NATIONAL NATIVE TITLE TRIBUNAL

Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another **[2022] NNTTA 40 (31 May 2022)**

Application No: **QF2021/0006**

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

- and -

IN THE MATTER of an inquiry into a future act determination application

Kevin Alfred De Roma

(grantee party)

- and -

Western Yalanji Aboriginal Corporation RNTBC (QCD2013/002)

(native title party)

- and -

State of Queensland

(Government party)

DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN INQUIRY

Tribunal:	Mr Glen Kelly, Member
Place:	Perth
Date:	31 May 2022
Catchwords:	Native title – future act – application for a determination in relation to mining lease – power to make determination – whether grantee party has negotiated in good faith
Legislation:	*Mineral Resources Act 1989* (Qld)
	Native Title Act 1993 (Cth) ss 29, 30A, 31, 35, 36, 38, 39, 60AB.

Cases:

Brady on behalf of the Western Yalanji People #4 v State of Queensland [2013] FCA 958 (***Western Yalanji #4 v State of Queensland***)

Brownley v Western Australia (1999) 95 FCR 152; [1999] FCA 1139 (***Brownley***)

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland [2012] NNTTA 9 (***Drake Coal***)

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49 (***Cox***)

*Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation (*2005) 196 FLR 52; [2005] NNTTA 88 (***Gulliver***)

June Ashwin on behalf of the Wutha People/Western Australia/Contact Uranium Limited [2008] NNTTA 129 (***Wutha v Contact***)

Marjorie May Strickland & Ors v Minister for Lands & Anor [1998] FCA 868 (***Strickland***)

Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal [2014] NNTTA 74 (***Muccan Minerals v Njamal***)

Muccan Minerals Pty Ltd & Another v Taylor and Others on behalf of Njamal [2016] NNTTA 28 (***Muccan Minerals v Njamal #2***)

North Ganalanja Aboriginal Corporation & Waanyi People v Queensland [1996] HCA 2; (1996) 185 CLR 595 (***North Ganalanja***)

Northern Territory and Griffiths (2019) 269 CLR 1; [2019] HCA 7 (***Griffiths***)

Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people [1999] NNTTA 361 (***Placer (Granny Smith)***)

Rita Dempster & Ors (Southern Noongar)/Bayside Abalone Farm Pty Ltd & Anor/Western Australia [1999] NNTTA 235 (***Dempster***)

Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli [2015] NNTTA 26 (***Rusa v Gnulli***)

Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli [2018] NNTTA 81 (20 December 2018) (***Rusa v Gnulli 2***)

Western Australia/Johnson Taylor on behalf of the Njamal people/Garry Ernest Mullan [1996] NNTTA 34 (***Njamal***)

Western Australia/Roberta Vera Thomas & Ors (Waljen)/Austwhim

Resources NL; Aurora Gold (WA) Ltd [1996] NNTTA 30 (***Waljen***)

White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd & ICRA Ashton Pty Ltd/Scott Franks & Anor (Plains Clans of the Wonnarua People)/New South Wales [2011] NNTTA 72 (***White Mining***)

Western Australia/Arthur Dimer & Ors (Ngadju People); Cyril Barnes & Ors (Central East Goldfields People)/Equs Limited [2000] NNTTA 290 (***Dimer***)

Western Australia/Western Australia Petroleum Pty Ltd & Anor/Hayes & Ors on behalf of the Thalanyji People [2001] NNTTA 18 (***Western Australia v Thalanyji***)

Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2);Brendan Wyman & Ors (Bidjara People)/Queensland [2012] NNTTA 93 (***Xstrata***)

Representative(s) of the native title party:	Julia Taylor, North Queensland Land Council Patricia Lane, Counsel
Representative of the grantee party:	John Withers
Representative of the Government party:	Julieanne Butteriss, Department of Resources Margot Clarkson, Crown Law

REASONS FOR DETERMINATION

Background

[1] On 3 March 2021, the State of Queensland (**the Government party**) issued a notice pursuant to s 29 of the *Native Title Act 1993* (Cth) (**NTA**) that it intends to grant mining lease ML100258 (**the lease**) to Mr Kevin Alfred De Roma (**the grantee party**). As is set out in the notice, the lease comprises an area of 57.24 Ha and is located approximately 20km south-west of Lakeland in Queensland.

[2] The Western Yalanji Aboriginal Corporation RNTBC (**WYAC**) is the native title party and holds native title rights and interests in trust for the Western Yalanji People #4 over the area of the lease (QUD6008/1999). The native title party was represented at all material times by North Queensland Land Council (**NQLC**).

[3] Following the s 29 notice, the negotiation parties are required to conduct a good faith negotiation with a view to obtaining the agreement of the native title party to perform the future act (NTA s 31(1)). Pursuant to s 30A of the NTA, the Government party, the grantee party and the native title party are all negotiation parties. The parties did not reach agreement and on 20 December 2021, at least six months after the notification day, the grantee party applied to the Tribunal for a determination that the future act may be done pursuant to s 38 of the NTA.

[4] On 21 December 2021, I was appointed by the President of the Tribunal to conduct the inquiry in this matter.

[5] Per s 36(2) of the NTA and as clarified by *Cox* at [11], I cannot proceed to make a determination in this matter if the native title party satisfy me that either the Government party or the grantee party failed to negotiate in good faith as required by s 31(1) of the NTA. The native title party alleges that the grantee party did not negotiate in good faith, however makes no such assertion against the Government party.

[6] After assessing all the materials before me, I am not satisfied that the grantee party negotiated in good faith.

Tribunal proceedings

[7] The Tribunal accepted the grantee party's application for a s 38 future act determination on 21 December 2021.

[8] The parties were notified that a preliminary conference to discuss directions for the subsequent inquiry process was to be held on 25 January 2022. The representative for the grantee party, Mr John Withers (**Mr Withers**), advised that he would be unavailable on that date and the remainder of January and requested an adjournment to 3 February 2022. I agreed to the adjournment and draft directions were circulated to the parties in advance of this conference. As a result of the delay, I sought feedback from the native title party in advance of the conference on whether it would allege a lack of good faith on the part of the Government party, the grantee party, or both.

[9] The native title party indicated they would allege a lack of good faith on the part of the grantee party, and directions were made accordingly.

[10] On 22 February 2022, the native title party requested a short extension to the directions which I approved.

[11] On 24 February 2022, the native title party provided a statement of contentions addressing their good faith allegation against the grantee party, which was accompanied by a number of supporting documents which are detailed in a further section of these reasons.

[12] On 10 March 2022, the grantee party provided a number of documents which are also detailed in a further section of these reasons.

[13] On 21 March 2022, the native title party provided a statement in reply to the grantee party's submissions, which was accompanied by a number of documents which are detailed in a further section of these reasons.

[14] On 24 March 2022 and 25 March 2022, parties confirmed the matter could be determined on the papers without any hearing. I reviewed the parties' materials and decided that the materials adequately addressed the matters in contention and so decided that no hearing was necessary.

Good Faith Material

[15] Following is a summary of the material provided by the parties for the inquiry into good faith.

Native Title Party:

a) Contentions dated 24 February 2022 (**NTP Contentions**);

b) Supporting documentation for contentions (comprising 31 documents listed at Appendix 1 of this determination) (**NTP Contentions Annexure**);

c) Statement of Contentions in Reply to Mr De Roma dated (**NTP Contentions in Reply**); and

d) Supporting documentation for reply contentions comprising the following (4 documents) (**NTP Contentions in Reply Annexure**):

Reference	Description	Date
Doc Number D1 pp 2-16	NNTT Extract of Determination	n.d.
Doc Number D2 p 17	NNTT Map of Determination	n.d.
Doc Number D3 p 18	Map of Bonny Glen Station	21 March 2022
Doc Number D4 pp 19-23	Historical title search of Lot 66 on 245572	21 March 2022

Grantee Party:

a) Documentation (comprising a number of documents listed at Appendix 2 of this determination).

Legal Principles for assessing negotiation in good faith

Regard for Right to Negotiate

[16] The High Court has held that the right to negotiate should not be seen as a 'windfall accretion' for native title parties (*North Ganalanja* at [24]). Further, the negotiation process set out through the right to negotiate provisions of the NTA is a core part of the future act regime, should be effective, not a right in name only (*Njamal* at [9]) and should be construed beneficially when balancing the rights of the native title party and the broader community (Njamal at [7] citing *Waljen* at [16]-[22]).

Defining 'negotiate in good faith'

[17] There is no definition of the phrase 'negotiate in good faith' in the NTA. The NTA does however seek that 'every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate' (NTA Preamble) which Deputy President Sumner in *Njamal* at [10] noted has been translated into the requirement to negotiate in good faith in s 31(1)(b). Section 31(1)(b) requires that 'the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties', or native title party where there is just one.

[18] Although a definition is lacking, it has been established that the term 'good faith' is to be interpreted in its natural and ordinary meaning. Notions of both negotiation and good faith are summarised in *Strickland* at [38]:

> The words "negotiate in good faith" are not defined in the NT Act and must be given their normal meaning having regard to the statutory context and principles of statutory construction. "Negotiation" involves communicating, having discussions or conferring with a view to reaching an agreement. Good faith involves both subjective honesty of purpose or intention and reasonableness of effort to negotiate and reach agreement.

[19] In *Brownley*, Lee J set out at [23] that:

> The duty to negotiate in good faith imposed by s 31 incorporates, at least, some part of the duty as understood by the general law, namely an obligation to act honestly, with no ulterior motive or purpose, albeit that the negotiation may be conducted negligently or incompetently.

Conduct of the parties

[20] With this in mind, when seeking to understand whether a party has acted in good faith, assessment is directed towards the quality of the conduct of a party and to their state of mind as manifested by this conduct (see *Cox* at [38]).

[21] Acting with a view to reaching agreement has a number of practical effects on the conduct and behaviour of a party. President Dowsett in *Rusa v Gnulli* at [16] stated the 'question is not as to the adequacy of the … party's negotiation technique or strategy. The question is whether that party's behaviour *demonstrates* that it has not negotiated in good faith' (emphasis added).

[22] Deputy President Sumner in *Placer (Granny Smith)* at [30] noted good faith requires a 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 (emphasis added).

[23] Similarly, Lee J outlined in *Brownley* at [25] by setting out that:

> If a Government party ignores the requirement of the Act and seeks to exercise power without considering, and responding to, any submissions put to it by a native title claimant, relevant to the matters referred to in s 39, it will not be negotiating in good faith. Similarly, if a State purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith. Delay, obfuscation, intransigence, and pettifoggery would be *indicia* of such conduct.

[24] This of course means that a party cannot just go 'through the motions' with closed minds or rigid or predetermined positions (*Cox* at [24]), engage in disingenuous conduct (*Cox* at [25] and [26]) or fail to advance negotiations by way of deliberate delay, sharp practice, misleading negotiation or some other type of unconscionable conduct (*Cox* at [27]) or with no intention of reaching agreement and then seeking arbitration (*Xstrata* at [59] citing *White Mining* at [33]).

Exercise of statutory rights

[25] Importantly as to this last point, good faith is 'not evaluated on the basis of the "status", "stage" or "substance" of negotiations' but on conduct' (*White Mining* at [33]). The overall effect of this is that it is not necessary for negotiations to have reached a particular stage in order to demonstrate good faith. As such, the grantee party exercising its statutory right to seek a determination once the six month statutory right to negotiate period has passed is not taken to show a want of good faith (see *Cox* at [19]).

Assessing good faith

[26] It is generally accepted that when deciding whether a party has conducted itself in good faith it is their overall conduct that must be scrutinised (see for example *Njamal* at [12], *Strickland* at [38] and *Brownley* at [35] and [37]). In *Njamal* at [17]-[18] a set

of indicia were proposed to assist in forming an understanding of whether a party (a Government party in that case) had acted in good faith. These are included in *Strickland* at [35] with apparent endorsement and they are routinely adopted in determinations of this type, including this one.

[27] It must be noted that the *Njamal* indicia are not legal principles and are not exhaustive. Member Lane at [25] in *Dimer* outlined a useful approach, setting out that the *Njamal* indicia aren't a checklist or series of conditions and that it is not necessary for the parties to engage in all the activities described. Failure to engage in one or more parts of the indicia will not, on their own, lead the Tribunal to a finding of lack of good faith. Equally, there may be other indicators that show the indicia of good faith have not been adhered to. One example provided by Nicholson J in *Strickland* at [38] is that negotiation in good faith does not mean a party has an obligation to accept or capitulate to another party's position.

[28] Member Lane in *Dimer* at [30] set out a framework for assessing the conduct of parties based on the *Njamal* indicia:

> 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:
>
> - 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));
> - 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));
> - 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
> - 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.

Assessment is contextual

[29] When making this assessment of good faith, the overall conduct of a party is to be taken in context with the particular matter and its associated facts. Each assessment will be affected by this context as set out in *Xstrata* at [65]:

> When determining whether the parties have negotiated in good faith, a contextual evaluation is required. The approach taken by one party is normally influenced by the approach taken by, or the conduct and actions of, another. The obligation to negotiate in good faith applies to all parties, so the Tribunal will not ignore the relevant actions of others when assessing the negotiation conduct of the party being challenged. For example, as the passage in *Placer (Granny Smith)* quoted above (*Placer (Granny Smith)* at [30]) indicates, lack of good faith in the negotiations by a native title party will be relevant to whether other parties have fulfilled their obligation and may impose a lesser standard on them. Similarly, if a grantee party is a small miner with few resources and limited capacity to make offers or give concessions in relation to a small project, what would be regarded as negotiating in good faith could be different from that of a large mining company with the capacity to make substantial offers and concessions in relation to a large project (see *Drake Coal* at [85]).

No authority if a lack of good faith, burden of evidence on party alleging lack of good faith

[30] In making a determination, s 36(2) provides that if a negotiation party satisfies the Tribunal that another negotiation party (other than a native title party) has not negotiated in good faith, then it must not make a determination on the s 35 application. In terms of showing or demonstrating a want of good faith, the Tribunal has held that the practical effect of this is that the evidential burden rests with the party making the allegation. This is perhaps best summarised in *Gulliver* at [10] (citing *Dempster* at [4], [21] and *Placer (Granny Smith)* at [21]-[28]) which says:

> The Tribunal has said that the practical effect of s 36(2) is to place an 'evidential burden' on the party alleging lack of good faith negotiations which would normally require it to produce evidence to support its allegations. The Tribunal is not required to adopt strict rules on burden of proof but any party alleging a lack of good faith negotiations must provide contentions and documents which specify in detail the matters it relies on.

[31] I conduct my assessment of whether parties negotiated in good faith in this matter in line with the above principles.

The Lease and Summary of the Grantee Party's Project

[32] The grantee party's application for the mining lease is made under Chapter 6 of the *Mineral Resources Act 1989* (QLD) (**MRA**).

[33] The grantee party proposes to mine gold and has applied for a 15 year term, with the possibility of renewal. The grantee party proposes to use sluice boxes and other hand held tools, including panning dishes. If all mining cannot be carried out by mobile methods, the grantee party indicated a water pump, a small loader (9-14 tonne), a small excavator (approximately 18-20 tonne), and a small tandem truck may be used. The lease is approximately 57.24 hectares in size.

The Good Faith Negotiation Period

[34] As the allegation of a lack of good faith is made against the grantee party, this section will focus mainly on steps taken by and interactions between the native title party and the grantee party.

DETERMINATION

What Occurred During the Negotiations

Details of the Process and the Document Exchange

[35] At all material times, the grantee party was represented by Mr Withers. Any reference to the grantee party throughout this determination is also a reference to Mr Withers as the grantee party's authorised representative. Negotiations on the lease possessed the added complexity of being linked to and negotiated alongside two separate leases, ML100249 and ML100250, which were notified a considerable time prior to the lease. The applicant for these other leases is Mr Edmund Fitzgerald who is also represented by Mr Withers, with these leases being referred to as the '**Fitzgerald leases**' in this determination.

[36] While the Fitzgerald leases and the negotiation process surrounding them is not being considered in this determination, they were being negotiated along with the current matter. The positions and correspondence put forward in relation to the Fitzgerald

leases were linked to and resubmitted into negotiations on the lease by the grantee party. These materials are taken into consideration in this determination, however only at the point at which they are formally introduced by the grantee party, as will become clear upon reading. It is necessary to consider the materials relating to the Fitzgerald leases in order to make sense of some of the positions and correspondence put forward by the grantee party.

[37] On 17 February 2021, correspondence from the Government party with the s 29 notification of the lease was sent to the native title party and NQLC with a notification date listed as 3 March 2021 (NTP Contentions Annexure p 51). This commenced a process whereby negotiation looks to have been conducted solely through the exchange of correspondence. This process generated a large volume of material which, alongside steps taken by the parties, is examined in the following.

[38] On 5 March 2021, NQLC corresponded with Australian Mining & Exploration Title Services (AMETS) as the listed authorised holder representative. This correspondence provided notification that NQLC was the legal representative of the native title party and sought information on the operations of the grantee party. To facilitate this, a 'Details of Proposed Operations' questionnaire was attached to the correspondence as an aid for the collection of information on proposed operations for the native title party (NTP Contentions Annexure, pp 60-67).

[39] This 5 March correspondence also stated that neither the native title party nor NQLC are funded to undertake negotiations, that s 60AB of the NTA provides for the native title party to charge fees for performing certain functions and that the native title party has an agreement with NQLC to recoup NQLCs costs on their behalf (NTP Contentions Annexure, p 61). As such, NQLC advised, in the course of negotiations, the grantee party is requested to contribute to the costs of NQLC and the native title party. To clarify, s 60AB(1)(a) of the NTA states that a registered native title body corporate (**RNTBC**) such as the native title party may charge a fee for the costs it incurs when negotiating an agreement under s 31(1)(b), which is the case here.

[40] On this same day, NQLC also corresponded with the Government party in response to its s 29 notification. In this correspondence NQLC submitted the grant of the licence would have the effect of impairing native title rights, the community, cultural and

social life of the native title party and of Aboriginal heritage. NQLC further notified the Government party it had requested information from the grantee party and outlined the native title party emphasis on adequacy of information, effect on native title rights, access and heritage protection in addition to the expectation the grantee party would meet costs as provided by s 60AB of the NTA (NTP Contentions Annexure pp 69-72).

[41] On 15 March 2021, Mr Withers corresponded with NQLC to provide notice that he would be taking carriage of the matter on behalf of the grantee party rather than AMETS. This was, as Mr Withers explained, due to him negotiating the Fitzgerald leases and as Mr Withers set out, because he had extensive history in holding various types of mining tenure in the NTP's area since 1973 (NTP Contentions Annexure, p 73).

[42] In this correspondence, Mr Withers also communicated that the grantee party in this matter had instructed him to respond similarly to questions or negotiation positions put forward regarding the Fitzgerald leases, stating '**this reasonable request will save time** for not going over most of all issues in progressions [sic] again' (original emphasis). I assume this means time would be saved as issues wouldn't have to be dealt with a second time, however this would only be effective if the questions and issues referred to were satisfactorily resolved during negotiations on the Fitzgerald leases.

[43] Mr Withers also stated that '[n]o doubt the **progressive monetary offers made** for [the Fitzgerald leases], would have applied similarly to ML100258' (original emphasis) or would start in a similar place as the Fitzgerald leases if required to recommence the negotiation process. At this point, Mr Withers also proposed heritage inspections, when undertaken, should be batched so as to save resources on the part of the grantee party in the current matter and the grantee party of the Fitzgerald leases. Mr Withers then invited the provision of the draft ancillary agreement (**AA**) and 'the Questionnaire' which I assume to be the Details of Proposed Operations questionnaire (NTP Contentions Annexure, p 73).

[44] On 26 March 2021, NQLC responded to Mr Withers with the correspondence and questionnaire previously sent to AMETS (NTP Contentions Annexure, p 75).

[45] Following this on 6 April 2021, Mr Withers responded with the completed questionnaire, attaching the Resource Authority Public Report which outlines the broad details of the lease. Mr Withers again noted the grantee party wished to batch it with the Fitzgerald leases although noted there may be some differences (NTP Contentions Annexure, p 78). It is unclear whether this 'batching' was also to mean these matters would be intended to be bundled into the one AA or negotiated at the same time with similar terms.

[46] In this correspondence, Mr Withers confirmed the lease was reduced in size to 32.51 hectares and attached mapping with the final boundaries of the lease. Mr Withers also stated the Environmental Authority held by the grantee party, in was what was termed the 'standard EA', the draft of which was also provided, which he says was similar to that of other small scale alluvial miners in the area. Mr Withers explained that the proposed mining program had not been provided by the grantee party at that point (NTP Contentions Annexure, p 78).

[47] On 7 May 2021, Mr Withers followed this correspondence with an email seeking confirmation of receipt of his 6 April 2021 correspondence (NTP Contentions Annexure, p 102), while on 21 June 2021 the Government party emailed the parties seeking an update (NTP Contentions Annexure, p 107). Mr Withers reported his sets of correspondence to the Government party on the same day (NTP Contentions Annexure, p 106).

[48] On 16 July 2021, Mr Withers sent further correspondence to NQLC, imploring a response to this previous sets of correspondence stating 'I thought that you would also respond to my previous emails in a timely manner, so that AA's (Ancillary Agreements) can be finalised ASAP, as both Edmund Fitzgerald and Kevin De Roma needs [sic] to have these (3) ML's [sic] granted also ASAP' (NTP Contentions Annexure, p 112).

[49] The content of Mr Withers 16 July 2021 correspondence to NQLC is relatively impenetrable. In seeking to summarise however, Mr Withers noted the lease is in proximity to road access (closer than the Fitzgerald leases) and that the grantee party wished to pay the same costs for a proposed work area (**PWA**) inspection, whether it was batched with the same inspections on the Fitzgerald leases or not. Mr Withers

also noted or asserted the rate on offer for heritage inspectors was above those set by the Australian Taxation Office (**ATO**) (NTP Contentions Annexure, p 112). The reference to the rate on offer for the PWA inspection referred to that put forward in reference to the Fitzgerald leases. These are examined further in this section.

[50] This correspondence then made comment in relation to a number of AA clauses, however these must have related to the AA provided by NQLC for the Fitzgerald leases as no such document had been shared in this matter at that point. Mr Withers referred to a 'windfall clause' which he put should be the same as the Fitzgerald leases, and compensation payments, which he stated should also be the same as that put forward in the Fitzgerald leases and calculated on a per hectare basis rather than a per lease basis (although the difference is unclear at this point).

[51] Mr Withers further set out that in relation to the Windfall clause and PWA fees 'I have given more than **reasonable reasons** for what has been offered by the Grantees to be a sufficient **voluntary** $ (Dollar) amount to help out the NT Party financially, so we do not wish to increase these **voluntary** amounts offered for these (2) Clauses in future negotiations' (NTP Contentions Annexure, p 112, original emphasis). This was also a reference to positions put forward previously in discussions on the Fitzgerald leases, now to apply here, although at this point in the materials before me the 'reasonable reasons' Mr Withers referred to are not necessarily clear and neither is the need for the strong emphasis on the word voluntary.

[52] Mr Withers further noted '[a]s far as the **Compensation Payments**, then we will further increase the offer under the circumstances noted in past emails to be in a Clause in the AA, and I will note of this progressive offer to you in an email in the near future' (NTP Contentions Annexure, p 112, original emphasis).

[53] Mr Withers again corresponded with NQLC on 19 July 2021. As previously, this correspondence is somewhat impenetrable however it appears the essence of it was to seek a response to the previous sets of correspondence sent by Mr Withers and to make further offers to the native title party. On this point Mr Withers stated he has made a further offer on what he entitled 'Compensation (Consideration)' for the Fitzgerald leases and sought to carry this over to the lease at a dollar per hectare rate (NTP Contentions Annexure, p 117). In this correspondence Mr Withers said:

> We wish to **double the offer made** for Compensation that was offered in the attachment sent to you on the **28/10/2020** for the [Fitzgerald leases] and offer double $/per Hectare calculations as well for ML100258, and to note … **ML100258** to the nearest Hectare will be **33** Hectares … (original emphasis).

[54] In this same correspondence Mr Withers then said:

> If we were to make an offer of an equal $ (Dollar) offer per Mining Lease as you have offered the Grantees, then our offers combining all the (3) ML's added together would be less than we have offered by calculating such by $/Hectare, and this would be argued by what area we would have as a Workplace Health and Safety area whilst mining is in operation.

[55] In essence, Mr Withers was putting forward that the offer for what he termed 'Compensation (Consideration)' should be calculated per hectare according to the area affected by mining activity itself and this would be greater than the amount on offer on a per lease basis. The '28/10/2020' correspondence referred to was provided for the Fitzgerald leases however can be seen to be forming the opening positions of the grantee party in this matter. The 28 October 2020 correspondence was formally introduced into this matter at a later date so is considered further in this section.

[56] On 22 July 2021, NQLC sent correspondence to Mr Withers (NTP Contentions Annexure, p 122). Attached to this correspondence was the draft of the AA and a copy of a previous letter from NQLC to Mr Withers dated 6 December 2020 in relation to the Fitzgerald leases, which was also referenced as being in response to Mr Withers' 28 October 2020 correspondence (NTP Contentions Annexure, pp 125-176).

[57] The NQLC covering correspondence dated 22 July 2021 set out the main points of interest for WYAC in the AA and provides a counter offer for Mr Withers. In summary these are:

- Aboriginal Cultural Heritage Protocol (**ACHP**) and Costs: NQLC states the ACHP is standard in WYAC's AA and at a minimum, miners are expected to comply with the ACHP. Additionally, WYAC had reaffirmed 'that the compliance with the ACHP is not negotiable and is to remain in all WYAC's AA's.' NQLC also included correspondence from 6 December 2020 in

relation to the Fitzgerald leases which had stated that 'WYAC do not accept your proposal that Aboriginal Cultural Heritage can be addressed without reference to the Aboriginal Cultural Heritage Protocol (**ACHP**) as drafted in the Ancillary Agreement (**AA**)' (original emphasis) and makes reference to the cultural heritage duty of care as defined in the *Aboriginal Cultural Heritage Act* 2003 (Qld) (ACHA) (NTP Contentions Annexure, pp 125-126).

The 6 December 2020 correspondence further states that 'as a standard practice for mining leases, along with other ground disturbance matters on Western Yalanji Country, as is the case for other native title parties, is to comply with the ACHP as drafted in the Ancillary Agreement (AA) forwarded. The ACHP is not a new construct and was contained in the now expired SSM ILUA[1] where compliance was adhered to by miners in the past' (NTP Contentions Annexure pp 125-126).

NQLC also set out the position that the costs in the AA on this topic 'cover WYAC's expenses only' and would 'not be reduced as WYAC should not be put in a position where they are incurring costs for a miner to meet their obligation under the Aboriginal Cultural Heritage Act' (NTP Contentions Annexure, p 122). NQLC then sets out that '[y]our proposal [of 28 October 2020] does not cover costs that would be incurred by WYAC' and that WYAC will consider whether surveys for this GP can run together with those of the Fitzgerald leases (NTP Contentions Annexure, p 122). NQLC include a schedule which sets out the costs involved with the inspection itself in addition to a series of allowances for travel, accommodation and meals (NTP Contentions Annexure, pp 153-154).

- Access: Amendment to AA clause 9 to clarify that Traditional Owners can access the tenement area without notice, where active mining is not taking place with the term 'Area of Operations' amended to clarify this point (NTP Contentions Annexure, pp 122-123, 138-139).

[1] The Small Scale Mining Indigenous Land Use Agreement (SSM ILUA) (NTP Contentions Annexure, pp 475-560) refers to an ILUA entered into by the Western Yalanji, the State of Queensland and the North Queensland Miners Association in 2012 and expiring 5 years after ILUA registration. The SSM ILUA provided a set of previously agreed outcomes for small scale miners to opt into when seeking grant of mining tenure. The content of the SSM ILUA and the AA considered in this determination bear strong similarity.

- Environmental protection: Agreement to remove penalty clause for non-compliance [with State laws] and instead the grantee party to notify WYAC in event of a breach only (NTP Contentions Annexure, p 123).

- Plan of Operations, Progressive Rehabilitation and Closure Plans: Acknowledge these are not required for this level of mining and provide drafting to reflect. WYAC instruct to retain clauses if this does become relevant (NTP Contentions Annexure, p 123).

- Implementation: Parties can call a meeting with 20 days notice rather than convening an annual meeting, and parties to bear own costs if a meeting is required (NTP Contentions Annexure, p 123).

- Costs: Grantee party to contribute to the 'costs of consultation and consent meeting for the Western Yalanji People as required in accordance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)' with contribution capped at $2,500 pro rata (ex GST). On this point NQLC further set out that should agreement in principle be reached on this and the Fitzgerald leases, batching can occur, which includes notification for the community consultation and consent notice for each mining lease (**ML**) being batched in one meeting, once terms are agreed (NTP Contentions Annexure, p 123).

- Windfall Threshold: To remain at $750,000 per lease for 'single and multiple lease scenarios' in addition to the fixed compensation amount set out in the following point (NTP Contentions Annexure, p 123). The model provided in the draft AA is to seek agreement on a lower per annum figure (Compensation) and have no production payment unless a threshold (a 'windfall threshold') is reached. This windfall threshold is indexed to inflation and above this threshold, it is proposed a percentage of total earnings is to be paid to the native title party (NTP Contentions Annexure, p 152).

- Compensation: Reduce to $1500 (ex GST) per annum which WYAC says it views as reasonable and is comparable to payment under Native Title Protection Conditions (**NTPCs**), imposed on prospecting and exploration tenure pursuant to the *Mineral Resources Act 1989* (Qld) (MRA), for administrative payments for exploration tenure. NQLC further set out that the

> 'Native Title Act affords our clients the right to negotiate including for compensation for the impairment of the MLs on their native title rights and interests' (NTP Contentions Annexure, pp 124 and 151).

[58] NQLC then set out their view of next steps being that if the grantee party was agreeable to this proposal, arrangements could be made for a community consultation and consent meeting 'at a time when there are other tenements to include' or alternatively agree to pay the full $2500 for a meeting solely focussed on this matter.

[59] On August 4 2021, Mr Withers responded with what could be reasonably termed as aggressive correspondence on the positions put forward by NQLC. Mr Withers sets out that the native title party should review his previous sets of correspondence (including those focussed on the Fitzgerald leases) regarding issues he asserts NQLC were claiming to require mandatory monetary payments. In particular, this was in relation to heritage inspection and windfall clauses which he had formed the view 'are **not negotiable** as stated in your latest letter on the 22/7/2021' (NTP Contentions Annexure, p 185, original emphasis). NQLC did not however set out that these things were not negotiable, rather it said that 'compliance with the ACHP is not negotiable' (NTP Contentions Annexure, p 122).

[60] Mr Withers presented the view that cost issues would be voluntary to negotiate and that he had voluntarily offered costs to address what he termed 'Compensation (Consideration)' and PWA heritage inspections, which Mr Withers maintained he had lifted over the course of negotiations, which includes those specific to the Fitzgerald leases and carried into this matter (NTP Contentions Annexure, p 185).

[61] Mr Withers then asserted that:

> It seems also quite obvious that the N T [sic] Parties' Legal Advisor is not getting through to the N T Party as to how, over the many years of RTN negotiations that there has become fair guidelines for all to see as to where monetary payments by Miners for the Future Acts are mandatory or only voluntary to negotiate upon. The Native Title Party has not given me any reason whatsoever as to why any payment cost that they are claiming for should be any more than a **NIL** payment, and I have given **numerous reasons** to show that any payment to be made above a **NIL** payment, would be voluntary rather than mandatory, or even to negotiate upon, but to show good will, then I have offered payments for these three issues

> asked by the N.T. Party without arguing on any particular issue for such not to be in the AA at all. We definitely do not want to see the NT Party, to be out of pocket for any issues that they are not already government funded for' (NTP Contentions Annexure, p 185, original emphasis).

[62] For clarity as drawn from other parts of this same correspondence, the three issues referred to by Mr Withers in this passage are costs for heritage inspections, windfall payments and compensation.

[63] Mr Withers then criticised NQLC for seeking separate AA's for each tenement, although there appears to be confusion on the part of Mr Withers about the differentiation between the multiple mining leases and the two separate grantee parties, who would reasonably be expected to be separate contracting parties. In any case, Mr Withers notified NQLC that Mr De Roma agreed for the lease to be in a separate albeit similar AA to that of the Fitzgerald leases (NTP Contentions Annexure, p 185).

[64] Mr Withers then offered a lengthy response to the headings of the NQLC correspondence of 22 July 2021 outlined in paragraph [57] of this determination. On the ACHP and Costs, Mr Withers complained '[w]e have been over and over this matter for about 12 months' (a reference to the Fitzgerald leases) and asserted he had explained what are described as 'generous beyond cost offers' for native title party out of pocket costs. Mr Withers dwelt on the out of pocket issue for PWA heritage inspections stating that the native title party hadn't explained why the out of pocket costs were, as stated by Mr Withers, 'a horrific amount of money' which he calculated to be about $13,000 for the 2 Fitzgerald leases, stating this represented far more than out of pocket costs (NTP Contentions Annexure, p 186). It is unclear how this calculation was arrived at.

[65] Mr Withers then took issue with the NQLC position of expecting compliance with the ACHP. Mr Withers admonished NQLC and said '[l]et me **AGAIN** remind the N T [sic] Party that we are **not** progressing an ILUA or **not** ticking the box agreeing to any NTPC's that relate to EPM applications, as we are going through the Right To Negotiate system' (NTP Contentions Annexure, p 186, original emphasis). This suggests there was perhaps some confusion on the part of Mr Withers as to the extent of the rights afforded to the native title party under the right to negotiate regime, or

perhaps the potential impact on native title rights and interests pursuant to a mining lease as opposed to a generally less impactful form of prospecting or exploration tenure.

[66] Mr Withers then posited that outcomes arrived at on other MLs with other miners should have no relationship with this matter due to their different characteristics, such as size, whether they are situated in areas of particular cultural significance or most notably, where native title holders are exercising their native title rights and interests (NTP Contentions Annexure, p 186).

[67] In relation to these native title rights and interests and in support of his positioning, Mr Withers then stated '[i]t has been well noted that in most cases regarding Pastoral Holdings … that the Determined N T Parties holders [sic] do not hold priority over the co-existing landholders or miners that hold Mining Leases' (NTP Contentions Annexure, p 186). While this comment is not untrue, it fails to acknowledge the area subject to this mining lease application is determined to be exclusive possession native title due to either ss 47A or 47B of the NTA applying (NTP Contentions Annexure, pp 12-13). As the land is not vacant crown land, this would indicate s 47A of the NTA applies, where prior extinguishment has been disregarded indicating the pastoral lease is held by Aboriginal people or the traditional owner group itself.

[68] In relation to access, Mr Withers made a counter proposal that access be open until the miner gives 10 days notice of the commencement of work, after which 10 days notice to access from the native title party would be required. Mr Withers noted there may be 'obligations of entry permission from the co-existing Landholder' (NTP Contentions Annexure, p 186) which again failed to acknowledge the operation of s 47A of the NTA in this area and the nature of the underlying pastoral lease.

[69] Mr Withers then outlined the intention to delete clauses relating to Environmental Protection and the Plan of Operations, Rehabilitation and Closure. Regarding the latter, Mr Withers stated the intention to 'reduce the original AA sent to us by getting rid of Clauses that relate to our obligations to other Departments under Acts that they are in control of and administer' (NTP Contentions Annexure, p 186).

[70] In relation to 'Costs' Mr Withers simply said '[w]e have been over this issue many times, and I gave many reasons and at least 4 alternate ways to obtain consent from the

Western Yalanji People without such costs to apply to the Grantees for this issue' (NTP Contentions Annexure, p 187). The grantee party position on costs gains more clarity further in this determination.

[71] Mr Withers presented a similar position in relation to the 'Windfall Threshold' by stating '[s]eeing that the Native Title Party and the Pastoral holder are not entitled to a payment (Val/Min Payment) from the proceeds of sales of any minerals that is mined, then we suggest that you please agree to what we have offered for this Windfall Clause' (NTP Contentions Annexure, p 187).

[72] On the topic of compensation, Mr Withers argued that, as he held the view the compensation costs provided for in the SSM ILUA were excessive and considering this was the right to negotiate process, any compensation was expected to be significantly lower. Mr Withers also set out that if the lease was judged on its own merits, presumably a reference to its size or prospectivity, the compensation would 'be probably NIL in monetary terms' (NTP Contentions Annexure, p 187). Mr Withers then stated his view that the provision of access and potential offers of employment, if needed, were the way forward rather than 'the Miners being out of pocket for no Lawful reason by providing such large payments' (NTP Contentions Annexure, p 187).

[73] Mr Withers rounded out this correspondence with some remarks on 'Next Steps', noting the proposal from NQLC to attend a consultation and consent meeting with the native title party at a time when there would be other tenements to include to reduce meeting costs for each miner in attendance, or pay the proposed meeting cost put forward by NQLC to deal with the lease and the Fitzgerald leases alone. Mr Withers stated that it wasn't expected the AAs under consideration would be the same as for other miners, so he would not be attending 'at the same meeting' (NTP Contentions Annexure, p 187). Additionally, Mr Withers set out that 'due to the very high costs asked for in [the] AA, and for the cost of the time wasted progressing these ML's so far, then Edmund and Kevin do not agree to most of the N T [sic] Parties proposals for costs and other issues noted in the original AA sent out, or in the latest AA sent to us' (NTP Contentions Annexure, p 187).

[74] Mr Withers then informed NQLC he would have a modified AA to send, to which NQLC replied on 5 August 2021 with a request for that to be marked up for comparison purposes (NTP Contentions Annexure, pp 187 and 188).

[75] Mr Withers provided further correspondence to NQLC, on what looks to be 6 September 2021, which clarified the position on what he termed 'Compensation (Consideration)'. He proposed that rather than base an offer on dollars per hectare, which he stated 'was last progressively offered by me at … **$33** for ML 100258' (NTP Contentions Annexure, p 197, original emphasis), that it instead be a figure per lease (including the Fitzgerald leases) and 'be now again progressed to **$90** for **each** of the ML's' (NTP Contentions Annexure, p 197, original emphasis).

[76] In this correspondence, Mr Withers then stated his view that these offers 'are well beyond what would be required if such calculations were to be actually judged on all of the (3) ML's merits' (NTP Contentions Annexure, p 197). NQLC responded on 7 September 2021 stating they would respond to the offer once the amended AA was provided in addition to confirmation of the grantee party's position on payment of costs for the consultation and consent meeting (NTP Contentions Annexure, p 199).

[77] Mr Withers responded to this request on 8 September 2021 informing NQLC he would soon forward a copy of the amended AA. The topic of the consultation and consent meeting costs elicited a stronger and lengthier response from Mr Withers. In relation to the fee he said 'our opinion has not changed … for not agreeing to this cost' and that 'I can certainly give you details of how consultation and consent was arranged **free of charge** in the past for the Grantee for his AA to be finalised and executed in a **timely manner**, if the NT Party may wish to go down that approach?? [sic]' (NTP Contentions Annexure, p 204, original emphasis).

[78] In support of this, Mr Withers attached three separate pieces of correspondence dated 17 September 2020, 2 October 2020 and 28 October 2020 (referred to in paragraph [36]). While these related to the Fitzgerald leases, as is clear throughout the process that is the subject of this determination, the positions set out in them were foundational to the negotiation process of the lease, as referenced by Mr Withers on numerous occasions. Like Mr Withers' other sets of correspondence, these were dense and somewhat impenetrable however due to their relevance and because they are

instructive of Mr Withers' positioning throughout this matter, they are summarised by topic below.

[79] In the 17 September 2020 correspondence, Mr Withers took some time on criticism of the expired SSM ILUA (NTP Contentions Annexure, p 211). This criticism related mainly to what he regarded as the high cost schedules and that mining leases, irrespective of their particular characteristics, were dealt with uniformly. This led to the point that each mining lease should instead be judged on its own merits, which is a recurring theme in the materials provided by Mr Withers; that the right to negotiate would be expected to provide lesser outcomes than the expired ILUA and, in particular, that costs in any RTN agreement are voluntary rather than mandatory. This distinction seems to be made on the basis that the expired SSM ILUA contained a schedule of costs that was not able to be modified.

[80] This was demonstrated by passages such as the following, in which Mr Withers also set out his mistaken view that native title has been determined to be non-exclusive:

> We have considered that if these particular ML's were to be **judged on their own merits** in relation to where they are situated, and considering environmental issues, and that the ML's are in an area that is a non-exclusive area, and the area is on Land Lease area of a Pastoral Holding (Coexistence), and the ML areas are in the well known the [sic] Palmer River Goldfield where some alluvial areas were turned over and mined up to (9) times over a period between years of about 1872 to 1896, and in the latest 50 years the area has been normally under an Exploration Permit … then you will find that any costs that the NT Party has asked for in the provided Ancillary Draft Agreement, are most likely **not Mandatory** payments to be made, but **only Voluntary** to negotiate on (from 17 September 2020 correspondence, NTP Contentions Annexure, p 212, original emphasis).

[81] In effect, the term 'judged on their own merits' could be taken to mean taking into consideration the overall set of attributes of each area in question rather than uniformly as in the SSM ILUA, and this would impact on each individual outcome.

[82] This is extended to Mr Withers' commentary on the right to negotiate itself where he said:

> It is most important to note that the most noticeable re-occurrences in relation to ILUA's and RTN Agreements, is that about **90% of the time** is mostly wasted and spent on negotiating about funding arrangements **(MONEY)**, payments to be made to the NT Party by the Grantee Party for Compensation and other non-mandatory issues for costs. **(MONEY)**. Usually no consideration is made by the NT Party or by their Legal advisors as to whether the costs asking are Mandatory or Voluntary to negotiate upon, and forget about what the real meaning for negotiations has been noted as that has been stated and means that :- **"Section 31(2) does not extend beyond negotiation about the effect of the Future Act has on Registered Native Title Rights and Interests."** If … there is any Impairment of such NT Rights and Interests of the NP [sic] Party, then Compensation may be payable by the Grantee, and to be calculated as the Law requires such is to be based upon. I am sure that most Legal advisors know how such Compensation is to be based upon, but the costs in the draft agreement has not been calculated according to how the Law provides … and the NT Party has concluded without any facts … that the Grantee will Impair the NP [sic] Party of their **current enjoyment of their Native Title Rights and Interests** within the area of both these ML's are situated (from 17 September 2020 correspondence, NTP Contentions Annexure, pp 212 and 213, original emphasis).

[83] Mr Withers offered no views or explanation on what it was the law may provide in relation to compensation. Additionally, Mr Withers appeared to be of the view there was no entitlement to compensation because there was no impairment of native title. This was further expanded upon when he stated:

> Regarding **compensation costs** for Mining Leases, if such were applicable … [t]he NT Parties asking of **$2,000 per annum** … is **no where** [sic] **near reasonable**, and if these … ML's were to be **judged on their own merits** then the cost would likely to be **NIL** (from 17 September 2020 correspondence, NTP Contentions Annexure, p 213, original emphasis)

[84] In the 2 October 2020 correspondence, Mr Withers made further comment on the legal basis for compensation by stating that 'even if it was found that the Law would require any sort of compensation … **legitimate reasons** [would need to be] given by the NP [sic] Party to substantiate … any payment above **NIL**' (from 2 October 2020 correspondence, NTP Contentions Annexure, p 215, original emphasis). In further comment in his 28 October 2020 communication to NQLC, Mr Withers puts forward a limited view of what may be appropriate compensation by stating that '[u]sually an offer of employment or allowance to provide access for the use of Native Title Rights

and interests … would be all that could be asked of the Proponent' (from 28 October 2020 correspondence, NTP Contentions Annexure, p 217).

[85] Regarding Consultation and Consent meetings, Mr Withers bluntly stated:

> We do not agree to pay any **Costs for a contribution to consent meetings** as … in the past … [consultation and] seeking consent was done at Community, or Working Group Meetings … funded by FHCSCIA [sic].[2] We also find that NQLC"s [sic] is funded to provide help with Legal aid to N.T. Parties in relation to negotiations for Future Acts for Mining and Exploration. (FAME) (from 17 September 2020 correspondence, NTP Contentions Annexure, p 213, original emphasis).

[86] It is unclear on what basis Mr Withers made a finding in relation to the resources of the native title party or its representative, however the effect of this statement was that no contribution would be made to these meetings as in Mr Withers' view, they were funded from elsewhere. Mr Withers added to this by stating '**Millions of dollars** has been provided by the government to pay negotiators and Legal representatives for both sides over long periods of time in the past of more than 20 years, to negotiate ILUA's' (from 17 September 2020 correspondence, NTP Contentions Annexure, p 212, original emphasis).

[87] Mr Withers expanded on this in his 2 October 2020 correspondence stating that '[i]n relation to costs for Community Meetings, you state that NQLC and the NP [sic] Party are not funded in the manner I have indicated in my letter 17/09/2020. If such is the case that the funding is not given in the manner which I suggested, then such is certainly funded in another manner by the government that I am not aware of' (from 2 October 2020 correspondence, NTP Contentions Annexure, p 215). Clearly Mr Withers did not accept the native title party's explanation of resourcing.

[88] In his 8 October 2020 correspondence (in reply to an NQLC communication, n.d.), on this same topic Mr Withers says '[p]lease read again comments I made in the past about this issue. I declare that this issue has been dealt with, even though we did not agree on the matter' (from 8 October 2020 correspondence, NTP Contentions Annexure pp 217 and 218). I am uncertain of what basis such a declaration may be

[2] The correct acronym is FaHCSIA which refers to the Department of Families, Housing, Community Services and Indigenous Affairs. FaHCSIA ceased operation as an entity in 2013.

made, however what is certain is that Mr Withers had no intention of paying a fee under s 60AB of the NTA or making a contribution to a Consultation and Consent meeting at this point.

[89] Regarding heritage surveys, Mr Withers stated '[i]n relation to **costs for the PWA CH Survey,** then for these (2) particular ML's you will find that there is no legal requirements [sic] for such to be carried out by, or paid for by the Grantee Party' (from 17 September 2020 correspondence, NTP Contentions Annexure, p 214, original emphasis). This theme of needing some form of legal requirement prior to topics being agreed upon or even discussed carried through the materials generated by Mr Withers.

[90] Mr Withers had a similar position on the idea of a Windfall Payment as contained in the draft AA, saying that 'In regard to the **Windfall Payment** I wish to advise that there is no obligation to provide any report referred to under the Valmin code[3], and to provide such is based as being Voluntary, not Mandatory' (from 17 September 2020 correspondence, NTP Contentions Annexure, p 214, original emphasis). Mr Withers also said that an 'amount of 2.5% of the gross proceeds over the Threshold amounts noted shall be, if any, the payable amount to the NT Party to be classed as an extra Good [sic] will voluntary donation or contribution towards a Compensation payment' (from 17 September 2020 correspondence, NTP Contentions Annexure, p 214, original emphasis).

[91] Regarding other statutes, Mr Withers set out that where the grantee party was required to comply with legislation in any case, 'then such should not be reminded of us again in the Ancillary Agreement' (from 2 October 2020 correspondence, NTP Contentions Annexure, p 216).

[92] Finally, on the nature of the agreement to be reached, Mr Withers stated:

> I personally would like a no frills agreement similar to that we have with the co-existent Landholder that usually can be of **(1) Page** and usually with **no conditions** except for provisions for a Compensation payment to be made, **if any**

[3] Refers to the Australasian Code for the Public Reporting of Technical Assessments and Valuations of Mineral Assets (VALMIN Code), the purpose of which is to provide a set of principles and minimum requirements for the preparation of Public Reports on Mineral Assets. Produced by the Australian Institute of Mining and Metallurgy and the Australian Institute of Geoscientists. The VALMIN Code is a mandatory code for the members of these two bodies.

> is to be paid (from 2 October 2020 correspondence, NTP Contentions Annexure, p 216, original emphasis).

[93] On 10 October 2021 Mr Withers provided his version of the draft AA, however it was not marked up as requested by NQLC. In the cover correspondence, Mr Withers again made points about what would be considered voluntary and mandatory and took further issue with his interpretation of what was not-negotiable from the point of view of the native title party. Mr Withers then made an accusation of deceit against NQLC when he stated 'one will see that such costs are definitely **Voluntary** to negotiate upon rather than to try to put it across (Deceive) to the Grantees that it is Mandatory for the very high cost, and for such to be classed as **non negotiable**' (NTP Contentions Annexure, p 219, original emphasis). The costs referred to here were again those for a heritage survey, windfall payments and a monetary amount on grant of lease.

[94] Perhaps most notable in the AA version provided by Mr Withers were the changes to the cost schedules. Firstly, Mr Withers removed the term 'Compensation' (which he in fact removed from the draft AA altogether) and replaced it with the term 'Consideration', offering a one off payment of $90 (and removing GST references) in place of the NTP's $1500 per annum (ex GST) (NTP Contentions Annexure, p 245). Secondly, Mr Withers amended the windfall payment threshold to $2.7 million, removing CPI indexing (NTP Contentions Annexure, p 245) and thirdly, offered a flat rate for heritage surveys being $500 for mileage and $210 which he characterised as 'Good will gesture Fee' (a total of $710) in addition to a sum of $710 in the event an inspection was not undertaken (NTP Contentions Annexure, p 246), which Mr Withers referred to as a donation in the covering email (NTP Contentions Annexure, p 219).

[95] Additionally, in the clause of the AA entitled 'Compensation, Release and Waiver', Mr Withers removed the word 'Compensation' and replaced it with 'Consideration'. Consistent with this direction, albeit somewhat puzzlingly, Mr Withers also removed and consequently amended clauses which set out that the agreement is to be regarded as full and final satisfaction of any compensation liability and allowing this to be pleaded by the grantee party in the event of a compensation claim against him (NTP Contentions Annexure, p 237).

[96] As later correspondence from the NQLC showed, the changes to the body of the AA proposed by Mr Withers were substantial in their extent and impact. This NQLC

correspondence, dated 23 December 2021 (NTP Contentions Annexure, pp 369-377), notes:

- changes to definitions, which on some occasions contravened statutory definitions and changed legal meanings, including removal of terms which complied with statutory definitions;

- changes in clauses which appeared to undermine the functionality of the agreement and impact upon one or another's existing legal requirements such as warranties, change of the word 'novated' to 'notated' (a different and unrelated concept altogether) in the interpretations section, changes to clauses around 'nominated body' which referred to the native title party and the obligations of the group;

- removal of entire clauses such as 'Force Majeure', 'Plan of Operation', 'Progressive Rehabilitation and Closure Plans' and 'Meetings';

- removal of clauses in 'Environmental Compliance', 'Amendment to conditions of the mining lease' and 'Annual Consumer Price Index Adjustment'. This included a suite of clauses in Schedule 4 of the AA, which is the ACHP; and

- significant changes to remaining clauses such as in 'Dispute Resolution', 'Access' and 'GST'.

[97] Mr Withers provided further correspondence to the NTP on 11 November 2021 in which he sought feedback from NQLC. Mr Withers stated there was some urgency in that he was 'put on notice by one of the Grantees that he cannot afford any more time wasted', again made points about 'mandatory' and 'voluntary' payments before increasing the compensation offer by $45 (NTP Contentions Annexure, p 268).

[98] On 1 December 2021, Mr Withers again corresponded with NQLC seeking a response to his 10 October 2021 correspondence. In this he provided an overview of his and the grantee party's views in the negotiation. In summary, Mr Withers set out his view that:

(a) Offers made by the grantee party were reasonable given the unreasonable and unexplained high costs proposed by the native title party (NTP Contentions Annexure, p 283).

(b) The grantee party was not obliged to fund the native title party in s 31 negotiations and did not wish to here. Mr Withers reiterated '[w]e have noted … reasons as to why we do not wish to donate or contribute costs for this issue in at least 4 email attachments' (NTP Contentions Annexure, p 283, original emphasis).

(c) Section 31(2) of the NTA did not extend beyond negotiations about the effect of the future act on the registered native title rights and interests. He said that during negotiations, the native title party had not noted anything to indicate the grantee party would have any effect on the native title party's rights and interests whilst mining and that the grantee party's Plan of Operations gave a fair indication of the location of mining so 'there should be minimal or no effect' on native title (NTP Contentions Annexure, p 283).

(d) Compensation for impairment of native title was based on similar tests for owners who held ordinary title under the MRA. As such, Mr Withers said the native title party's compensation amount was unreasonable and unexplained, that there was a need for the native title party to provide reasons for their position and 'to either confirm some sort of impairment that we will have, or could have on their enjoyment of their Native Title Rights and interests which is rights that are not currently being enjoyed at all or on a frequent basis by the NTP.' He further reiterated the grantee party offered $150 for compensation (NTP Contentions Annexure, p 284, original emphasis).

(e) There was no requirement to provide any report under the VALMIN code enabling the native title party to seek a windfall payment based on the value of the metals produced. Mr Withers wished to set the windfall threshold value at $4.8 million (NTP Contentions Annexure, p 284).

(f) There was 'no legal requirement for **an Aboriginal heritage survey** to be carried out by or paid for by the Grantee' but would pay out of pocket costs per

the grantee party's calculation (NTP Contentions Annexure, p 284, original emphasis).

(g) Any offer to pay costs (such as above) should have been classed as being a component of the overall compensation in any agreement (NTP Contentions Annexure, p 285).

(h) The native title party did not have exclusive possession native title (NTP Contentions Annexure, p 285).

(i) The rights of native title holders to be present and access the area of the lease was recognised, however presented the view that native title rights would 'most likely **not be affected**, and in this case these traditional rights are not rights currently enjoyed at all, in these areas, or on any nearby areas'. Mr Withers noted that only areas of operation would be off limits following grant of the lease (NTP Contentions Annexure, p 285, original emphasis).

(j) The lease represented a tiny portion of the overall native title determination and that in any case, it 'seems that the only reason that any of the Traditional Owners wishes to be within the Determined area is because of employment, **and for no particular traditional reason'** (NTP Contentions Annexure, p 285, original emphasis).

(k) The grantee party's offer was affected by what Mr Withers stated was an understanding that a determination of native title did not provide land ownership, have the power to stop development or have priority over other interests such as pastoral leases (NTP Contentions Annexure, p 286).

(l) The lease was not likely to interfere with heritage or places of significance (NTP Contentions Annexure, p 286).

(m) Regarding the right to negotiate that '[w]e understand that rising from the RTN process **sometimes** there are **benefits for the N.T. Party**' (NTP Contentions Annexure, p 286, original emphasis).

(n) The native title party was funded by FaHCSIA (NTP Contentions Annexure, p 286).

(o) It was not unreasonable for a grantee party to ask about the nature and exercise of native title rights in the area (NTP Contentions Annexure, p 286) and that '[b]ecause of the absence of evidence of how members of the NT Party enjoy their NT Rights and Interests then we understand that **any consideration** offered would be considered **reasonable**' (NTP Contentions Annexure, p 288, original emphasis).

(p) 'We have been focusing mainly on Monetary issues, and about unnecessary issues … rather than to talk more on what effect the Grantees will have on the NT Parties Native Title Rights and Interest whilst Mining. It is plain to see that talking up on the RTN process etc and demanding very high Monetary payments for issues that are probably not Mandatory to negotiate on, or to agree upon' (NTP Contentions Annexure, p 286).

[99] On 14 December 2021, NQLC responded to Mr Withers with a further amended AA. In this version of the AA, NQLC re-instated a number of clauses either deleted or amended by Mr Withers, re-named schedule 2 'Compensation' and under this heading, re-instated a $1500 (ex GST) annual payment, $750,000 Windfall threshold and CPI indexing for this threshold amount (NTP Contentions Annexure, pp 292 and 300-348).

[100] The Aboriginal Cultural Heritage Inspection Costs were also modified from the version provided by Mr Withers and also differed from the version of the AA initially provided by NQLC. This included a day rate for inspection team members, Australian Taxation Office rates for allowances, provision for Archaeologist and helicopter hire, and an administration fee.

[101] Mr Withers' response to this, dated 16 December 2021, was animated (NTP Contentions Annexure, pp 349 and 350). Mr Withers:

- stated he has still not received a reasonable explanation for what he considers to be high costs;
- asserted more than out of pocket expenses are being offered by the grantee party for heritage inspections;

- noted the expired SSM ILUA contained costs that were, in his view, excessive and presented the view the AA provided on 14 December 2021 was 'a lot worse than the badly worded over costed **expired** ILUA' (NTP Contentions Annexure, p 349, original emphasis);

- stated that the amount proposed in the AA was three times more than the expired SSM ILUA, with the native title party asking this amount 'without any explanation as to what effect the Grantees [sic] will have on their Traditional NT Rights and Interests which [are] currently **not** being traditionally enjoyed at all or on a frequent basis' (NTP Contentions Annexure, p 349, original emphasis);

- stated that the changes to the cultural heritage inspection costs were '**horrifying**' and took some time taking exception to the costs schedules (NTP Contentions Annexure, p 350, original emphasis); and

- stated that the grantees were not large scale miners and that 'we are going through the RTN process, we are not negotiating an ILUA' (NTP Contentions Annexure, p 350).

[102] The grantee party lodged his Future Act Determination Application (**FADA**) in mid-December 2021, of which all parties were notified in correspondence from the Tribunal on 22 December 2021. Following this date, on 23 December 2021, NQLC replied to Mr Withers' 16 December 2021 communication with lengthy correspondence (referred to in paragraph [96] of this determination) detailing the native title party's view of the extent of issues with the AA draft provided by Mr Withers, which are extensive. NQLC focussed their comments on the content of the AA draft only.

[103] As mentioned in paragraph [96], there are a large number of fairly fundamental issues that the native title party outlined, including a number which impact on the effectiveness and durability of the AA as a contract in the first instance.

[104] Mr Withers responded to this correspondence on 18 January 2022 (NTP Contentions Annexure, pp 428-433), reiterating many of the views that were set out previously. Worth noting are his views on Compensation and his replacement with the term

'Consideration', stating the native title party had not given any information that would justify a Compensation payment for the effect the mining in the area would have on native title rights and interest and that judged on its own merits, no compensation would be payable although $150 remains on offer. Mr Withers reiterated his position on the windfall threshold, again stating the native title party was not entitled to any payment under the VALMIN code.

[105] Mr Withers also took issue with cultural heritage inspection costs, particularly with what he described as 'huge financial profit' for native title party inspectors and reiterated his offer of $710 'if the inspection was not carried out' (NTP Contentions Annexure, p 430). Mr Withers again focussed on out of pocket expenses and offered what may be described as a fairly jaundiced perspective on the motivations of the native title party by stating that if a cultural heritage inspector was to travel to and from the mine site 'from Mareeba township, camp overnight, do a 6 hour stroll over the ML area, then I could certainly say that this would not cause me any financial losses, and would be happy to pocket the profit made. I hope all may get the point I am trying to make?' (NTP Contentions Annexure, p 432). The point isn't entirely clear however the overall point of view seems to be.

[106] Mr Withers also made many similar points as previously noted, such as there would be little or no impact from mining on native title rights, that native title rights weren't being exercised and that it was a right to negotiate matter rather than an ILUA. Mr Withers also alleged NQLC are trying to lie, misinform or deceive in relation to clauses on various processes and records and, in general, quibbled or took issue with a number of the clauses NQLC referred to, re-inserted or redrafted in the AA.

[107] The views of Mr Withers are perhaps best summarised by this passage, where he stated:

> You note that the revised Draft AA is on terms as other similar small scale mining agreements. This Draft AA may have been offered to other SSM's but can you please let me know if any mentally bankrupt Small Scale Miner (SSM) has agreed to this Draft AA **exactly** as you have sent it out to me? … This cost to do an Inspection **is NOT a quote**, and if **other SSM's** were to comment, then I would **assume** that they would be **thinking** that this revised AA is a totally a [sic] money grabbing scam' (NTP Contentions Annexure, p 432, original emphasis).

[108] No further correspondence was exchanged between the parties.

Good Faith Assessment

The Contentions of the Parties

[109] While the native title party provided a set of contentions and later contentions in reply to those of the State and the grantee party, the grantee party did not submit a set of contentions as such. The approach taken by the grantee party (through its representative Mr Withers) was to submit a range of materials, included in which was a set of responses to the native title party's contentions redacted into the native title party's contentions document itself. In this the grantee party made repeated accusations of deceit, deceitful behaviour and lies towards the native title party. By the native title party's count, there are 23 references to deceitful behaviour and 8 to lies in the grantee party's annotations of the native title party's contentions (NTP Contentions in Reply, p 4) and I note there are numerous other mentions of the same in the other documents provided by the grantee party.

[110] Regarding the grantee party's submissions to this inquiry, the native title party assert:

> The responses made by the Grantee Party ought not be accepted as a meaningful attempt to engage with the Native Title Party's contentions. The Tribunal has had to wade through a sea of bare assertions, unsubstantiated by reasons or rational analysis. The Grantee Party has consistently claimed that the process engaged in was a negotiation, but the responses given to the Tribunal do not suggest a rational or open minded attempt to engage with the substance of the matters for negotiation (NTP Contentions in Reply [36]).

[111] It is difficult to disagree with this assertion.

[112] At this point I feel I must comment on the general state of the materials submitted by both the native title party and the grantee party, which were less than ideal.

[113] The state of the native title party's contentions and contentions in reply made for a difficult process to understand the basis for its assertion of a lack of good faith by the grantee party in the negotiations. It is standard practice for a party alleging a lack of good faith by another party to logically set out in its contentions the ways it alleges there has been a lack of good faith.

[114] This is generally done by reference to the various established good faith indicia, and an alleging party is expected to support these allegations by reference to the evidence it presents and the case law underpinning its arguments. The use of a chronology of the negotiations is also considered helpful. Unfortunately this was not the case in this matter and the native title party did itself a disservice with the poor state of its contentions, contentions in reply and in particular, the annexure to its contentions. These are a critical part of the evidence base in any matter however on this occasion were a large, relatively unorganised and somewhat impenetrable compendium which added greatly to the time required for this consideration. This is particularly disappointing, given the native title party was legally represented.

[115] The grantee party's materials were also largely impenetrable. As mentioned, the grantee party did not submit contentions and evidence in the usual manner but sent various emails which responded to different parts of the native title party's contentions with the grantee party's evidence embedded in the covering email.

[116] The grantee party used a referencing system for the evidence it submitted that was difficult to understand. I, along with supporting Tribunal staff, was required to spend an extended period of time trying to sort through the materials to understand the referencing system used and discern any sort of timeline. It was necessary to do so to try to understand what the grantee party was referring to and what precisely he was saying. While I am cognisant that the grantee party was not legally represented, the erratic and chaotic manner in which the grantee party's materials were presented to the Tribunal made the task of assessing the grantee party's response to the native title party's allegation of a lack of good faith an exceedingly difficult and time consuming task.

[117] Despite the state of the materials presented by the parties in this matter, it can be said that the central contention of the native title party is that the grantee party has held a fixed and intractable negotiation position. This contention applies to four broad topics which guide this determination. These topics are:

(a) The nature of the determined native title

(b) Compensation

(c) Heritage Provisions

(d) Negotiation, Consultation and Decision support

The nature of the determined native title

[118] From the materials before me, it is clear the grantee party holds a series of misconceptions about the nature of the determined native title, this being exclusive possession. The native title party points this out in its contentions (NTP Contentions at [39]) and included the determination of native title in its annexure (NTP Contentions Annexure, pp 4-50). As seen in the previous section however, the grantee party made repeated mention of his belief that the native title held by the native title party is non-exclusive despite this not being the case. While the native title party didn't explicitly state this in their 5 March 2021 correspondence or in materials generated in the negotiation process, this type of information is readily available on the public record and it is the parties' own responsibility to understand the fundamentals of any area they are working in. At the very least, it would have been open to the grantee party to seek information and verification from the Government party regarding the status of the native title party's native title determination over the land the lease overlaps.

[119] The annexure provided by the native title party does indicate the nature of the native title held within the included native title determinations. The land the subject of the lease is identified as 'Lot 66 on Plan SP161906 (Bonny Glen Holding)' in the determination of QUD 2003 of 2001 in *Western Yalanji #4 v State of Queensland* (NTP Contentions Annexure, p 28). This is further identified in the determination of QUD 6008 of 1999 in *Western Yalanji #4 v State of Queensland* where Lot 66 on Plan SP161906 is included in the 'areas to which ss 47A or 47B of the NTA apply' (NTP Contentions Annexure, p 28). This parcel is also clearly marked as the exclusive possession native title area in a map of the determination area in Part B of Schedule 1 of the determination (NTP Contentions Annexure, p 30).

[120] This is further clarified by the native title party in their contentions in reply (NTP Contentions in Reply Annexure, pp 9, 17 and 18) which, through the provision of a

land tenure search, confirms the pastoral lease is held by Gummi Junga Aboriginal Corporation (NTP Contentions in Reply Annexure, p 19).

[121] Despite this body of information, the grantee party appears to remain of his original view or, as the native title party contend, 'the Grantee Party seeks to pay no regard to the existence of exclusive native title over the area of the Tenement' (NTP Contentions in Reply at [5]).

[122] In its contentions, the native title party states that the 'assertions [the grantee party] makes about the native title rights and interests do not take account of or properly appreciate the nature of the rights held by the Native Title party' (NTP Contentions at [48]) to which the grantee party directly replies '[t]he assertions here … by the NTP do not take into account of or properly appreciate or [sic] that they do not agree of [sic] the Judgements (Cases) made by Tribunal Members' (GP Doc 45.K.(b)10-3-2022, p 12). It is of course the Federal Court that determines native title rights, not the Tribunal. It is also unclear what decisions of the Tribunal the grantee party might be referring to and how this is in any way relevant to the status of the native title party's native title determination over the land the lease overlaps.

[123] In this same passage, the native title party make explicit mention of exclusive native title and its effect on a number of occasions. The native title party for example state that the grantee party 'asserted that the Native Title Party would have to get permission from the Landholders to enter the Tenement area, failing to appreciate that native title rights were exclusive and no permission was required other than cultural protocols for the country in Western Yalanji law' (NTP Contentions at [48]). The grantee party responds by saying '[a]re the NTP trying to tell me that any of the NTP (Western Yalanji People) do not have to ask permission from the Landholder to enter this Land Lease Pastoral Holding, called Bonny Glen Station?' (GP Doc 45.K.(b)10-3-2022, p 13) Given the determination of exclusive possession native title, it would appear so.

[124] The failure of the Mr Withers to grasp these fundamentals and the subsequent inability to move from his preconceived idea to an acknowledgement of what has been determined is, in my view, demonstrative of the inflexibility contended by the native title party.

[125] Perhaps arising from this, the grantee party asserts on a number of occasions that in effect, native title is not being exercised in the area. In fact he asserts this directly by setting out his view that 'in this case these traditional rights are not rights currently enjoyed at all, in these areas, or on any nearby areas' (NTP Contentions Annexure, p 285, Mr Withers correspondence dated 1 December 2021). This is also noted a number of times in the previous section and is mentioned on a number of occasions in Mr Withers' correspondence. Paragraph [64] of this determination provides examples of this, which includes the grantee party arguing the native title party should provide evidence for how native title rights are enjoyed in order to arrive at a sum for consideration (NTP Contentions Annexure, p 288)

[126] In the body of materials provided in this inquiry, the grantee party goes so far as to say that 'seeing that the NTP are not currently at all enjoying any of their NT Rights and interests in the ML100258 area, then the GP should … have little or no affect on the NTP's NT Rights and Interests. I do not blame the NTP for not being in the area, as I also would not like to visit the area again unless I was paid at ATO rates for travel costs to be there' (GP Doc 45.K.(a) 10-3-2022, p 1). The native title party contend that this comment 'exemplifies the intransigent position of the Grantee Party' (NTP Contentions in Reply at [13]), which is difficult to disagree with.

[127] It would appear that an assumption implicit in this line of argument from the grantee party is that native title is not affected as (in his view at least) it is not being physically practiced in the affected area. It would also appear that if it were to be, the grantee party then holds the view that it is only the physical act of mining that would affect native title rights and interests. In his 1 December 2021 correspondence for example, Mr Withers notes that the native title party hasn't indicated that the grantee party would have any effect on the native title party's rights and interests whilst mining and that the grantee party's Plan of Operations indicate the location of mining so 'there should be minimal or no effect' (NTP Contentions Annexure, p 283).

[128] Of course neither of these assumptions would be correct. The future act under consideration is the actual grant of the mining lease itself over the entire area, not the physical act of mining in a confined area within the mining lease. It is the grant of the mining lease that creates the set of rights over the land the grantee party can then

exercise, and it is the grant which impairs the determined native title rights and interests.

[129] The native title rights and interests are defined by a determination made in the Federal Court, not by the perceptions of the grantee party as to their physical practice. As highlighted, the grantee party was not able to come to terms with the fact that there is a determination of exclusive possession native title over the area and does not seem to appreciate what the future act itself is. It is perhaps these erroneous views that formed the basis of his approach in the other topics examined below.

[130] As previously mentioned, it is my view this is demonstrative of an inflexible and unreasonable approach that unnecessarily cruelled the likelihood of agreement being reached with the native title party.

Compensation

[131] The compensation element of the draft AA as proposed by the native title party consisted of an annual payment and a windfall payment should the earnings of the operation exceed an agreed threshold amount. As examined previously in this determination, the grantee party retitled the sections as 'Consideration' in apparent denial that compensation is a topic of negotiation, offered a one off payment of one tenth of the native title party's proposed annual payment and sought to raise the windfall threshold to over 350% of that proposed by the native title party.

[132] There were a number of communications on this topic, with the grantee party proposing alternatives to the calculation of a figure and gradually raising what was termed by the grantee party as a progressive offer to the final figure, although it has to be noted that simply labelling something as progressive does not necessarily make it so. Although communications were freely exchanged during the course of the negotiation period, the resulting final offer has led the native title party to the main contention that the grantee party held a fixed and intractable position (NTP Contentions at [81], NTP Contentions in Reply at [22]).

[133] As part of the context for this portion of the consideration, the native title party contends the SSM ILUA operates as a bench mark for negotiations (NTP Contentions in Reply at [22]) and as such discussion around the SSM ILUA is contextual to this

matter (NTP Contentions at [10]). The grantee party would appear to disagree, given the energy spent on his criticisms of the SSM ILUA in the correspondence during the negotiation phase and in the materials provided into this inquiry.

[134] In doing this, the grantee party makes repeated mention that the parties are not negotiating an ILUA but are participating in the right to negotiate process, which suggests that a lesser outcome could or should be expected, particularly in comparison with the expired SSM ILUA. This looks to impact upon his approach to this, and other topics, in the negotiation period.

[135] As a more general comment, the grantee party also repeatedly remarks on 'mandatory' versus 'voluntary' costs and agreement elements, effectively setting out that unlike the SSM ILUA, legal or statutory obligations, matters put forward by the native title party are voluntary to negotiate or come to agreement and therefore the grantee party declined to advance them. While the grantee party is quite correct that the matters to be discussed are to be agreed upon, setting them aside because they are perceived as 'voluntary' would appear to defeat the purpose of negotiation.

[136] I also note the refusal of the grantee party to pay any of the costs of the native title party for the negotiations.

[137] Perhaps due to the view held by the grantee party that the effect on native title will be minimal or that 'taken on its own merits', Mr Withers calculates any compensation would be nil or minimal. The grantee party also states that as the VALMIN Code does not require the grantee party to provide certain material to the native title party, then the native title party is not entitled to any windfall payment and as such the windfall is voluntary. The VALMIN Code is irrelevant however; parties can arrive at whatever outcome they choose to on whatever basis they agree on.

[138] In *Drake Coal* at [201] Deputy President Sosso said the following in relation to the evaluation of the reasonableness of compensation offers in good faith matters:

> The Tribunal would only consider the fairness of a compensation package in two circumstances. First, if the offer of the grantee party is so manifestly and obviously unfair that any reasonable person would regard it as a "sham" or "unrealistic" offer. Second, if independent material is produced to the Tribunal

> which indicates that an offer is potentially unfair or unrealistic, such that the party putting that proposal forward is not negotiating in good faith.

[139] In these circumstances, the VALMIN Code looks only to have been used as a device to seek to justify a pre-fixed view and then set an unrealistic position, being the setting of a windfall threshold at a level so high there was little likelihood of the clause becoming enlivened and little likelihood the native title party would agree to it in the first place.

[140] What is perhaps most telling of the views of the grantee party in this topic area is the removal of the term 'Compensation' from the draft AA and its replacement with the term 'Consideration', thus removing clauses from the agreement designed to protect the grantee party from later claims for compensation by the native title party under the NTA. This seems inexplicable given clauses of this type are a commonplace element of agreements such as this and in light of the highly publicised native title compensation rulings, such as *Griffiths* by the High Court of Australia.

[141] In *Wutha v Contact*, Deputy President Sosso stated (at [40]):

> When a grantee party puts forward a proposal which on its face is reasonable, and where there is a fundamental difference of opinion on a key point with the native title party, the failure of the grantee party to resile from its original position is not, in every case, the exhibition of a rigid non-negotiable position. A rigid non-negotiable position is where a party is exhibiting intransigent and possibly unreasonable behaviour.

[142] Taking the materials across the time of the negotiation period, I agree the grantee party has held a fixed and intransigent position and exhibited intransigent and unreasonable behaviour. Despite labelling offers as 'progressive', in reality there was so little change in the position held by the grantee party over the course of the negotiation that it cannot be seen as a real or tangible advancement of offer or negotiation. Also, what were described as the 'reasons given' for these figures looked to have been based upon the erroneous assumptions I have remarked on previously, and as such were not reasonable and were, unsurprisingly, not accepted by the native title party.

[143] Further to this, the complete removal of any reference to the term 'compensation' in the draft AA provided by the grantee party was in my view unreasonable, unexplained and unnecessary. Mr Withers' approach of erroneously deleting and amending

clauses, in some cases to the very real detriment of his client, is indicative of not only Mr Withers' fundamental lack of understanding of the area in which he was operating but a bloody-minded approach to the negotiations by the grantee party. This is further compounded by the grantee party's continued refusal to agree on trivial matters such as the incorporation of statutory provisions into the AA, which is noted as an indicia that a party has failed to negotiate in good faith in *Njamal*.

[144] Given the general construction of s 31 agreements, State deeds and now High Court determinations, it is quite unreasonable to simply remove terms such as 'compensation' and expect agreement will be reached. It is difficult to ascertain whether it was the state of mind of the grantee party to deliberately engage in terms he knew would not be acceptable to the native title party and therefore not reach agreement, however it can be said that taking the action he did has had this same effect. In my view, taking these actions and expecting a different result is not something a reasonable person would do in the circumstances.

Heritage Provisions

[145] The native title party contend that '[c]ultural heritage inspections are an essential element in protecting the cultural significance of an area' (NTP Contentions at [54]) and that '[b]y adopting an intransigent approach… the grantee party has effectively refused to negotiate on an essential matter' (NTP Contentions at [55]). The grantee party remarks that these contentions are 'very deceitful' (GP document 45.K.(b) 10-3-2022, p 14), although he fails to effectively define how these contentions are deceitful.

[146] The native title party further contend that as a result of this approach, 'this effectively meant that no matter what correspondence was exchanged about aspects of the ancillary agreement document, agreement would never be reached between the parties' (NTP Contentions at [55]). The grantee party responds to this assertion by stating '[n]ot so. The GP's AA is very similar to the NTP's AA, only that costs issues are not agreed to, and some trivial issues were deleted or some essential issues were added' (GP document 45.K.(b) 10-3-2022, p 14).

[147] The back and forth between the parties is outlined in the previous section and shows a significant difference between the parties on the issue of costs. The draft AA provided by the native title party contains a schedule of costs which includes allowances in

addition to payment to the inspectors themselves in recognition of their time. This seems reasonable - members of a native title group shouldn't be expected to provide a free service to a grantee party simply because that grantee party finds it convenient.

[148] The materials show that the grantee party was particularly focussed on the idea of covering out of pocket expenses only or proffering what appears to be an inducement of the same amount not to conduct a heritage inspection. It may or may not be that the cost scheduling provided by the native title party was excessive. What is important is that the parties engage in a manner that seeks agreement taking into account each other's circumstances and the nature of the licence and proposed activity. In this instance, the grantee party simply rejected the position of the native title party out of hand, provided commentary that disparaged the heritage of the area and the motivations of the group members and presented an approach and an offer that remained effectively unchanged throughout the course of the negotiation period.

[149] The offer made by the grantee party, if it can be called that, was based on a calculation with unclear origins or logic and effectively excluded consideration of a wide variety of factors, including the time of the inspectors. While the grantee party may have legitimately taken exception to the position put forward by the native title party in terms of costs, it is difficult to understand how the grantee party isn't able to appreciate why the native title party would not take exception to his approach given the nature of Mr Withers' comments and what could only be regarded as an unreasonable offer.

[150] In effect, this comes to a question of the state of mind of the grantee party. In *Brownley* Lee J observed at 162-3/[25]:

> [if] a State purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith. Delay, obfuscation, intransigence and pettifoggery would be indicia of such conduct.

[151] Lee J went on to say at 163/[27]:

> Furthermore, it is not necessary to show the party has 'knowledge' or intent to negotiate in bad faith – 'honesty and good faith in the conduct of a government will be judged objectively, not by whether a government believes it has so acted.

[152] This also applies to the other parties in any particular matter.

[153] In *Muccan Minerals v Njamal #2* at [60], Member McNamara referenced *Western Australia v Thalanyji* at [7] – [8] when he observed that the Tribunal has consistently followed and applied the law in *Brownley*, as I do here.

[154] The grantee party may not have set out to deliberately sabotage the negotiations, however it is my view that his approach had the effect the native title party contends; that is that he has in effect refused to negotiate on a key matter. As such, it is my view that the grantee party adopted a rigid and inflexible approach and that this approach, as evidenced through the materials examined earlier in this determination, is not that which a reasonable person seeking to reach agreement would take.

Negotiation, Consultation and Decision support

[155] As established previously, the grantee party refused to agree to support the native title party in their consultation and consent process, with Mr Withers stating things such as 'I can certainly give you details of how consultation and consent was arranged **free of charge** in the past for the Grantee for his AA to be finalised and executed in a **timely manner**, if the NT Party may wish to go down that approach?? [sic]' and 'I declare that this issue has been dealt with, even though we did not agree on the matter' (from 8 October 2020 correspondence, NTP Contentions Annexure, p 218).

[156] Mr Withers also stated '[u]sually no consideration is made by the NT Party or by their Legal advisors as to whether the costs asking are Mandatory or Voluntary to negotiate upon, and forget about what the real meaning for negotiations has been noted as that has been stated and means that **:- "Section 31(2) does not extend beyond negotiation about the effect of the Future Act has on Registered Native Title Rights and Interests."** (from 17 September 2020 correspondence, NTP Contentions Annexure, p 213, original emphasis) with this being a justification for not engaging on various issues, including this one.

[157] It is a well-established principle that the obligation to negotiate in good faith does not extend to providing financial assistance to a native title party to conduct negotiations (*Gulliver* [62] – [97]). However it must also be kept in mind that s 60AB of the NTA empowers a RNTBC to charge a fee for the costs the body incurs when, amongst other

things, negotiating a s 31 agreement such as the agreement parties were attempting to negotiate in this matter (as previously mentioned at [5] of these reasons).

[158] In *Muccan Minerals v Njamal* Member McNamara said at [87]:

> As stated earlier in this decision, the Tribunal may have regard to the individual circumstances of parties when determining whether the appropriate negotiation standard has been reached and this can include resource constraints on native title parties and representative bodies (*Dimer*).

[159] On the assertion by the grantee party that matters such as this are beyond the effect of the Act on the native title rights and interests, President Dowsett in *Rusa v Gnulli 2* states at [99] and [100] that:

> …there is no absolute obligation on one party to negotiation to fund another party…
>
> Further, I doubt whether refusal to negotiate concerning the payment of negotiation expenses is about matters related to, "the effect of the [proposed future act] on [Gnulli's] registered native title rights and interests" for the purposes of s 31(2). That provision should probably be construed as meaning that failure to negotiate on an "unrelated matter" cannot, alone, be a basis for a finding of lack of good faith. Such failure may, however, be a relevant circumstance in considering whether the relevant party has otherwise established absence of good faith. I adopt that position.

[160] I adopt the view of President Dowsett here and as such, am of the view that failure to engage in negotiation, consultation and process support is a relevant circumstance given the overall approach of the grantee party. This has further complexity added when considered that in its 5 March 2021 correspondence NQLC clearly advised Mr Withers that neither they nor the native title party are funded to undertake the relevant negotiations and that the native title party would be utilising s 60AB of the NTA to recover NQLC's costs (which clearly the native title party would otherwise be required to cover).

[161] The native title party had therefore alerted the grantee party to the resourcing issue faced by the native title party in undertaking negotiations relating to the grant of the lease and it was both reasonable and routine for the native title party to seek to include those resourcing constraints as an important issue of the negotiations. At a minimum,

it was a clear indication to the grantee party that the NTA at least recognises the need for RNTBCs to recover costs in this type of negotiation, particularly when the sum asked by the native title party could be considered modest.

[162] There also needs to be some consideration of the changed native title landscape this matter took place in, as opposed to the landscape in which the cases I have cited occurred. In previous years, a large proportion of native title claims had not been determined and native title claim groups were usually represented by native title representative bodies, such as NQLC. Funding was provided by the Commonwealth to these representative bodies to carry out their functions under the NTA on behalf of the native title claimant groups they represented. Mr Withers' mistaken referral to funding of native title bodies via FaHCSIA appears to be a reference to this funding arrangement.

[163] The current native title landscape is somewhat different, as many native title claims have now been determined and Prescribed Bodies Corporate (**PBCs**) such as WYAC hold native title rights and interests on trust for the traditional owners the subject of the native title determination. In this post-determination landscape funding arrangements are less clear, however it is apparent that PBCs seek alternative sources of funding to engage legal representation to assist them to protect and preserve the native title rights and interests they hold on trust for traditional owners.

[164] Where a proponent seeks the grant of mining tenure that is likely to impact on the determined native title rights and interests underlying the tenure area, the NTA contemplates the PBC recovering its costs of negotiating over the doing of the future act via s 60AB. This is not an unreasonable proposition. The PBC would not be put to such expense were it not for a proponent seeking the grant of tenure for their own financial benefit.

[165] In this post-determination landscape, and with s 60AB of the NTA available to PBCs such as WYAC, a new light is cast on the principle that the obligation to negotiate in good faith does not extend to providing financial assistance to a native title party to conduct negotiations. I consider the approach of President Dowsett in *Rusa v Gnulli 2* (as referred to at paragraph [159]) is consistent with my view of the issue of negotiation cost recovery in the post-determination landscape.

[166] I am of the view that the failure of the grantee party to constructively engage in negotiations on this topic and the vehemence of Mr Withers' commentary has had an overall negative impact on the negotiation process. As in previous issues addressed in this determination, it is my view that the grantee party adopted a rigid and inflexible approach and that this approach is not that which a reasonable person seeking to reach agreement would take.

DETERMINATION

[167] I am not satisfied Kevin Alfred De Roma negotiated in good faith as required by s 31(1)(b) of the Act. I do not have the power to proceed to make a determination on the future act determination application brought in respect of ML100258. I dismiss the future act determination of Kevin Alfred De Roma under s 148(a).

Glen Kelly
Member
31 May 2022

Appendix 1: List of documents supporting NTP Contentions dated 24 February 2022

Reference	Description	Date
Doc Number D1 pp 4-50	Western Yalanji Determination QUD6008-1999/QCD2013/002 (Brady on behalf of the Western Yalanji People #4 v State of Queensland [2013] FCA 958).	24 September 203
Doc Number D2 pp 51-54	Notice of proposed grant of ML100258 and copy of section 29 notice (notification date 3 March 2021).	12 February 2021; 17 February 2021
Doc Number D3 pp 55-59	Resource authority public report for MLA100258.	17 February 2021
Doc Number D4 pp 60-67	Correspondence from NQLC to Australian Mining and Exploration Title Services (AMETS) requesting details of the proposed operations on ML100258 and attaching 'Details of Proposed Operations' (DPO) questionnaire.	5 March 2021
Doc Number D5 pp 68-72	Correspondence from NQLC to Department of Resources (DOR) containing submissions in relation to ML100258.	5 March 2021
Doc Number D6 pp 73-74	Correspondence from Mr Withers to NQLC referencing section 29 notice and attaching correspondence with AMETS.	15 March 2021
Doc Number D7 pp 75-77	Correspondence from NQLC to Mr Withers attaching DPO questionnaire.	26 March 2021
Doc Number D8 pp 78-101	Correspondence from Mr Withers to NQLC attaching completed DPO questionnaire, mapping of ML100258, including mapping of proposed amended area and approximate position, resource authority public report for ML100258 and 'Draft Environmental authority' for Kevin Alfred De Roma.	6 April 2021
Doc Number D9 pp 102-105	Correspondence from Mr Withers to NQLC attaching above correspondence and copying AMETS.	7 May 2021
Doc Number D11 pp 110-111	Correspondence from DOR to parties requesting an update and attaching 'Right to Negotiate Process' flow chart.	21 June 2021
Doc Number D10 pp 106-109	Correspondence from Mr Withers to DOR, replying to above correspondence.	21 June 2021
Doc Number D12 pp 112-116	Correspondence from Mr Withers to NQLC, referring to his correspondence of 15 March and 6 April 2021.	16 July 2021
Doc Number D13 pp 117-118	Correspondence from Mr Withers to NQLC, referring to his correspondence dated 17 September 2020, 2 October 2020, 28 October 2020 and 17 December 2020.	19 July 2021
Doc Number D14 pp 119-176	Correspondence from NQLC to Mr Withers responding to above, and attaching: • letter from NQLC to Mr Withers dated 22 July 2021	22 July 2021

Reference	Description	Date
	outlining counter proposal (pp 122-124), • letter from NQLC to Mr Withers dated 6 December 2020 referencing ML100249 and ML100250 (Fitzgerald leases) advising counter offer not accepted and providing reasons (pp 125-126); and • draft Ancillary Agreements for Fitzgerald leases.	
Doc Number D15 pp 177-178	Correspondence from DOR to NQLC referencing Mr Withers 16 July 2021 correspondence and inquiring whether NQLC has sought instructions from WYAC, and provided counterproposal to Mr Withers.	3 August 2021
Doc Number D16 pp 179-181	Correspondence from NQLC to DOR responding to above.	3 August 2021
Doc Number D17 pp 182-187	Correspondence from Mr Withers to NQLC responding to NQLC letter of 22 July 2021, and attaching letter in response dated 4 August 2021 (pp 185-187). (Ref: 31. 4-8-2021)	4 August 2021
Doc Number D18 pp 188-191	Correspondence from NQLC to Mr Withers, acknowledging receipt of above and requesting the draft AA be returned in word format with a red line mark up.	5 August 2021
Doc Number D19 pp 192-198	Correspondence from Mr Withers to NQLC responding to NQLC's 5 August 2021 correspondence, and attaching letter in response dated 6 September 2021 (pp 197-198). 'Our Ref: - 33. 6-9-2021'.	6 September 2021
Doc Number D20 pp 199-203	Correspondence from NQLC to Mr Withers confirming receipt of above, and advising it will respond once AA and confirmation on Mr Wither's position in relation to payment pf costs of WYAC consultation and consent meeting is provided.	7 September 2021
Doc Number D21 pp 204-218	Correspondence from Mr Withers to NQLC attaching letters from Mr Withers to NQLC dated 17 September 2020 (pp 211-214) (GP Documentation, Our Ref:- 10. 15/09/2020.) and 2 October 2020 (pp 215-216) (GP Documentation, Our Ref:- 13. /2020.) and correspondence from Mr Withers to NQLC dated 28 October 2020 (pp 217-218) (GP Documentation, REF:- 28/10/2020 and REF.14. 8/10/2020).	8 September 2021
Doc Number D22 pp 219-267	Correspondence from Mr Withers to NQLC referring to above correspondence and attaching draft AA for ML100258 and providing response in relation to costs.	10 October 2021
Doc Number D23 pp 268-275	Correspondence from Mr Withers to NQLC seeking response to above.	11 November 2021
Doc Number D24 pp 276-289	Further correspondence from Mr Withers to NQLC seeking response to above and attaching letter dated 1 December 2021 (pp 283-289). (GP Documentation, Ref: - 39. 1-12-2021).	1 December 2021

Reference	Description	Date
Doc Number D25 pp 290-291	Correspondence from WYAC to NQLC in relation to costs.	9 December 2021
Doc Number D26 pp 292-348	Correspondence from NQLC to Mr Withers advising WYAC's costs as confirmed by WYAC on 9 December 2021, and attaching draft AA.	14 December 2021
Doc Number D27 pp 349-352	Correspondence from Mr Withers to NQLC in response to above. (GP Documentation, Ref:-41.)	16 December 2021
Doc Number D28 pp 353-367	Correspondence from National Native Title Tribunal advising it has received a Future Act Determination (FADA) from Kevin Alfred De Roma in relation to ML100258, attaching draft directions and a copy of the FADA.	22 December 2021
Doc Number D29 pp 368-426	Correspondence from NQLC to Mr Withers attaching letter dated 23 December 2021 in response to Mr Wither's version of AA provided on 10 October 2021 (pp 369-377) and attaching marked up AA.	23 December 2021
Doc Number D30 pp 427-474	Correspondence from Mr Withers to NQLC in response to above and attaching letter dated 18 January 2022 (pp 428-433) (GP Documentation, Ref:- 43. K.), and draft AA.	18 January 2022
Doc Number 31 pp 475-560	Indigenous Land Use Agreement for Small Scale Mining and Exploration Activities North Queensland Area and Western Yalanji People (SSM ILUA).	n.d.

Appendix 2: List of documents provided by Mr Withers on behalf of Mr De Roma

Reference	Description	Date
Ref:-45.K. 3-10-2022	Summary of Mr Wither's view on past negotiations and issues.	n.d.
Ref: - 39. 1-12-2021	Correspondence from Mr Withers to NQLC dated 1 December 2021.	1 December 2021
Ref. 43K. 18-1-2022. AA etc.	Copy of the AA offered to NQLC by Mr Wither's on 10 October 2021.	n.d.
43. K. 18-1-2022. 42. etc.	Correspondence from NQLC to Mr Withers dated 23 December 2021, containing WYAC's response to draft AA provided by Mr Withers on 10 October 2021.	23 December 2021
Ref. 43K. 18-1-2022 RTN etc.	Correspondence from Mr Withers to NQLC dated 18 January 2021, responding to above.	18 January 2022
Ref. 45.K.(a) 10-3-2022.	Mr Wither's submissions in response to NTP Contentions Annexure.	10 March 2022
Ref:-45k.(b) 10-3-2022	Mr Wither's submissions in response to NTP Contentions.	10 March 2022
Ref. 11:-	Correspondence from Mr Wither's to NQLC, dated 16 July 2021, advising Mr De Roma wishes to pay same costs as the current offers on Fitzgerald leases and proposing to batch the negotiations.	16 July 2021
Ref:- 29. 17-7-2021	Correspondence from Mr Withers to NQLC, dated 19 July 2021, referring to letters dated 17 September 2020, 2 October 2020, 28 October 2020 and 17 December 2020.	19 July 2021
Ref: 30. 22-7-2021	Correspondence from NQLC to Mr Withers dated 22 July 2021.	22 July 2021
Ref:-31. 4-8-2021.	Correspondence from Mr Withers to NQLC, attaching letter in response to above.	4 August 2021
Ref:- 32. 5-8-2021.	Correspondence from NQLC to Mr Withers, dated 5 August 2021, requesting the AA be returned in red-line mark up.	5 August 2021
Ref:- 33. 6-9-2021.	Correspondence from Mr Withers to NQLC responding to NQLC correspondence of 5 August 2021.	6 September 2021
Ref:- 34. 7-9-2021.	Correspondence from NQLC to Mr Withers re provision of response upon provision by Mr Withers of AA and GP position in relation to payment of costs of WYAC's consultation and consent meeting.	7 September 2021
Ref:- 35.	Correspondence from Mr Withers to NQLC advising he intends to provide AA to NQLC before 8 October 2021.	8 September 2021

Reference	Description	Date
Ref:- 36.	Correspondence from Mr Withers to NQLC attaching AA.	10 October 2021
Ref 37:-	Correspondence from Mr Withers to NQLC requesting feedback from NQLC on his version of draft AA provided to NQLC on 10 October 2021.	11 November 2021
Ref 38:-	Automated email from Mr Cecchi of NQLC advising 'that he is to be expected back in the office on the 15th of November'.	11 November 2021
Ref:- 39:-	Correspondence from Mr Withers to NQLC requesting feedback from NQLC on draft AA Mr Withers provided to NQLC on 10 October 2021.	1 December 2021
Ref:- 40.	Correspondence from NQLC to Mr Withers advising WYAC's instructions on costs, responding to AA provided by Mr Withers on 10 October 2021 and attaching AA.	14 December 2021
Ref:-41.	Correspondence from Mr Withers to NQLC.	16 December 2021
Ref:- 42.	Correspondence from NQLC to Mr Withers.	23 December 2021
Ref:- 43.K.	Correspondence from Mr Withers to NQLC responding to above.	18 January 2022
Ref:-44K.	Correspondence from Mr Wither's advising he has responded to the 23 December 2021 letter from NQLC.	18 January 2022
Ref:- 45K.	Covering email in relation to GP Documentation.	10 March 2022

Appendix 3: Chronology

Date	Description	Source
17 February 2021	State issues the section 29 notice, stipulating the notification date as 3 March 2021.	Doc Number D2, p 51
19 February 2021	AMETS corresponds with Mr John Withers, attaching section 29 notice.	Doc Number D6, p 74
5 March 2021	NQLC corresponds with AMETS providing introductory letter and DPO questionnaire.	Doc Number D4, pp 60-67
5 March 2021	NQLC corresponds with DOR with submissions in response to section 29 notice.	Doc Number D5, pp 68-72
15 March 2021	Mr Withers corresponds with NQLC notifying he will be negotiating AA on behalf of Mr De Roma, and states that: • The area of ML100258 will be reduced; • Mr De Roma is seeking to batch negotiations on ML100258 with the Fitzgerald leases; • The batching can be removed if required; and, • Seeks copy of DPO questionnaire.	Doc Number D6, p 73
26 March 2021	NQLC corresponds with Mr Withers, forwarding DPO questionnaire.	Doc Number D7, p 75
6 April 2021	Mr Withers corresponds with NQLC acknowledging receipt of DPO questionnaire, and: • Reiterates batching proposal; • Stresses that Environmental Authority is a 'Standard EA'; • The area of ML100258 has been reduced to approximately 32.51 Ha; • Attaches mapping (pp 82-85); • Attaches resource authority public report (pp 86-96); • Attaches completed DPO questionnaire (pp 97-101)	Doc Number D8, pp 78-101
7 May 2021	Mr Withers corresponds with NQLC seeking confirmation of receipt of above correspondence.	Doc Number D9, p 102
21 June 2021	DOR corresponds with parties, attaching letter advising of 3 month notification period and requests update on negotiations.	Doc Number D10 pp 107-109
16 July 2021	Mr Withers corresponds with NQLC seeking response to his 6 April 2021 correspondence and stating that Mr De Roma wishes to pay same costs as proposed for Fitzgerald leases in relation to windfall clause, compensation payments and PWA inspection.	Doc Number D12 p 112; Ref. 11:-

Date	Description	Source
19 July 2021	Mr Withers corresponds with NQLC referring to above correspondence, urging finalisation and notes further offers.	Doc Number D13 p 117; Ref:- 29. 17-7-2021.
22 July 2021	NQLC corresponds with Mr Withers, responding to above, and attaches: • a letter outlining counter proposal; • a letter dated 6 December 2020 referencing Fitzgerald leases and advising Mr Wither's counter offer is not accepted and providing reasons; and • draft AA for ML100258.	Doc Number D14 pp 119, 122-124, 125-176
3 August 2021	DOR corresponds with NQLC inquiring whether NQLC has sought instructions from WYAC, in relation to Mr Wither's correspondence of 16 July 2021, and provided counterproposal to Mr Withers.	Doc Number D15 p 177
3 August 2021	NQLC corresponds with DOR confirming it has sought instructions from WYAC and responded to Mr Withers on 22 July 2021.	Doc Number D16 p 179
4 August 2021	Mr Withers responds to NQLC correspondence of 22 July 2021.	Doc Number D17 pp 182 and 185-187; Ref:-31. 4-8-2021.
5 August 2021	NQLC corresponds with Mr Withers confirming receipt of above and requests AA be returned with a red-line mark up.	Doc Number D18 p 188; Ref:- 32. 5-8-2021.
6 September 2021	Mr Withers responds to NQLC's 5 August 2021 correspondence. Correspondence states: • Grantee parties want to agree with WYAC on Compensation (Consideration) being per tenement. • Last offer on per/Ha basis was '**$88** for ML100249, and **$32** for ML100250, and **$33** for ML100258' [emphasis in original]. • 'latest progressive total offer for the (3) ML's on that calculation on offer was **$153.00**' as grantee parties 'wish the N T Party to enjoy their Native Title rights and interests on all areas of the (3) ML's **outside** of the WHS areas' i.e. operations areas.	Doc Number D19 pp 192, 197-198; Ref:- 33. 6-9-2021.
7 September 2021	NQLC corresponds with Mr Withers stating it will respond to above once AA and confirmation of Mr Withers position on payment of costs for consultation and consent meeting is provided.	Doc Number D20 p 199; Ref:- 34. 7-9-2021.

Date	Description	Source
8 September 2021	Mr Withers corresponds with NQLC attaching correspondence dated 15 September 2020, 2 October 2020 and 28 October 2020.	Doc Number D21 pp 211-218; Ref: - 35.
10 October 2021	Mr Withers corresponds with NQLC, referring to above, and attaching AA (not marked up) and provides further response in relation to costs).	Doc Number D22 pp 219, 227-267; Ref: - 36.
11 November 2021	Mr Withers corresponds with NQLC seeking a response to above.	Doc Number D23 p 268; Ref 37:-
1 December 2021	Mr Withers corresponds with NQLC, seeking a response in relation to his 10 October 2021 correspondence, and providing a summary of his views on negotiations.	Doc Number D24 pp 276, 283-289; Ref:- 39:-
14 December 2021	NQLC corresponds with Mr Withers attaching a further amended AA. In this version of the AA, NQLC reinstate a number of clauses either deleted or amended by Mr Withers, re-name schedule 2 ‘Compensation’ and under this heading, re-instate a $1500 (ex GST) annual payment, $750,000 Windfall threshold and CPI indexing for this threshold amount.	Doc Number D26 pp 292, 300-348; Ref:- 40.
16 December 2021	Mr Withers responds to above and NQLC’s version of AA, taking issue with a number of items.	Doc Number D27 pp 349-350; Ref: - 41.
20 December 2021	Kevin Alfred De Roma lodges FADA.	
23 December 2021	NQLC respond to Mr Wither’s 16 December 2021 correspondence and detail NQLC’s views on extent of fundamental issues with amended AA provided by Mr Withers (on 10 October 2021).	Doc Number D29 pp 368-377; Ref:- 42.
18 January 2022	Mr Withers responds to above.	Doc Number D30 pp 427-433; Ref:- 43. K.