as a matter of policy and practice no specific funding is provided for this purpose;
- the Government party would have known that the Australian government did not provide funding to representative bodies or PBCs to assist the latter in future act negotiations, at least by the time the s 29 notice relevant to this inquiry was given [79].

Five person rule

Regulation 9 of the PBC Regulations sets out the 'five person rule', says that evidence of consultation and consent can be provided if at least five members of the PBC who are common law holders whose native title rights and interests would be affected by the proposed native title decision sign to certify that consultation had taken place and consent has been given. If there are fewer than five members so affected, at least five members, including each affected common law holder who is also a member, must sign.

The Government party contended that that practical difficulties and cost of obtaining consent of native title holders could be overcome by the 'five person rule'.

The Tribunal rejected this contention:

The 'five person rule' is only an evidentiary aid. The five persons must still be satisfied that the appropriate consultation and consent process has been properly carried out. They cannot assert under the 'five person rule' that the consultation and consent has been properly followed if, in fact, it has not [87].

Summary of findings with respect to funding

The Tribunal findings in relation to funding of registered native title corporations were:

- the NTA permits representative bodies to provide assistance to both claimants and holders of native title and they may apply for, and be funded by, the Australian government for this activity, referring to ss 203BB(1)(b) and 203C;
- no distinction is drawn between registered native title claimants and those holding native title, as both are 'native title parties' under ss 29(2)(a) and (b) but the different approaches to funding each for the conduct negotiations under s 31(1) are a matter of Australian government policy;

- once a PBC has been determined it has statutory functions it is obliged to perform by the PBC Regulations, including obligations under r 8 to consult with, and obtain the consent of, affected common law holders of native title before making a native title decision;
- a decision to agree to the grant of a petroleum exploration permit is likely to lead to native title rights and interests being affected (i.e. it is a native title decision) and this requires the consultation provided for in r 8(2);
- the cost of performing the statutory functions in relation to consultation and obtaining consent could be substantial in some cases;
- the Australian government does not make funds available to representative bodies specifically to enable them to be dispersed to PBCs for the purpose of conducting s 31 negotiations;
- while the Australian government's funding conditions do not prohibit a representative body from dispersing funds to PBCs for s 31 negotiations, this will be of no practical utility if the only funds available from the Australian government have been provided for other purposes, which appears to be the case;
- a representative body could provide assistance on a fee for service basis and, in this case, the Ngaanyatjarra Council and lawyers employed by it agreed to act for WDLAC in future act negotiations on a limited basis;
- the Australian and state/territory governments do not agree about responsibility for the funding of prescribed bodies corporate and no general funding provision is made by either of them to enable these bodies to carry out their statutory functions, apart from the limited Commonwealth funding referred to above for assistance until the first annual general meeting;
- at least since the beginning of 2002, the Government party would have been aware of the Australian government's funding conditions and of the limitations placed on the use of funds for the activities of prescribed bodies corporate [89].

Does the obligation to negotiate in good faith extend to funding the native title party?

The Tribunal held:

- if there is no obligation on another party to fund negotiations in good faith, when dealing with a native title party who is a registered native title claimant, there was no reason for this to change simply by virtue of the native title party being a PBC;
- subsection 31(2) makes it clear that a refusal to negotiate on the matters other than the effect of the future act on registered native title rights and interests does not mean failure to negotiate in good faith;
- even if this is wrong, the conduct of the negotiations in relation to funding in this matter did not indicate a lack of good faith by the Government party [88], [90] to [93].

Further, if a native title party wants the question of the funding of negotiations to be an issue within the scope of good faith negotiations, a specific proposal, including the cost of complying with the PBC Regulations, to show that, without funding, it will not be able to properly negotiate about the future act, should be put on the table. Even if it could be argued that good faith negotiations can encompass the funding of a PBC post-grant because s 39(1) (a) (iii) talks of the effect of the future act on the development of the social, cultural and economic structures of

the native title party, no such proposal was developed or put to either the Government party or grantee party [95].

Section 29 notice is not part of negotiation in good faith process

The Tribunal found the giving of a s 29 notice is not part of the negotiation process [100]-[101].

The Tribunal found that the government and grantee parties did negotiate in good faith. Note the Tribunal's concluding comments on funding issue [102] to [103].

4.36 *Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, NNTT WF05/10, [2005] NNTTA 100 (23 December 2005) Hon C J Sumner (Reported – *Griffin Coal v Nyungar People* (2005) 196 FLR 319)

Compensation negotiations and the Government party

The Tribunal held that since the amendments to the *Mining Act* 1978 (WA) particularly the insertion of s 125A (on 11 January 1999), the Government party has no obligation to pay compensation to a native title party for the doing of the future act, nor any obligation to negotiate about compensation or s 33 (1) payments for the grant of mining tenements [36] - [38].However, it was accepted that the Government party may still need to consider, if a proposal is made that a condition imposing s 33(1) payments be made by the grantee. Further the Government party may need to consider an ancillary agreement between the native title and grantee parties which include such payments (see *Brownley v Western Australia* [1999] FCA 1139; (1999) 95 FCR 152 at [54]; *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211 (Njamal) at 250-251, [45], [51].

Section 33(1) and the exclusion of matters from good faith negotiations s 31(2)

The Tribunal held:

> '... Section 33(1) payments are a mechanism whereby compensation for the effect of a future act on native title rights and interests may be paid. Compensation for the effect of a mining tenement on native title rights and interests itself is not assessed by reference to royalty-type payments but in the manner referred to above under Part 2, Division 5 of the Act. However, if a native title party wishes to request the grantee party to satisfy any obligation to pay compensation by s 33(1) payments then it can make a proposal to this effect and the grantee party would be obliged to consider it in the manner explained in *Brownley*. To satisfy the jurisdictional precondition of negotiation in good faith there is no obligation at large on the grantee party to negotiate in good faith about s 33(1) payments but only insofar as they are seen as a means of satisfying the obligation to pay compensation for the effect of the future act on native title. Such negotiations are not excluded by s 31(2).' [44]

> '…. Whether negotiations about s 33(1) payments are necessary to satisfy the obligation will depend on the facts of particular cases and the conduct of the negotiation parties over the whole of the negotiations.'[46]

No submission by the native title party on the effects of the proposed future acts

The native title party declined to make any submissions about the doing of the future act. The Tribunal noted that the behaviour of the parties is taken into account as to whether the other parties have negotiated in good faith (*Walley v Western Australia* [1996] FCA 490; (1996) 67 FCR 366). The native title party's decision not to make a submission on the effects of the future act is a factor that can be taken into account in determining whether other parties have negotiated in good faith [48] and [50].

4.37 *Raymond Dann & Ors (Amangu People)/Western Australia/Empire Oil Company (WA) Limited*, WF06/21, [2006] NNTTA 153 (24 November 2006), John Sosso

The native title party challenged jurisdiction of the Tribunal in contending the grantee party had not negotiated in good faith in relation to negotiation of a proposed exploration permit 4/04-5 EP pursuant to s 31 of the *Petroleum Act* 1967 (WA) (the proposed tenement).

The native title party had earlier challenged the validity of the s 29 notice (see 6.11 *Raymond Dann & Ors (Amangu People)/Western Australia/Empire Oil (WA) Limited*, NNTTA WF06/21, [2006] NNTTA 126 (25 August 2006), Mr John Sosso). The grantee had reached agreement with the Yued people whose native title application area was also overlapped by the proposed tenement.

The Tribunal reviewed the parties' accounts of negotiations over terms of a heritage agreement and in particular the grantee party's refusal to pay compensation at the exploration stage. At one stage of the negotiations, the grantee offered 5% of on ground expenditure over crown land or non native title land. When the grantee resiled from this position, the native title party asserted that the withdrawal of offer was inconsistent with the grantee's duty to negotiate in good faith. Another issue was the native title party's requirement that heritage surveys be required for all of the land and water, not only where the native title was claimable, which was the grantee's position. The native title party's overall contentions were of a lack of fair dealing by the grantee party [23] to [43], [56] -[57], [66].

Jurisdictional question – scope of good faith negotiations

The Tribunal outlined the legal principles in evaluating whether s 31(1) negotiations in good faith have taken place, confirming s 32(1) does not limit the scope of matters the subject of negotiations, rather the NTA creates an opportunity for dialogue (see *Walley v Western Australia* (1999) 87 FCR 565). However the NTA does not compel government and grantee parties to reach agreement beyond the scope of the legislation. Section 31(2) relieves a negotiation party from having to negotiate about matters unrelated to the effect of the proposed tenement on the native title party's registered native title rights and interests [52] and [76].

The Tribunal held:

- The native title party's determination application specifically excludes land and waters affected by Category A and B past and intermediate acts and PEPAs and areas where native title has been otherwise extinguished. Therefore freehold land and roads are excluded from the claim and in that excluded area there are no native title rights about which a grantee party or Government party has to negotiate in good faith as 'there is no legislative nexus" imposing an obligation to negotiate in respect of land and water outside the claim area [76].
- Section 38 determination requires the Tribunal to take into account effect of the proposed tenement on the land and waters concerned. It was open to the native title party to seek protection for a greater area but there was no obligation to negotiate heritage protocols for areas over which the native title party does not have registered interests. A refusal to do so is not a failure to negotiate in good faith [77].
- The material before the Tribunal did not support a finding of dishonesty on the part of the grantee [78].

- It is not open to the Tribunal to decide if there have been good faith negotiations on the basis of the Tribunal's view of the reasonableness of the substantive offers (*Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 321 per Nicholson J), rather it is required to determine if there has been a genuine attempt to reach agreement [82].
- The grantee party had negotiated in good faith as required by s 31(1) (b) and the Tribunal has jurisdiction to inquire into and make a s 38 determination in relation to the proposed tenement.

4.38 *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People*, NNTT WF07/26, [2008] NNTTA 38 (3 April 2008), Hon C J Sumner (Reported – *Australian Manganese Pty Ltd v State of Western Australia and Others* (2008) 218 FLR 387)

The Tribunal held the grantee party negotiated in good faith in tripartite negotiations with the native title party and the Jigalong Community. The native title party contended the grantee party insisted on a tripartite agreement and were not prepared to enter into bipartite agreement and as such adopted a rigid negotiating position [8].

The Tribunal held:

- The obligation to negotiate in good faith under the NTA is with the native title party and not with the Jigalong community.
- The grantee party made reasonable attempts to reach agreement with the native title party as evinced by negotiations, attending meetings, correspondence, exchange of draft agreements and modifications of its offers.
- The facts did not support unwillingness on the part of the native title party to enter a tripartite agreement.
- The issue of a bipartite agreement between the grantee and the native title party was not raised until after the s 35 application was lodged.
- At all material times the parties upon whom the obligation to negotiate in good faith was imposed were negotiating a tripartite agreement and the fact that the Jigalong Community later found the draft tripartite agreement unacceptable does not reflect adversely on the grantee's negotiations with the native title party.
- There was no basis for a finding that there was a failure to negotiate in good faith on the part of the grantee in relation to the native title party.

4.39 *Doxford/Janice Barnes, Jessie Diver, Owen McEvoy, Deree King, Patrick Fisher (Wangan and Jagalingou)/State of Queensland*, NNTTA QF08/1, [2008] NNTTA 54 (28 April 2008), John Sosso

The grantee party made a future act determination application in relation the proposed grant of a mining lease under the *Mineral Resources Act 1989* (Qld) s 245. The native title party asserted that the grantee party had not negotiated in good faith. Initially, the native title party was represented by Gurang Land Council (Aboriginal Corporation) Native Title Representative Body (GLC) but their services were withdrawn and the Tribunal was notified of new representatives. Contentions lodged by the GLC were relied upon by the native title party.

The native title party contended that the grantee had not attempted to seriously negotiate or at best negotiated in an inadequate manner. The grantee party's future act determination application stated an offer of a percentage of production had been made and contended no response had been received from the native title party and provided evidence of an overall difficulty in contacting the native title party's representative, the GLC [14] - [19]. The Government party gave evidence of the Department of Mines, Native Title Unit efforts to contact the GLC to arrange a meeting to discuss the proposed mining lease [20] – [32]. No meeting was ever convened.

Legal principles and findings

The Tribunal held:

- To be satisfied that a negotiation party has not negotiated in good faith the Tribunal must be presented with material that substantiates such an allegation; (See *Gregory Wayne Down/Cyril Barnes and Others on behalf of Wongatha People/Western Australia*, NNTTA WF04/9, [2004] NNTTA 91 (1 October 2004) at [25]).[34] (see para 4.33)
- In the absence of supporting material it is not open to the Tribunal to find it lacked jurisdiction solely on the contentions filed. In such circumstances the Tribunal should hold a hearing so the question of jurisdiction could be adequately determined in the absence of the parties [34].
- The native title party has not provided any evidence supporting its version of events or the implication of lack of good faith.
- An indicia of what constitutes good faith is set out in *Placer (Granny Smith) v Western Australia* [1999] NNTTA 361, (1999)163 FLR 87 at 93-94 [35].
- To determine if a party has negotiated in good faith the Tribunal has to assess the overall conduct of each party in the context of the party's capacity to negotiate, the attitudes and actions of the other parties and the negotiating environment of the circumstances [37].
- In this instance the limited financial circumstances of the grantee party and his capacity to engage is a consideration [37].
- A lesser standard of negotiations is appropriate if one or more negotiating parties has acted unreasonably or absented themselves: *Re Minister for Lands, State of Western Australia and Marjorie Strickland & Ors* [1997] NNTTA 31; (1998) 3 AILR 261 at 265.
- Despite being on notice from the Form 5 that the grantee claimed various attempted contacts with the GLC, there was no affidavit evidence from the native title party to refute those claims.
- The good faith obligation of the grantee party in the circumstances and the professional obligation imposed on a representative body is summarised as follows:

> '… The obligation placed on a grantee party to negotiate in good faith does not require that party to ascertain who is the solicitor on the record or who has the authority to negotiate in an organisation the size of a representative body. The obligation is to use best endeavours to make contact with the native title party and to evince a desire to negotiate, and then to negotiate with an open mind in an endeavour to reach an accord, if possible. There is a professional duty imposed on a representative body who is the legal representative of a native title party requiring that body to inform a negotiation party seeking to negotiate whom to contact, and to be proactive in advancing the negotiation process. The fact that

> the proponent is a small miner, and that the benefits that may flow to the native title party from any accord may be minimal, is not relevant. Each proposed future act has to be dealt with on its merits, otherwise most time and negotiating effort would be expended on large scale mining' [41].

- There was no material before the Tribunal to substantiate native title party's contentions [45].
- The Tribunal determined the grantee fulfilled the s 31(1)(b) NTA good faith negotiation obligation and the Tribunal has jurisdiction to conduct a s 35 inquiry and make a s 38 determination.

4.40 *Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd*, NNTTA WF07/40, [2008] NNTTA 90 (11 July 2008) John Sosso (Reported – *Cox v Western Australia* (2008) 219 FLR 72) (Appealed – see para 4.45)

The grantee party made a future act determination application in relation the proposed grant of mining lease 47/4104 which overlapped both a registered native title claim of the Puutu Kunti Kurrama & Pinikura People (the first native title party) and the area of the East Gurama People's determined native title application, the registered body corporate being the Wintawari Guruma Aboriginal Corporation (the second native title party). The inquiry proceeded with both native title parties contending that the grantee did not negotiate in good faith. The grantee party has numerous tenements and tenement proposals in the Pilbara region and had met with various native title parties seeking to negotiate Land Access Agreements (LAA) for their Project Tenure and for their Mining Tenure [10], [14]. The grantee's précis of facts of the negotiation events between the grantee and native title parties was not contested [9] and [19].

Contentions of the native title parties

The first native title party had no complaint about the grantee party's conduct of the negotiations. It contended:

- All discussions with the grantee were about a Claim Wide Agreement and the proposed mining lease was not raised as a priority tenement in those discussions. [32].
- The LAA negotiations between the parties were at an early stage and little of substance had been discussed prior to the grantee making a s 35 application [44].
- The grantee did not negotiate about any matters in s 33 and s 39 NTA, the exercise of native title rights and interests, effects on those interests or significant sites in the mine area, nor were any s 33(1)(b) offers made [46].

The grantee party submitted that the first native title party misunderstood s 31(1)(b) as it does not require negotiation parties to negotiate 'about' the grant of the tenement, rather negotiation of a whole of claim agreement would satisfy s 31(1)(b) requirement in respect of the proposed mining lease [42].

The second native title party contended:

- The negotiations for the whole of claim agreement included relieving the grantee party of the right to negotiate proceedings, but until the agreement is completed the NTA continued to apply.

- The grantee compensation proposals were limited to "things produced" rather than upon profits made or income produced, such that given the scale of the iron mining activities, there was nothing reasonable in the financial package offered [34]-[35].

Legal principles

The Tribunal adopted analysis of the obligation to negotiate in good faith stated in *Placer (Granny Smith) v Western Australia* [1999] NNTTA 361; (1999) 163 FLR 87 at 93-94, noting references to the obligations of the Government party now applied to all parties. It was also noted that once an application is made under s 35 and s 75, the prior conduct of the parties is the focus of the inquiry, evidence of subsequent negotiations are not relevant or admissible: *Cameron v Hoolihan* [2005] NNTTA 84; (2005) 196 FLR 37 at 47/[38], [31].

The Tribunal held:

- While there is no statutory obligation for a government or grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate such payments may in some circumstances be an indication of a failure to negotiate in good faith: *Brownley v Western Australia* [1999] FCA 1139; (1999) 95 FCR 152 at (169/[54] – [55].
- The obligation imposed on a grantee party is to receive and consider fairly any s 33(1) payment proposal but without a an obligation to "capitulate to reach agreement": *Western Australia/West Australian Petroleum Pty Ltd & Anor/ Hayes & Ors on behalf of the Thalanyji People*, NNTTA WF00/07, [2001] NNTTA 18 (9 March 2001) Hon C J Sumner at [37], [38].
- The history of negotiations between the second native title party and the grantee did not reveal that the grantee adopted an unreasonable negotiating position [39].
- The statutory obligation is to negotiate about the doing of the proposed future act and does not extend beyond negotiating about the effect of the act on the registered native title rights and interests of the native title parties [49].
- Parties are at liberty to subsume individual right to negotiate discussions in negotiations of a broader agreement than the doing of the act [52].
- The s 31 requirement to negotiate about the doing of the act in the context of its effect on native title rights and interests cannot be avoided unless there is an explicit agreement to that effect. There was no such agreement between the grantee and first native title party [52].
- The obligation to negotiate in good faith with the first native title party had not been met when the s 35 application was lodged as the material indicates the negotiations for a LAA were at an early stage and had not advance to a stage where the general discussions in themselves could satisfy s 31(1)(b) [58].
- A grantee party could satisfy s 31(1)(b) if, even at an early stage of negotiations, there was under a general framework of advanced discussions for the doing of the relevant future act. While other proposed tenements were raised as a priority in bipartite discussions, the proposed mining lease was not the subject of serious negotiations.
- The evidence does not support a finding that the grantee party engaged in disingenuous conduct in its negotiations with the first native title party [[72] – [74]. Rather the grantee party was acting honestly but made an error in seeking a future act determination about the proposed mining lease when the negotiations about that tenement were in their infancy [77].

- The process of negotiations with the second native title party indicates the LAA process stalled. If the broader agreement could not be progressed, the onus was on the grantee party to disaggregate the proposed mining lease and revive negotiations about it. It would be contrary to s 31(1)(b) good faith requirement to rely on failed general negotiations which never substantively addressed the proposed mining lease [82].
- The grantee party did not discharge its obligation to negotiate in good faith with either of the native title parties and the Tribunal has no jurisdiction to conduct an inquiry and make a s 38 determination.

4.41 *June Ashwin and Others on behalf of the Wutha People/Western Australia/ Contact Uranium Limited*, NNTT WF08/16, [2008] NNTTA 129 (19 September 2008), John Sosso

A Regional Standard Heritage Agreement (Goldfields) (RSHA) in regard to proposed grants of prospecting licences was entered into, however the native title party preferred to negotiate a Wutha Alternative Heritage Agreement (Wutha Agreement) which was not successfully concluded.

The grantee party made a s 35 future act determination application. The native title party contended the grantee party had not negotiated in good faith as required by s 31(1)(b), for a number of reasons including: scant negotiations, failing to provide documentation to the native title party on the nature of the proposed activities, taking a rigid position in requiring a heritage agreement be executed and failure to meet other good faith indicia set out in *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211 at 219, [26] – [31], [34].

The Tribunal referred to the good faith negotiating indicia in *WA v Taylor* and included a further requirement of a contextual evaluation, noting 'It would be incorrect to impose on parties altruistic or artificial standards of behaviour removed from the financial, regulatory and interpersonal reality that they face.' [25] In this case the Tribunal noted the administrative problems experienced by the grantee party such as staff turnover resulting in duplication of effort, mishandling of information, failure to meet time requirements and innocent omissions [36].

The Tribunal held:

- It is open to the Tribunal to consider if a particular offer was reasonable in the context of determining if the offer evinced reasonable negotiation behaviour [38].
- The grantee party was not required to agree to the Wutha Agreement and agree to pay for heritage clearances for low impact prospecting. The offer to enter into a RSHA was reasonable and comprehensive, appropriate for the proposed prospecting tenements and was voluntarily assented to by the native title party. The Tribunal said 'Where a party puts forward a reasonable proposal and the counter proposal from another party is significantly at odds with the original proposal, the first party is not necessarily required to make a counter-offer which undercuts its first offer or which involves a capitulation on a fundamental point (e.g. the need to conduct heritage surveys or large differences in quantum of moneys to be paid).' [39] - [40]

- There was a failure by the grantee party to supply information to the native title party. However the native title party's participation in the Tribunal mediation process indicated that the omission did not significantly impede the capacity of the native title party to negotiate [43].
- The fact that the native title party executed the RSHA but later resiled from it suggested that the grantee's proposal was not unreasonable, harsh or inappropriate [49].
- Both the grantee and native title parties negotiated in good faith [50].
- The Tribunal has jurisdiction to conduct an inquiry and make a determination pursuant to s 38.

Was there an agreement depriving the Tribunal of power to make a determination – s 37

The Tribunal considered on the evidence it was possible that the parties had reached agreement. The parties proceeded on the basis that there was no binding agreement so the Tribunal did not need to determine the issue. If a party challenges the jurisdiction of the Tribunal, before it makes a determination pursuant to s 38, on the basis that there is a binding agreement, the Tribunal would need to determine that question before making a determination: (*Mineralogy Pty Ltd v National Native Title Tribunal* [1997] FCA 1404; (1997) 150 ALR 467 at 478 per Carr J) [46] – [48].

4.42 *Holocene Pty Ltd/Western Australia/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)*, NNTTA WF08/27, [2009] NNTTA 8 (6 February 2009), Hon C J Sumner (Reported – *Western Desert Lands Aboriginal Corporation v Western Australia and Anor* (2009) 232 FLR 169)

The native title party and grantee party reached an in principle agreement but failed to reach agreement on the granting of Mining Lease M45/1171 (the proposed Lease), part of the grantee's Lake Disappointment potash project, which included several existing and proposed tenements (the Project). When an agreement could not be reached the grantee party made a s 35 application for a future act determination by the Tribunal.

The Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) (WDLAC) the PBC of the Martu People contented the grantee party had not negotiated in good faith as required by s 31(b) [23]. The Tribunal set out the history of the negotiations between the native title and grantee parties prior to 27 March 2008 [15]. After that date the parties differed in their view on whether there was agreement of a Term Sheet [18] including terms for the grant of the Lease or a commercial offer that remained subject of negotiations [16] and the effect of the subsequent correspondence between the parties [22]–[27].

The Tribunal held:

- failing to pay the native title party's future negotiation costs [24]–[48]:

  In the face of direct contradictory evidence over whether the 27 March 2008 term sheet or an agreement on 10 April 2008 the grantee agreed to pay the future negotiation costs including future legal expenses, the native title party did not sufficiently meet the evidential burden required by s 36(2) NTA [42]–[43], [47].

- failing to approach negotiations with an open mind and adopting a predetermined position [49]-[63]:

Although the term sheet letter confirmed the agreement to be 'in principle', the specific commercial terms had been agreed. The commercial terms agreed at stage one of the negotiations were settled terms and not meant to be subject of further negotiations [57]–[58];

The changes proposed by WDLAC were substantial [59]–[63].

- imposition of unreasonable deadlines and unrealistic demands by the grantee party was not made out [64]–[68].
- failure to meet to continue negotiations in the circumstances was not indicative of bad faith. There was no absolute refusal by the grantee party and negotiations continued by correspondence [69]-[73].

Conduct of the native title party

- Reneging on agreed commercial terms:

  The grantee party contended the native title party failed to act in good faith and that this should be taken into account in deciding whether the grantee party had negotiated in good faith. The Tribunal found on the evidence there was reneging on the part of WDLAC from the commercial terms that were agreed to and the attempt to re-negotiate the commercial terms was indicative of a lack of good faith [78]–[79].

- Conduct of the chief negotiator:

  The correspondence from the native title party's chief negotiator before the Tribunal included a threat to publicly raise issues that would hinder the credibility and capital raising capacity of the grantee party [81]. The native title party acknowledged the chief negotiator exceeded his brief and was not authorised to act prior to the inappropriate behaviour of 31 July 2008. The Tribunal found the behaviour of the chief negotiator was inappropriate [80]–[86].

Conclusion

The Tribunal found matters indicative of a failure to negotiate in good faith that had been identified, when considered in relation to the grantee's conduct overall, supported a finding the grantee party fulfilled its good faith obligation [87]–[91]. The grantee party was entitled to be fixed in its view that agreed commercial terms should not be modified in any substantial way [88].

4.43 *Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd*, NNTT WF08/29, [2009] NNTTA 35 (17 April 2009), John Sosso

The grantee party lodged a FADA in relation the proposed grant of exploration licence E08/1023. The proposed licence is completely overlapped by the applications of Yaburara Mardudhunera People's application (first native title party) and the Kuruma Marthudunera People's (second native title party). Both native title parties submitted that the grantee's negotiations were not conducted in good faith as required by s 31 NTA.

The first native title party contended the grantee party had not made any reasonable effort to negotiate [13]. The second native title party contentions included, inter alia:

> the grantee party failed to put forward any proposals or respond meaningfully to heritage protection proposals; the only offer put forward by the grantee party was an undertaking to comply with the *Aboriginal Heritage Act 1972* (WA) and the NTA [14]; and the grantee party's assertions and information provided were not relevant to good faith negotiations [37].

In response it was contended the underlying tenure of the proposed licence is pastoral lease and a stock route with no evidence of adverse impact; the second native title party failed to provide submissions on the effect of the proposed licence apart from general concerns about disturbance of Aboriginal heritage; and the grantee party has negotiated with the state to provide a fund with benefits that include support to indigenous communities in Western Australia [15]-[18].

The Tribunal held:

- in relation to the first native title party that the grantee party made limited efforts to contact and negotiate with the first native title party and no effort after receiving notice of the first native title party's new address for service. The grantee was obliged to make contact after that notice and to fail to do so was fatal to the contention that it negotiated in good faith [41]-[68], [71];
- the grantee is a substantial organisation experienced in native title negotiations and litigation and would know from experience what obligations are imposed by s 31 NTA [69].

The Tribunal having found it had no jurisdiction, considered the second native title party's jurisdictional challenge and found that:

- the grantee contentions were relevant to an expedited procedure objection inquiry and most were not relevant to the evaluation of good faith negotiations [40].
- the grantee party adopted a confrontational attitude in communications with the second native title party and made no serious attempt to reach an accord [84].
- the obligation imposed by s 31(1)(b) required more than a presentation of the grantee party's position and listening to the second native title party's submissions. 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 v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 312 [86];
- the grantee party failed to negotiate in good faith by taking a rigid non negotiable position and failed to take into account legitimate concerns of cultural heritage [88], [91].

The Tribunal found that grantee party did not discharge its obligation to negotiate in good faith as required by s 31(1)(b) and the Tribunal had no jurisdiction to conduct an inquiry and make a s 38 future act determination.

4.44 *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia*, NNTT WF08/31, [2009] NNTTA 38 (24 April 2009), Daniel O'Dea

The native title party, the Yindjibarndi people, asserted that neither the grantee party nor the Government party had negotiated in good faith as required by s 31(1)(b) NTA. The grantee party had approached the negotiations for the proposed mining lease M47/1413 as part of a Whole of Claim Land Access Agreement (WCLAA) [5] and [15].

The Government party's negotiations

The Tribunal found in respect of the native title party's proposal that the Government party impose a condition requiring the imposition of a 2.5 per cent FOB royalty, that the Government party did not simply restate a standard policy position [44]. As common in West Australian future act negotiations, the Government was aware of the bilateral negotiations and it's response to the native title party's offer did not amount to a failure to negotiate in good faith [22] to [51].

The grantee party's negotiations

The native title party contended the WCLAA negotiations "obfuscated negotiations concerning the tenement so that the Yindjibarndi were unaware of the need to focus on it and when it might be made the subject of s 35 determination application.' They sought to apply the finding in *Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd*, NNTTA WF07/40, [2008] NNTTA 90 (11 July 2008) John Sosso DP (*Cox*)[15], [52], [60]. Further, it was contended there were long delays amounting to a period of less than six months and when the grantee party did counter offer 'it was an unreasonable retreat from what had previously been offered' [18],[52] [72].

The Tribunal held:

- The negotiations did focus on the mining leases as well as the WCLAA. *Cox* was distinguished on the facts [60];
- The evidence indicated that the grantee party's representatives were authorised to meaningfully negotiate with the native title party [64],[70];
- The negotiation and good faith requirements of s 31(1)(b) NTA do not require any party to negotiate in any physical sense for a period of six months. The Tribunal considers the quality of the process in determining the question of whether the parties have engaged in the process in good faith [67];
- There were significant delays by the grantee party, but in context of the negotiations, the delays did not prevent the parties from fully exploring the possibility of an agreement [71];
- As the native title party insisted that an uncapped royalty be part of the compensation package, the proposal put forward by the grantee party did not represent an unreasonable retreat. The Counter offer was reduced, but it was restructured at the request of the native title party [74];
- The parties had negotiated in good faith as required. The Tribunal has jurisdiction to conduct an inquiry and make a determination.

4.45 *FMG Pilbara Pty Ltd v Cox and Others* [2009] FCAFC 49; (2009) 175 FCR 141; (2009) 255 ALR 229 (30 April 2009) Spender, Sundberg and McKerracher JJ; [Leave to appeal to the High Court refused on 14 October 2009]

The grantee party appealed the findings in 4.40 Angelina *Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd*, NNTT WF07/40, [2008] NNTTA 90 which held good faith negotiations about the proposed mining lease did not satisfy the s 31(1)(b) NTA requirement. The grantee party had sought to negotiate on a whole of claim basis and to agree an overall Land Access Agreement (LAA) with each native title party in relation to the grantee party's project including the proposed mining lease, other proposed tenements and existing tenures in the Pilbara region.

The grantee party contended that the Tribunal erred in two ways, firstly in finding that the grantee party was obliged to continue to negotiate with the first native title party beyond the six month period specified in s 35 to satisfy s 31(1)(b) and secondly in concluding that the grantee party was bound to negotiate with the second native title party on the proposed mining lease when negotiations on the LAA failed [14]-[16].

The Full Court held:

- There is no requirement in s 31(1)(b) NTA for negotiations to have reached a certain stage. The Tribunal's interpretation '... puts a gloss on the statutory provisions and places a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain an arbitral determination' [23].
- The manner of the negotiations is not prescribed by s 31(1)(b), apart from a good faith obligation with a view to obtaining agreement.
- In regard to the second native title party's contentions (see [39]) that negotiations focused on a LAA leading to an ILUA could not also be relied upon to support a contention that they were negotiations conducted in good faith was not accepted. The Full Court said:

  > 'It is clear from the statutory framework and secondary materials such as the Explanatory Memorandum to the Native Title Amendment Bill 1997 that ILUAs are intended to be of mutual benefit. That is, they require consideration moving from each party to the other or others. ILUAs constitute a possible statutory solution 'to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery'. FMG's negotiation was directed towards achieving that statutory solution which also encompassed attempted agreement about the future act. To negotiate (as expressly held in good faith) for a period in excess of six months in order to reach an ILUA which also includes the future act can only be conduct within the requirements of s 31(1)(b) of the Act [40]-[42].'

- The findings of the Tribunal could not constitute a failure to comply with s 31(1)(b) unless there was a failure to negotiate in good faith, whereas the Tribunal's findings could only demonstrate good faith [43].
- The grantee party fulfilled its obligation to negotiate in good faith and the Tribunal had the power to conduct an inquiry and make a determination under s 38.

The court allowed the appeal and ordered the Tribunal's decision be set aside. In accordance with s 85A NTA no order as to costs were made.

4.46 *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia*, NNTT WF08/32, WF08/33, [2009] NNTTA 62 (23 June 2009), Daniel O'Dea

The native title party, the Wintawari Guruma Aboriginal Corporation, asserted that neither of the two grantee parties, and the government party had negotiated in good faith as required by s 31(1)(b) NTA. The first grantee party, negotiating on behalf of both grantees, had approached the negotiations for the proposed mining leases, M47/1407 to itself, and M47/1408 and M47/1410 to the second grantee, as part of a Whole of Claim Land Access Agreement (WOCLAA) and Land Access Agreement (LAA) which included a number of proposed tenements, under a Regional Commercial Agreement (2006 Protocol) executed in November 2006 [29],[41], [42].

Background

In May 2008 the native title party proposed a new negotiation protocol (2008 Protocol) in relation to the proposed leases [35]–[62]. The grantee parties wished to continue under the 2006 Protocol [41]–[43]. The primary grievance of the native title party was that the grantee parties failed to enter into the 2008 Protocol [80].

Following the decision in *Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd*, NNTT WF07/40, [2008] NNTTA 90 (11 July 2008) John Sosso - see 4.40), the first grantee party addressed priority tenements, including the three proposed mining leases and proposed a draft agreement dated 5 September 2008 [43]. At a meeting on 23 October 2008 the native title party sought to discuss the proposed 2008 Protocol and the grantees declined. Discussions focused on the proposed agreement [48]-[50].

Native title party contentions

The native title party contended that the grantee parties abandoned the 2006 Protocol after 5 September 2008, that they were aware that without a protocol there would be no funding to consider the 5 September 2009 draft agreement. Further, negotiations were at an embryonic stage when the grantee parties made the s 35 future act determination application. It was contended both the government and grantee parties had a 'closed mind' approach [62]-[63].

Grantee party contentions

It was contended, the obligation under s 31(1)(b) NTA:

- means that negotiations are simply to be with a view to obtaining the agreement of the native title party to the doing of the future act as distinct from being about the future act ;
- does not require disaggregation of specific future acts from broader negotiations in order to specifically discuss the proposed acts;
- alternatively, that the grantees had negotiated about the future acts, and disaggregated the specific future acts from the broader negotiations and did endeavour in good faith to specifically discuss those current future acts [65].

Additional submissions were made by the grantees made after the Full Court decision in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (30 April 2009) Spender, Sundberg and McKerracher JJ at [20],[23] and [42] (see 4.45):

- There is no requirement that negotiations for the purpose of s 31(1)(b) NTA must reach any stage, particularly beyond an embryonic stage ;

- the requirement for "good faith" in s 31(1)(b) NTA is directed to the "quality of a party's conduct" not the quality of the negotiations themselves; and
- negotiations with a view to agreeing an ILUA which would authorise a future act constitute conduct within the requirements of s 31(1)(b) [66].

Good faith negotiations

The Tribunal referred to the legal principles on s 31(1)(b) NTA negotiations set out in earlier decisions of the Tribunal and the recent decision in *FMG v Cox*. The Tribunal noted the Full Federal Court's emphasis on the inquiry into the quality of the party's conduct in the course of negotiations as a contextual assessment [13]-[19]. The Tribunal held:

- after the six month period for the bringing of a s 35 future act determination application, '... there is no obligation on a party to continue to negotiate, however, if a party chooses to continue the process of negotiation after that date , it is not absolved of the obligation to continue to conduct itself in good faith' [20].
- negotiations held prior to the issue of the s 29 notice are relevant to the assessment of good faith negotiations but limited to use as background information to subsequent negotiation conduct after the s 29 notice [24]-[28].
- the status of the 2006 Protocol was somewhat uncertain. The importance of the 2008 Protocol appeared to be related to funding the native title party's professional advice and the conduct of meetings [81].
- there is no obligation on any party to a negotiation under section 31(1)(b) of the Act to provide financial or other assistance to facilitate the engagement of one party in the process [82].
- the native title party agreed to respond to the whole of claim agreement within a week of the meeting of 18 June 2008, but did not.
- the behaviour of the native title party points to no other conclusion than that the native title party would not provide a response to the 5 September 2009 proposed agreement until such time as the grantee parties had entered into a negotiation protocol [82].
- the Government party followed its usual practice in Western Australia in the relation to negotiations for the grant of mining tenements, whereby substantive negotiations occur between the native title party and grantee which often lead to an ancillary agreement. In circumstances of these negotiations, including the conditions offered, the Government party negotiated in good faith [73]–[78].
- the native title party's contention that a negotiation protocol should be negotiated, and agreed at an early stage of negotiations to bring about a sound basis from which the parties can launch negotiations in good faith was rejected. The negotiation protocols and case law in relation to Tribunal mediation of matters before the Federal Court did not assist [83].
- there were substantive negotiations in relation to the proposed leases prior to the lodgement of the s 35 application. The WOCLAA negotiations, the 5 September 2008 proposed agreement and the grantee parties' requests for a response to their proposal were all indicative of the fact that the negotiations had passed well beyond the embryonic stage [85].

- the assertion that the proposed leases would have the effect of extinguishing the native title party's recently granted native title rights and interests is wrong in law, as the non-extinguishment principle in s 238 NTA provides otherwise [86].
- the assertion that the grantee parties were being disingenuous when they suggested the native title party was unwilling to negotiate, whereas they were aware of the native title party's procedural obligations in obtaining instructions from the members of its Prescribed Body Corporate and the difficulties of processes during the Law Business season, was not made out on the facts [89].
- there was evidence to support the grantee parties' contention that the native title party did not negotiate in good faith [92]-[98]:
    a. The native title party failed to respond to proposals and counter proposals. A party who in the course of negotiations, receives a proposal in relation to the doing of the act, should consider that proposal and respond without being required to accept such a proposal. (*Western Australia/Arthur Dimer & Ors (Ngadju People); Cyril Barnes & Ors (Central East Goldfields People)/Eques Limited*, NNTT WF99/10, Ms Patricia Lane, 9 August 2000 (at 40)).
    b. the native title party did not respond to the grantee and government parties' requests to provide submissions to indicate the effect of the grant of the proposed leases on their native title rights and interests.
- there is no evidence that the native title party had not negotiated in good faith prior to the meeting of 18 June 2008. After that meeting the evidence indicates the conduct of the native title party 'was suggestive of evasive and disingenuous behaviour, which was designed to frustrate the advancement of negotiations' [100].
- the conduct of the native title party in the negotiations in relation to the proposed leases amounted to a failure to negotiate in good faith, whereas the native title party's assertions that the grantee parties did not negotiate in good faith was not made out [90], [101].

4.47 *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People*, NNTT WF09/30, [2010] NNTTA 53 (16 April 2010), Hon C J Sumner

The native title party, Nyiyaparli People, contended the grantee party did not negotiate in good faith in regard to the proposed grant of a mining lease, part of the grantee's Davidson Creek Iron Ore Project. It was contended there were no specific negotiations about the proposed M52/1043 in the negotiations of a wider Land Access Agreement (LAA).

Earlier relevant negotiations between the same parties in relation to the Robertson Range Iron Ore Project tenements are *Australian Manganese Pty Ltd v State of Western Australia and Others* NNTT WF07/26, [2008] NNTTA 38; (2008) 218 FLR 387 (3 April 2008), Hon C J Sumner (para 5.21 of Guide) and *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People,* NNTT WF08/30, [2008] NNTTA 163 (19 December 2008), Hon C J Sumner [14]-[20]. In April 2009 the Government party arranged mediation between the grantee party and the Jigalong Community Inc (JCI) in relation to the Robertson Range Project tenements. The details of the Term Sheet agreement (Agreement) negotiated at that time, between the grantee party and the JCI on behalf of the native title party are set out at [22]–[30]. The proposed grant is not on the Jigalong Reserve land.

The native title party contended the Agreement was confined to tenements on the Jigalong Reserve [24]. It contended that the grantee party by asserting the Agreement was in relation to all of the native title party's claim area, adopted a rigid non-negotiable position for a whole of project or tripartite agreement and would not negotiate specifically about M52/1043 [25], [45].

The Tribunal held:

- Earlier negotiations demonstrated that the grantee party made genuine efforts to negotiate with the native title party to obtain agreement on other tenements in the grantee's projects [31].
- The evidence supported the grantee party negotiations for a LAA included M52/1043 [33]-[40].
- It was satisfied that the grantee party was prepared to consider a separate agreement on M52/1043, as discussed at Tribunal mediation held in December 2009. This readiness was indicative of good faith negotiations [44]–[47].
- The LAA terms and correspondence related to it were evidence the grantee proposed a substantial agreement in the negotiations, M52/1043 was a subject of the negotiations and the grantee party was prepared to reach agreement specifically about M52/1043 once a counter proposal was received from the native title party.
- There is no impediment to making a finding that negotiations in good faith have occurred in relation to a particular tenement where negotiations about it were conducted in the context of a broader project: 4.45 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; (2009) 175 FCR 141[49].
- There was no 'breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct' (*Cox* at [27]) on the part of grantee. The requirements of s 31(1) NTA have been met [50].
- The Tribunal has power to conduct an inquiry and make a s 35 determination.

4.48 *Western Australia/Cyril Gordon & Others on behalf of the Kariyarra People/Pilbara Livestock Depot*, NNTT WF09/32, [2010] NNTTA 55 (19 April 2010), Hon C J Sumner

The Government party made a s 35 application for a future act determination when an agreement could not be reached as to the proposed compulsorily acquisition of native title rights and interests in land situated in the town of Port Hedland for the purpose of the grant by the Government party, of a proposed lease for stock holding yards to the grantee party. The native party contended the grantee party did not fulfil the obligation to negotiate in good faith as it failed to make proposals in the first place, did not make counter-proposals and failed to do what a reasonable person would do in the circumstances [17].

The Tribunal held:

- The grantee party did make proposals and counter proposals;
    a. It proposed to conduct a heritage survey, which was in good faith [19].
    b. It proposed a one off payment to a community group in the area [20].
    c. It indicated willingness to consider employment of the native title party [22].

The native title party's view that the offers were minimal was not indicative of bad faith [29].

- There was no pattern of unreasonable behaviour on the part of the grantee party and the grantee party's conduct generally did not indicate disrespect for the legitimacy of the native title party's claim [23].
- There is no obligation for the Tribunal to decide if offers made by a grantee are reasonable, although regard may be had to them, if it assists the good faith assessment [25].
- The inquiry into the question of good faith is directed to the quality of a party's conduct in the negotiations and there is no prescribed content and manner for negotiations under s 31(1)(b) other than that the negotiations must be in good faith: 4.45 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; (2009) 175 FCR 141 [25].
- The Tribunal had regard to the nature of the future act (over pastoral lease land which had been operated as a stockholding yard since 2000) [26]; the fact that the native title party did not make a submission pursuant to s 31(1)(a) NTA and was not able to organise a meeting to obtain instructions without funding [27]; and that native title had not been determined and there was no immediate entitlement to compensation [28].
- Although the offers made by the grantee party were minimal there was no evidence of a breach or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct (*Cox* at [27]) [29]. The requirements of s 31(1) NTA have been met and the Tribunal has power to make a s 35 determination [30].

4.49 *Jabiru Metals Ltd/State of Victoria/Sandra Middleton Patten, Olive Tregonning, Albert Mullett and Graham John (Bootsie) Thorpe on behalf of the Gunai/Kurnai People*, NNTT VF10/1, [2010] NNTTA 138 (30 August 2010), Hon C J Sumner

The Gunai/Kurnai People contended the Government party had not negotiated in good faith.

Both the Government and grantee parties contended they acted in accordance with the Victorian practice in relation to good faith negotiations as confirmed in: *Mt Gingee Munjie v Victoria and Others* [2003] NNTTA 125; (2003) 182 FLR 375. The Victorian practice is for the native title party and grantee party to negotiate a Project Consent Deed before involving the Government to finalise the negotiations in a s 31 Deed. The native title party sought to distinguish *Mt Gingee Munjee* on the basis that in that matter the native title party was split and the representative body, the NTVS does not have a policy of excluding the government party unlike its predecessor the Mirimbiak Aboriginal Nations Corporations.

The Tribunal found in absence of any evidence of the NTVS approach to negotiations it was entitled to infer the Mirimbiak policy continued. The Tribunal noted the native title party was invited by the government party to make submissions and could have advised of its wish to follow a different negotiation procedure to the usual Victorian practice. T he Tribunal was satisfied the negotiations followed Victorian practice, that the obligation to negotiate in good faith is conditioned by that practice , that the *Mt Gingee Munjie* findings are still applicable and the Government party had negotiated in good faith as required by s 31(1)(b).