NATIONAL NATIVE TITLE TRIBUNAL

Mobile Concreting Solutions Pty Ltd & Another v Wintawari Guruma Aboriginal Corporation RNTBC **[2022] NNTTA 56 (17 August 2022)**

Application No: **WF2022/0001**

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

- and -

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

Wintawari Guruma Aboriginal Corporation RNTBC (WCD2007/001)
(native title party)

- and -

Mobile Concreting Solutions Pty Ltd
(grantee party)

- and -

State of Western Australia
(Government party)

DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN INQUIRY

Tribunal:	Member Helen Shurven
Place:	Melbourne
Date:	17 August 2022
Catchwords:	Native title – future act – application for a determination in relation to a mining lease – power to make determination – whether grantee party has negotiated in good faith – grantee party has not negotiated in good faith – whether State has negotiated in good faith – State has negotiated in good faith – Tribunal does not have power to proceed with future act determination inquiry
Legislation:	*Native Title Act 1993* (Cth) ss 29, 30, 30A, 31, 35, 36, 38, 39,

60AB, 60AC, 145

Mining Act 1978 (WA) s 85

Aboriginal Heritage Act 1972 (WA) s 18

Cases:

Adani Mining Pty Ltd/ Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/ State of Queensland [2013] NNTTA 30 (*Adani Mining v Diver*)

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49; (2009) 175 FCR 141

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

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

Kevin Peter Walley on Behalf of the Ngoonooru Wadjari People v State of Western Australia [1999] FCA 3; (1999) 87 FCR 565 (*Walley v WA*)

Marine Produce Australia Limited and Another v Mayala People [2018] NNTTA 28 (*Marine Produce v Mayala People*)

Marjorie May Strickland & Ors v Minister for Lands & Anor [1998] FCA 868; (1998) 85 FCR 303 (*Strickland v Minister for Lands*

Placer (Granny Smith) v Western Australia [1999] NNTTA 361; (1999) 163 FLR 87 (*Placer v Western Australia*)

Western Australia v Dimer Western Australia v Dimer [2000] NNTTA 290; (2000) 163 FLR 426

Western Australia/Johnson Taylor on behalf of the Njamal people/Garry Ernest Mullan [1996] NNTTA 34; (1996) 134 FLR 211 (*Western Australia v Taylor*)

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

Representatives of the native title party:

Aaron Rayner, Wintawari Guruma Aboriginal Corporation
Alex Romano, Chalk & Behrendt Lawyers and Consultants Pty Ltd

Representative of the grantee party:

Ken Green, Green Legal

Representatives of the Government party:

Domhnall McCloskey, State Solicitor's Office
Ruth Lavender, Department of Mines, Industry Regulation and Safety

REASONS FOR DETERMINATION

Background

[1] On 28 May 2021, the State of Western Australia (the State/ GVP) notified under s 29 of the *Native Title Act 1993* (Cth) (the Act/NTA) that it intended to do the future act of granting mining lease M47/1584 (the proposed lease) to Mobile Concreting Solutions Pty Ltd. The proposed lease comprises an area of just over 0.27 square kilometres, located approximately 7.4 kilometres north-westerly of Tom Price.

Who are the parties to this inquiry?

[2] On 3 March 2022, the National Native Title Tribunal (the Tribunal) accepted an application from Mobile Concreting Solutions Pty Ltd for a future act determination. The application asserted that the determination should be that the future act of the grant of M47/1584 should be done (see ss 35 and 38 of the Act). There are three parties in this inquiry:

- Mobile Concreting Solutions Pty Ltd (Mobile Concreting/the grantee),
- Wintawari Guruma Aboriginal Corporation RNTBC (WCD2007/001) (Wintawari Guruma/WGAC/the native title party), and
- the State of Western Australia (the State).

[3] Any person who, four months after the notification day, is a native title party in relation the land or waters that will be affected by a future act, has a procedural right to negotiate with respect to its grant (see s 30(1)(a) and s 31 of the Act). Wintawari Guruma is the native title party in this inquiry because it holds native title rights and interests in trust for the native title holders in the area of the proposed lease, as determined by the Federal Court in *Hughes v Western Australia*.

[4] The normal negotiation procedure under the Act is that other parties must negotiate in good faith with the native title party with a view to obtaining their agreement to the doing of the future act (see s 30A and s 31(1)(b) of the Act). Under s 35 of the Act, any negotiation party may apply to the arbitral body for a determination under s 38 of the Act if there is no such agreement, provided at least six months have passed since the s 29 notification date. Section 31(2) suggests that the

negotiations in good faith should involve matters related to the effect of the act on the registered native title rights and interests of the relevant native title parties.

[5] The native title rights and interests held are, in summary, the non-exclusive rights to:

(a) enter and remain on the land, camp, erect temporary shelters, and travel over and visit any part of the land and waters;

(b) hunt, fish, gather or take and to use, share and exchange the resources of the land and waters such as food, water and medicinal plants and trees, timber, charcoal, ochre, stone and other traditional resources (excluding minerals);

(c) engage in ritual and ceremony on and in relation to the land and waters; and

(d) care for, maintain and protect from physical harm, particular objects, sites and areas of significance to the native title holders.

[6] A Member of the Tribunal was appointed by the Tribunal President to conduct the inquiry and make a s 38 future act determination in relation to the application. Section 38 of the Act prescribes the type of decision that can be made in respect of such an application, being, in summary, a determination that the act:

a) must not be done;

b) may be done;

c) may be done subject to conditions to be complied with by any of the parties.

Before such determination is made, I must be satisfied the parties have negotiated in good faith. I have determined the Tribunal does not have the power to make a s 38 determination because Mobile Concreting did not negotiate in good faith. My considerations and reasons for the decision on good faith are outlined below.

The future act determination application

[7] The application from Mobile Concreting states (at 10) that parties had been unable to reach agreement. The application also asserted (at 11.3) that any sites of particular significance will be protected by the *Aboriginal Heritage Act 1972* (AHA). The application was accompanied by various documents and annexures, which showed, among other things, that Mobile Concreting hold a live exploration licence (E47/3473) that wholly overlaps the area of the proposed lease.

[8] The application also referred to s 85 of the *Mining Act 1978* (WA) (*Mining Act*) which outlines the rights of the holder of a mining lease, as follows:

> **Rights of holder of mining lease**
>
> **85.** (1) Subject to this Act, a mining lease authorises the lessee thereof and his agents and employees on his behalf to:
>
> (a) work and mine the land in respect of which the lease was granted for any minerals;
> (b) take and remove from the land minerals and dispose of them;
> (c) take and divert subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes, and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with mining for minerals on the land; and
> (d) do all acts and things that are necessary to effectually carry out mining operations in, on or under the land.
>
> (2) Subject to this Act, the lessee of a mining lease:
>
> (a) is entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and
> (b) owns all minerals lawfully mined from the land under the mining lease.
>
> (3) The rights conferred by this section are exclusive rights for mining purposes in relation to land in respect of which the mining lease was granted.

The inquiry process

[9] A preliminary conference was held on 15 March 2022, where discussions were held about proposed compliance dates. Directions were set so as to require the good faith materials and the substantive s 39 inquiry materials at the same time.

[10] The Wintawari Guruma materials contained information about allegations they had made in April 2022 against Mobile Concreting under the AHA and *Mining Act,* including a response from the relevant Minister which indicated an investigation was underway by the State. I called a case management conference for 15 June 2022 to ventilate those issues and assess whether or not they were likely to affect the timeline of the inquiry. Given the investigation duration was uncertain, I concluded the inquiry should proceed as timetabled.

[11] Following the case management conference, and as discussed at that conference, Wintawari Guruma provided the following documents to the Tribunal and all parties:

- Letter to Minister Buti and Minister Johnston regarding 'potential breaches of the law by Mobile Concreting' dated 12 April 2022;

- Preliminary advice of an Indigenous and Ethnographic Survey of SJ Crushings Pty Ltd Limited's Proposed Tom Price Quarry works by Ryan Hovingh and Robin Stevens 2011 (the Snappy Gum report); and
- Mine Closure Plan for M47/1462 and L47/423, 2017.

[12] I note the State's investigation into the issues raised was concluded and communicated to Mobile Concreting on 9 June 2022, outlining that a breach of the AHA had not been substantiated (Annexure 96 to Mobile Concreting's contentions). It is not clear when the native title party were so advised.

[13] On 13 July 2022, the native title party raised an issue about dust samples which were stated to have been collected from the Mobile Concreting quarry. They requested an opportunity for parties to exchange submissions on this issue, once further samples had been gathered and analysed. Rather than extend the inquiry timeline, the Tribunal's response was as follows:

> Member Shurven notes the emails from Mr Romano and Mr Green on 13 July 2022. It has been asserted the issue raised in relation to dust samples taken from the MCS quarry site is relevant to the s 39 criteria in the FADA [future act determination application] inquiry. Member Shurven proposes that the current directions as issued on 7 July stand, with submissions from parties still due on 21 July 2022.
>
> The Member will consider the issue of good faith negotiations and communicate with parties as soon as possible after 22 July 2022 as to whether or not she will allow a further brief period for submissions solely on the dust samples taken from the MCS quarry site issue and its relevance to the s 39 criteria.

[14] During the course of this inquiry, parties submitted many hundreds of pages of material, including maps and annexures, and made various allegations and cross allegations. This decision summarises that material and draws conclusions where needed. Parties were contacted to ensure they were satisfied the good faith part of the inquiry could be dealt with on the papers. In response, on 27 July 2022, Mobile Concreting made submissions that given issues they saw with Mr Rayner and Mr Hicks' affidavits, an opportunity for cross-examination could be allowed. I considered parties comments regards making my good faith decision on the papers, I address my considerations about those affidavits in my decision below (at [17]-[20]), and I saw no reason to hold a hearing. Parties were advised I would make a decision on the good faith part of the inquiry on the papers and as soon as possible.

Mobile Concreting evidence and contentions

[15] Mobile Concreting provided contentions, together with a chronology and a large number of supporting documents, including mapping, various surveys and reports, and relevant correspondence.

Wintawari Guruma evidence and contentions

[16] Wintawari Guruma provided contentions and final contentions, as well as the following affidavit evidence, and further evidence and materials during the inquiry, as referred to in this decision:

- Mr Dennis Hicks Senior, Eastern Guruma lore man, common law holder and Director of WGAC, affirmed 23 May 2022, with annexures.
- Ms Kathryn Przywolnik, Heritage Manager WGAC, affirmed 24 May 2022, with annexures including a July 2019 Report.
- Mr Aaron Rayner, Chief Operating Officer WGAC, affirmed 26 May 2022, with annexures.
- Mr Alexander Romano, Senior Associate, Chalk & Behrendt Lawyers and Consultants Pty Ltd, affirmed 26 May 2022, with annexures relating to the Tribunal mediation process.
- Professor Josephine McDonald, Archaeologist, affirmed 2 June 2022, with annexures.

[17] Mobile Concreting's contentions assert (at 34 and 35 respectively) that the affidavits of Mr Rayner and Mr Hicks provided by the native title party are unreliable and should be accorded little weight. I do not repeat the various allegations made about Mr Rayner's affidavit, save to say challenges are made to over 80 paragraphs in that affidavit – Mobile Concreting does not take issue with paragraphs 79-106 of Mr Rayners affidavit (apart from paragraphs 88-89), and the annexures stand alone as evidence of various communications. As such, rather than rely on any of the contested paragraphs, my focus in relation to Mr Rayner's affidavit is paragraphs 79-87 and 90-106, together with the annexures.

[18] In relation to Mr Hicks, the grantee party asserts (at 7.3) that his affidavit is unreliable because parts of the evidence are inconsistent or incorrect. For example, the grantee

raises concerns about apparent inconsistencies in the number of times Mr Hicks says he visits the area and assertions about obligations the grantee may or may not have in relation to a cultural heritage management plan. However, I do not find this to undermine the evidence Mr Hicks has provided as he talks variously of the determination area, the proposed lease area and the Bigaan cultural area (as described further below). I also find that assertions about other parts of the evidence (for example, concerns about markings on the annexed map) are not such that they put other parts of the evidence into disrepute.

[19] The grantee party also asserts (at 7.3) that none of the documents filed by Wintawari Guruma show the extent of the Bigaan cultural area – this area is raised throughout the party materials as being a relevant heritage area for the native title party (see further detail at [67] onwards below). However, the map annexed to Mr Hicks' affidavit does show the extent of Bigaan. Mr Hicks asserts it is an area of cultural and heritage importance to the native title party (for example, at 17), and his comments about the extent of the Bigaan area are consistent with the mapping he has annexed to his affidavit. He states that:

> *Bigaan* is an important area for Eastern Guruma people, it goes for a long way in our country and is an area where we have many stories and sites of significance. There are engraving sites, rock art sites, artefact sites and important water sites for Eastern Guruma people. Together these sites work together to give *Bigaan* it's importance for Eastern Guruma people.

[20] Mobile Concreting assert there are no markings of such within the proposed lease. However, Mr Hicks has marked a hill and firestick story as being on the proposed lease (and within the Bigaan area). The maps annexed to his affidavit are also annotated with sites and areas around the proposed lease. I am satisfied Mr Hicks' evidence outlines relevant information for this inquiry and have relied on it below where appropriate.

The State's evidence and contentions

[21] The State provided their initial compliance and the following evidence and materials:

- Quick Appraisal document containing key tenement information for the proposed lease;

- Topographical mapping;
- Aboriginal Heritage Inquiry System (AHIS) searches;
- Proposed endorsement and conditions to be imposed upon the grant of the proposed lease; and
- Correspondence received and send by the Department of Mines, Industry Regulation and Safety.

Tribunal power to make a determination

[22] If any negotiation party satisfies the Tribunal that any other negotiation party (other than the native title party) did not negotiate in good faith, the Tribunal must not make a determination (see s 36(2) of the Act). The implication of s 36(2) was explained by the Full Federal Court in *FMG Pilbara v Cox* (at [11]) as follows:

> ... the statutory prohibition at s 36(2) affects the 'power' of the Tribunal to make an arbitral determination rather than its 'jurisdiction'. The prohibition on exercise of the power only arises when the good faith point is both taken and taken successfully by a negotiation party. If there were no good faith but the point were not taken, the Tribunal would still have jurisdiction and power. The power to make a determination is a function of the jurisdiction conferred on the Tribunal.

[23] Wintawari Guruma alleges that both Mobile Concreting and the State failed to negotiate in good faith. Therefore, before I can make a determination about the grant of the future act, I must be satisfied Mobile Concreting and the State negotiated in good faith with a view to obtaining the agreement of Wintawari Guruma to the doing of the future act (being the grant of M47/1584), as required by s 31(1)(b).

[24] Allegations are made by Mobile Concreting that the native title party did not negotiate in good faith and I address these at [30]-[34] below.

The obligation to negotiate in good faith

[25] The obligation to negotiate in good faith is set out in s 31 of the Act:

> **s 31 Normal negotiation procedure**
>
> (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
>
> (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
>
> (b) the negotiation parties must negotiate in good faith with the view to obtaining the agreement of each of the native title parties to:

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

Legal Principles for assessing negotiation in good faith

[26] The effect of s 36(2) of the Act is to require the party alleging the lack of good faith to produce material to support the allegation. As explained in *Gulliver v Western Desert Lands Aboriginal Corporation* (at [10]):

> 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. (*Dempster, Western Australia and Bayside Abalone* [1999] NNTTA 235 Hon EM Franklyn QC (at 4, 21); *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 (21 December 1999) (at [21]-[28])).

[27] The expression 'negotiate in good faith' is not defined in the Act and should be given its ordinary and natural meaning as it appears within the statutory context of s 31(1)(b). This incorporates both a requirement of subjective honesty of intention and sincerity and an objective standard of overall reasonableness (see *Strickland v Minister for Lands* and cases therein).

[28] The parties are not required to reach any particular stage of negotiations before applying for a future act determination application. However, it is insufficient to merely go through the motions, and the quality of the conduct must be assessed (see *FMG Pilbara v Cox* at [20]-[27]):

> It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations... The Act makes no reference to the parties reaching any particular stage in their negotiations … there could only be a conclusion of lack of good faith within the meaning of s 31(1)(b) of the Act where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct…

[29] In *Western Australia v Taylor*, the Tribunal provided a series of indicia of conduct to be taken into consideration when assessing good faith, which was endorsed by the

Federal Court in *Walley v WA* (at [9]) and has been consistently referred to in Tribunal decisions. The good faith indicia as a whole focus on conduct which is 'unreasonable', 'unexplained' or 'unnecessary'. I must look at the overall conduct of the grantee and the State in all of the circumstances (see *Western Australia v Dimer* at [85] and *Adani Mining v Diver* at [34]). I must consider whether the behaviour of the grantee and/or the State reflects a subjective honesty of intention and an objective standard of overall reasonableness in the circumstances.

Allegations of lack of good faith against the native title party

[30] Mobile Concreting's contentions (at 6.3) allege that Wintwari Guruma have not negotiated in good faith. They allege (for example, at 18.13, 18.26 and 21) that sending the letter of 12 April 2022 to Ministers of the State (see [12] above) without copying in Mobile Concreting showed lack of good faith in that it was only provided following a request made at mediation and it was intended to do harm to the grantee party. However, it is open to a native title party to raise heritage concerns with the State and I do not consider the action of doing so in such a letter to be a lack of good faith, particularly given these concerns had also previously been raised directly with Mobile Concreting.

[31] A further allegation (at 20) is that the native title party **'**consistently refused to provide information which was reasonably requested and relevant to the negotiations', including (at 20.35-20.43) that the native title party refused to advise as to cultural heritage, including a management plan. I deal with this in more detail below.

[32] Mobile Concreting also argue, and my comments about each of these arguments are:

- (at 14 and 20.14) that the native title party did not provide nine heritage survey reports as requested. It appears that Mobile Concreting had information about the content of those surveys, as has been summarised in the grantee party commissioned report by Phil Czerwinski (GP Document 39), which particularly references the proposed lease – it is of note that the grantee party's own report (at page 26) summarises the surveys as follows:

> The surveys relevant to tenements G47/1273 and M47/1584 identified archaeological sites in and around these tenements, with the whole of tenements G47/1273 and M47/1584 identified during ethnographic

> consultation as an "Area of Concern" for Eastern Guruma survey representatives.

- (at 20.15-20.16) that the native title party did not advise if there was anything in the State Deed that would be an impediment to agreement. I consider that, as heritage and cultural issues were paramount to the native title party in these negotiations, that discussion about the State Deed was not a priority until those issues had been fully addressed.
- (at 20.44-20.57) the native title party refused to advise as to a flora and fauna plan. This issue was tied with cultural heritage and I do not believe there is sufficient information about flora and fauna in itself for me to comment on any parties' negotiations on this point.
- (at 22.1-22.18) in summary, that the native title party tried to circumvent the grantee representative by encouraging direct negotiation without legal representation. In my experience it is not uncommon for parties to request to have discussions in the absence of legal advisors from time to time during negotiations in native title matters, and I also note in the context of the fourth mediation session, that the request to so meet was made in the presence of the Mobile Concreting representative.

[33] Whether a native title party has negotiated in good faith is not part of the consideration under s 36(2), although the native title party's conduct can be taken into consideration when the Tribunal is assessing how reasonable the conduct of the grantee party or the State has been in the circumstances (see *Xstrata v Albury* at [65] and *Placer v Western Australia* at [30]). As noted in *Western Australia v Taylor,* the conduct of the other parties to a negotiation process is relevant to deciding whether a party has negotiated in good faith.

[34] I have concluded that the native title party did negotiate in good faith, and that a lesser standard is not required of the other parties from any behaviour of the native title party during these negotiations.

Allegations of lack of good faith made by the native title party

Allegations against the State

[35] *Marine Produce v Mayala People* canvassed the State's obligations to negotiate in good faith, referring to various representations made by the native title party to the State during s 31(1)(b) negotiations, and noted (at [210]) that:

> These representations should have put the Government party on notice that that there were potentially matters of concern to the native title party that only it could address.

[36] The native title party allege (as summarised in their contentions at 17), that the State, as a negotiating party, had a 'belated and ill-founded engagement in relation to the funding of the negotiations, [which] fell short of the good faith standard in the circumstances'. The native title party also allege that the State failed to, in a timely manner, notify them that Mobile Concreting was under investigation in relation to heritage matters, by government departments relevant to the negotiations. The State's contentions address these allegations, noting it was not copied into the April 2022 letter to the Minister and only became aware of same through this inquiry process. In relation to participating in negotiations, the State contentions argue that they did participate, including in the mediation process, and responded to questions throughout, including in writing.

[37] Wintawari Guruma contentions (at 54-61) allege the State failed to advise the native title party that:

- the grantee party was 'under investigation from government departments, a matter which was relevant to the negotiations, in a timely fashion';
- it considered that neither the State or the grantee need fund the native title party to participate in the negotiations (in the context of discussions having been held between the State and grantee party) 'and failed to advise the NTP of the outcomes of the discussions which appear to have been that neither the GVP or GP would fund the NTP'. They also argue the State 'failed to participate meaningfully in tripartite mediation in relation to issues of relevance to the GVP, namely, the funding of the negotiations and the cultural heritage concerns of the NTP'.

[38] I consider these issues under two main headings of funding and heritage issues.

Funding

[39] It appears that from 22 February 2022, when the native title party became clear the

grantee would not fund the native title party participating in the negotiations, the native title party then sought clarification from the State about its position on funding. That clarification was provided on 21 March 2022 in the form of 'a broader and existing policy position that no party had an obligation to fund NTPs in relation to negotiations for mining tenure'.

[40] The native title party position on funding is put succinctly in the 22 February 2022 letter (at 28 and 30), where it outlines that:

> WGAC is a party to these negotiations as a direct result of the operation of the NTA, because of the mining lease application by MCS and the statutory notification of the proposed grant of the mining lease by the State of Western Australia. WGAC did not initiate this process and did not invite it. The process is an imposition upon it and could result in impacts upon Eastern Guruma country and the rights of the Eastern Guruma people.
>
> If the situation was not already clear enough, WGAC has a statutory right to charge a person such as MCS, or alternatively, the State of Western Australia, a fee for costs WGAC incurs when "negotiating an agreement under paragraph 31(I)(b)"; see s 60AB(I)(a) Native Title Act 7993 (Cth) (NTA).

[41] The native title party provide some commentary about the reasoning provided by the State, of which it is critical. The native title party argues (at 57(c)) that the State has not considered:

> …the proper operation of the future act provisions of the NTA by ensuring that PBCs are able to recover costs in relation to mandatory negotiations triggered by the actions of the GVP and the GP; as compared to compensation for any loss, diminution, impairment or other effect of an act on the native title holders' native title rights and interests.

The native title party contentions (at 58) have taken this as the State having:

> …an intractable position about the funding of negotiations, based on a misapprehension of the law and unreasonably delayed providing advice of this position to the NTP. Evidently, the GVP believes that the NTP's cost of the negotiations about the Future Act that the GVP proposes to do (for the benefit of the GP and the GVP) should be borne by the NTP.

The native title party's final materials (at 45) argue the State should have made its position on funding clear as at the notification date. While there is some merit in the argument that if the State have a policy position on funding, it could be raised at the outset of negotiations, I do not believe the issue of State funding became an element of discussion until well into the negotiation period (when it became apparent the grantee would not agree to funding), and so it is not unreasonable in the course of these negotiations that position was not put on the table until the relevant time.

[42] The native title party's initial contentions argue that timeliness is critical to such negotiations - I do not consider the timeframe of a month for the State to provide their funding clarification to be unreasonable, particularly given that the State is dealing with many matters at any one time. The native title party also argue (at 47(b) of their initial contentions) that the grantee should have made endeavours for the State to fund the native title party in relation to agreement negotiations, however, I do not find this a compelling argument – each party is a separate negotiation party.

[43] The native title party refer to s 60AB and s 60AC of the Act in relation to funding. The Explanatory Memorandum (at 4.133) describes s 60AB as one 'which allows RNTBCs to charge fees for negotiating certain agreements'. In relation to the operation of s 60AB of the Act, I note it, and s 60AC, was introduced into the Act by the *Native Title Amendment (Technical Amendments) Bill 2007*. Section 60AC allows the person to whom the fee would be charged to request the Registrar of Aboriginal and Torres Strait Islander Corporations to provide an opinion on whether or not a fee 'is one that the body corporate may charge' under s 60AB. In this matter, it appears the negotiations did not reach the point at which the native title party did charge a fee to either the State or the grantee party.

[44] Under s 60AC(3), 'If the Registrar gives the opinion that the fee is not one that the registered native title body corporate may charge under that section, the body corporate must withdraw the charge'. The Explanatory Memorandum (at 3.16) in relation to s 60AB(3) provides that such fees charged should not be a taxation, and will not be so 'if it is imposed in respect of a service delivered to the persons required to pay the fee'. Fees are not to be paid for a future act determination inquiry (s 60AB(5)).

[45] Noting Member Kelly's comments in *De Roma v Western Yalanji Aboriginal Corporation* regarding the development of the law in recent times (for example, at [157]), it may be that in an inquiry where funding is the sole issue arising on which lack of good faith is raised, a party or the Tribunal may turn to s 145 of the Act, and may, on its own initiative or at the request of a party, refer a relevant question of law arising in an inquiry to the Federal Court for a decision as to the extent to which funding affects native title rights and interests in the context of s 31(1)(b) negotiations.

[46] Given the current status of the law, I could not conclude it was not reasonable for the State to decline to fund the native title party.

Heritage issues

[47] The native title party contentions (at 60) refer to the letter received by the Director of the Wintawari Guruma Aboriginal Corporation from the Minister for Mines and Petroleum on 22 May 2022 (in response to the allegations made against Mobile Concreting), which stated:

> I appreciate you raising concerns regarding Mobile Concreting Solutions Pty Ltd (MCS) activities in Eastern Guruma Country both in relation to potential noncompliances with the *Mining Act 1978* (Mining Act) and potential implications for granting of associated tenements. The Department of Mines, Industry Regulation and Safety (DMIRS) takes these allegations seriously and is committed to investigating.
>
> DMIRS has established processes for addressing noncompliance with the Mining Act and was aware of some of these matters raised prior to receiving your letter. These matters are being pursued with the tenement holder. An additional compliance investigation will also be undertaken in relation to further related matters raised in your letter. Although the specific detail of the Mining Act noncompliance matters are confidential, you will find summarised noncompliance enforcement actions are reported in the DMIRS Resource & Environmental Regulation quartlerly [sic] publication.
>
> The refusal of grant of tenements can be considered if it is in the public interest pursuant to S111A of the Mining Act. The outcomes of the compliance investigations will determine if the consideration of refusal of grant of tenements is appropriate in this situation.

[48] The native title party argues (at 61) that 'Until it received this correspondence, the NTP was not aware of this investigation' (presumably referring to the State being aware of and pursuing 'some of these matters' already), and that the State 'has taken a largely passive position in the negotiations (despite potential compliance concerns being raised by the NTP during the course of the negotiations and mediation)…' They go on to say 'the fact of the investigation and its potential consequence was a matter which the GVP should have disclosed. In the circumstances, this indicates a failure of the GVP to uphold the good faith standards required of it'.

[49] The issue of the State's heritage investigations in relation to activities of Mobile Concreting in recent years is a complex one, pre-dating the negotiations in relation to the proposed lease, and relating to the adjacent leases held by the grantee. There is evidence of issues having been raised in recent years by the native title party to the State in relation to operations on tenure held by the grantee party. It is not clear from

the materials the course of the investigations in relation to those concerns, or whether or not it was communicated to the complainant (which appears to be members of the native title party) the outcome of those investigations. I understand those communications were not specifically related to the tenure of this inquiry until the complaint raised in April 2022. However, the opaque nature of the previous investigations, including questions raised in Parliament, could certainly be said to have affected the relationship between the grantee and native title party, based on the pages which are devoted to those communications in party materials for this inquiry.

[50] The reference in relation to the Department of Mining, Industry Regulation and Safety (DMIRS) being aware of 'some of these matters raised prior to receiving your letter' and that 'These matters are being pursued with the tenement holder' was a surprise to the native title party, and nothing appears to have been clarified at the negotiation table regarding the prior matters, or the extent to which they involved the proposed lease, if at all.

[51] Overall, it appears Eastern Guruma people have for some years raised heritage concerns with the State relating to the operations of Mobile Concreting, and at best it appears the responses they received were haphazard and ad hoc. In relation to this particular proposed lease, and these negotiations, I could not say the responses met the threshold of lack of good faith, given that once the concerns were raised, a response was received within a reasonably prompt period of time.

[52] However, the State was on notice that heritage was of great concern to the native title party, and the State clearly had knowledge that only it could provide regarding investigations on foot relating to heritage, compliance and Mobile Concreting. It certainly is not clear which departments within the State had that knowledge, and how or when such could have been communicated to the relevant persons who were responsible for representing the State in the negotiations. As the native title party assert in their final submissions (at 48), they 'should be entitled to treat the government as though it acts with 'one voice''. Poor communication channels on a systemic level appear to be at the root of the issue, rather than a lack of good faith. Therefore, I am not prepared to make an adverse finding against the State, however, it seems there are internal processes that could be improved.

Allegations against Mobile Concreting

Background

[53] As noted at [23] above, the native title party contentions allege (at 16) that the grantee offended the good faith indicia (referred to at [29] of this decision) by:

> (xvi) unilateral conduct which harms the negotiating process;
>
> (xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise;
>
> (xviii) failure to do what a reasonable person would do in the circumstances.

[54] Mr Rayner asserts (at 79) that 'The relationship between WGAC and MCS is by far the worst relationship WGAC has with any mining proponents operating on Eastern Guruma country' and goes on to outline the nature of constructive relationships with other proponents. Specifically, the native title party contentions (at 20) raise arguments about the good faith of Mobile Concreting, including that Mobile Concreting:

- consistently disregarded or belittled their heritage concerns;
- notified Ministerial consent would be sought under s 18 of the AHA including the proposed lease area despite:

  i. 'the GP having received notice that the area of the proposed Future Act contained sites of significance;

  ii. the NTP for several years seeking to engage with the GP in relation to cultural heritage protection;

  iii. the obligations under existing agreements between the NTP and the GP which contemplate the creation of a cultural heritage management plan over the area of the proposed Future Act; and

  iv. the GP potentially being under investigation by DMIRS and [the Department of Planning, Lands and Heritage] for non-compliance with their obligations under State law'.

[55] In making a decision about good faith negotiations, it is useful to bear in mind I am

reconstructing negotiations and progress based on the materials provided by parties after those negotiations have taken place. I also note the parties have a relatively long history with other tenements having been granted to Mobile Concreting adjacent and near to this mining lease over past years – this includes a Deed of Agreement regarding mining tenure now held by Mobile Concreting, and an Exploration Agreement entered into in 2017 (see AR-6 to Mr Rayner's affidavit) in relation to the underlying exploration tenure E47/3473. Provisions within those agreements which the native title party say are relevant to good faith negotiations are outlined at 23-25 of their contentions.

Cultural Heritage

[56] In summary, and to put the inquiry into a broad context, I understand negotiations in relation to the proposed lease commenced in approximately May 2021, with a meeting between Wintawari Guruma and Mobile Concreting. Issues of alleged non-compliance with the existing Exploration Agreement were raised, including 'there had only been limited liaison committee meetings, there were no Eastern Guruma employees in MCS' operations and no cultural heritage management plan [CHMP] had been developed as per the terms of the Exploration Agreement' (Mr Rayner's affidavit at 86). Reference is made to a CHMP in the 2017 Exploration Agreement, in terms such as 3.1 of that agreement:

> The parties recognise the need for continuing consultation and open discussion to provide for proper management of heritage and cultural issues and/or the development of a CHMP in connection with the Company's Exploration Activities within the Agreement Area.

[57] The Mobile Concreting contentions argue (for example at 35.6) there is no requirement on the grantee to develop a CHMP, and also note there was no opposition from the grantee to doing so. However, it is not clear what engagement there was from the grantee to developing such during the life of the 2017 Agreement. Mobile Concreting outlined in their contentions (for example at 14.5) that any CHMP developed in relation to the proposed lease would 'need to contemplate support for the grant of Ministerial consent under the *Aboriginal Heritage Act 1972* (WA) to undertake works on the Tenements'.

[58] As summarised in Mobile Concreting contentions (at 20.35 to 20.43), Wintawari

Guruma envisioned a CHMP development process as a collaborative one, whereas Mobile Concreting envisioned the native title party would provide the grantee party the preferred CHMP terms which the grantee would consider, with the stipulation that it include support for Ministerial consent. Mobile Concreting noted that by them attending the Tribunal mediation process, it was collaborative in this respect.

[59] A Mining Proposal in relation to the proposed lease (dated November 2020) and a proposed agreement was provided from Mobile Concreting to Wintawari Guruma on 24 August 2021 (with the proposed agreement being referred to as a deed of variation to the Deed of Agreement regarding mining tenure, as referred to at [55] above). Mr Rayner argues that issues raised in a May 2021 meeting (see [56] above) were not addressed (affidavit at 90-91).

[60] Mobile Concreting followed up a response to its proposal on 13 October 2021 with a letter to Wintawari Guruma, which was responded to on 26 October 2021 (see Mr Rayner's affidavit annexure AR- 23). This response raised issues with Mobile Concreting which the native title party considered should be addressed prior to entering into an agreement, including:

- cultural heritage protection measures, and
- the absence of effective dust management controls.

Cultural heritage protection and dust management

[61] The issues of cultural heritage protection and effective dust management controls had previously been raised as issues of importance to Wintawari Guruma in relation to Mobile Concreting works on M47/1462, and is referred to in Dr Przywolnik's July 2019 report (at page 28 of her affidavit annexure KP-3) where she notes:

> throughout the survey [of part of E47/3473]... It was also observed that large plumes of dust arose and extended from the MCS mining operation, and survey team members expressed concern that the airborne dust on their sensitive engraving and sacred sites within the general area of the operation could degrade the integrity of those sites.

[62] Mobile Concreting contentions challenge assertions that people with non-scientific qualifications can express an opinion on the existence of, or the cause and effect of, dust on engraving sites. Nevertheless, this and various communications from the

native title party to Mobile Concreting for at least several years had been raising dust as an issue, and relating that concern to their native title party rights and interests. For example, concerns about dust featured in: the questions to Parliament without notice on 21 November 2019 (relating to M47/1462); the native title party objection to the grant of G47/1273; emails between Mr Rayner and Mr Clarke from Mobile Concreting in December 2020, including the comment from Mr Clarke that a 'Cultural Management Plan is something we are keen to do'; and then in relation to the proposed lease in this inquiry, in the 26 October 2021 letter.

[63] Dust is raised as an issue in Dr Przywolnik's report (at 28 and 30) and Professor McDonald's report (at 18 and 21), specifically in relation to dust at Bells Quarry, and generally in relation to the unknown effects of dust on engravings and similar. Mapping (for example, as annexed to Mr Hicks' affidavit) shows Bells Quarry is approximately 300 metres west of the proposed lease, and Dr Przywolnik estimates it is approximately 120 metres from M47/1462. Dr Przywolnik outlines her qualifications as an archaeologist and cultural heritage specialist, and her experience with rock art, and has also held the position of Registrar of Aboriginal Sites in Western Australia. She notes (at 12) she has undertaken five field trips into the Mobile Concreting operational area with 'archaeologists, anthropologists and Eastern Guruma Traditional Owners and Elders, for the purpose of recording important cultural places'.

[64] Professor McDonald also outlines her qualifications and experience in rock art, and that (at 5, emphasis in original):

> I have been working with Wintawari Guruma Aboriginal Corporation **(WGAC)** and the Eastern Guruma People on a collaborative rock art research project since 2019.

[65] Professor McDonald has provided similar evidence to that from Dr Przywolnik, including the existence of dust at Bells Quarry and taking into account the possible impacts the mine extension may have (at 20-22). Professor McDonald also states (at 21) that:

> It concerns me that the chemical composition of the dust is unknown: hence the long- term impacts of this on the engravings on horizontal surfaces (in particular) and surface of the rocks across the site (generally) cannot be understood without further study and analysis.

It appears this further analysis is now underway (see [13] above)

[66] Dr Przywolnik states (at 15) that:

> Research undertaken by WGAC in recent years has investigated and documented cultural heritage sites Eastern Guruma country that date from at least 47,000 years ago to modern times, and every age in between. There are few parts of Australia where a continuous archaeological record of this richness, immense antiquity and complexity, continuous through the massive climatic shifts of the ice age, can be found. Investigation of Eastern Guruma sites using modern techniques and accessing technical expertise across Australia was only commenced by WGAC in the last 5 years. Through this work with Eastern Guruma people and technical specialists the true and immense significance of Eastern Guruma sites is only starting to be understood by archaeologists.

[67] Much of the evidence in relation to this proposed lease focuses on Bells Quarry (just over 300 metres to the west of the proposed lease), and the Bigaan Cultural Site, which entirely overlaps the proposed lease and extends out from the proposed lease in all directions (see [19]-[20] above). The Narraminju Wuntu (Caves Creek) is also referenced, which is just to the north of the proposed lease.

[68] In relation to Bells Quarry, Dr Przywolnik states (at 23-25):

> While walking through the Bells Quarry site and recording motifs and cultural features, I observed that many of the engraved surfaces were coated in a layer of grey dust. In some motifs, the grey dust had collected in the pecked and abraded surface of the engraving, which was immediately noticeable and visually distinct...In all the fieldwork I have undertaken since 2017, I have not observed dust accumulation in and on the engraved surfaces anything like what I observed at the Bells Quarry site.

[69] Dr Przywolnik's affidavit (at 48) describes Bigaan as:

> ...one of the few culturally significant and culturally discrete landscapes in Eastern Guruma country that has not yet been affected by iron ore mining, and the key cultural features that comprise the site are largely intact. Undertaking systematic investigation to understand the site, and its management requirements, is a priority before it is disturbed further.

[70] I accept Bigaan is culturally significant to the native title party and that was a focus of the native title party in the good faith negotiations for the grant of the proposed lease. Bells Quarry sits on the adjacent tenement and I include it in this decision by way of context of the negotiations.

[71] Mobile Concreting contentions (20.19-20.34) argue that the native title party did not provide any evidence showing a basis for concerns about dust, and countered that 'It is difficult to understand why dust is not washed away by rain events' and that there was 'no objective basis for concern' about damage and dust. The native title party noted

they did not know what Mobile Concreting had put into place to address dust, despite that issue being on the table for some years.

[72] Mobile Concreting outlines (at 20.20) that they asked the native title party to 'Please advise why the NTP believes dust is an issue, including full particulars of place the NTP regards as sensitive to dust', and (at 20.23) a request from Mobile Concreting to the native title party on the issue of dust is described as to:

> 1. either identify the objective of the dust suppression management plan or propose such a plan;
>
> 2. identify the consequence that WGAC is concerned will arise from its concern as to dust, including as to any spatial extent;
>
> 3. advise how the objectives of the dust suppression management plan may be objectively assessed, including as to any spatial regard

[73] Mobile Concreting also are concerned (for example at 34.19) about photographs purporting to be of dust on rock engravings (for example, annexed to Professor McDonald's affidavit and Mr Rayner's affidavit), arguing 'it is difficult to understand how it illustrates a "significant" accumulation of dust on artefacts'. I accept the photographs are not clear, and I also accept that dust itself is a difficult visual to capture in a photograph. That does not undermine the written evidence provided regarding the existence of dust as observed by the deponents.

[74] Dr Przywolnik states (at 26-27) that:

> As the existing MCS quarry on M47/1462 is located close to the highway, I drive past it frequently in order to travel to different parts of Eastern Guruma country. I have often observed huge plumes of grey dust billowing up from the quarry, many metres high and drifting north over the plains or south back over the uplands towards Tom Price, depending on the direction of the wind.
>
> Based on what I observed, my conclusion was that the dust covering the engravings and the rocky surfaces within the site comes from the activities undertaken at the MCS quarry.

[75] Noting the proximity of the proposed lease to Bells Quarry and that Mobile Concreting will be able to conduct similar mining activities on the proposed lease under the grant, I accept dust is an issue which was on the table between parties and relevant to the grant of the lease.

[76] An informal exchange had been made by email on the issue of dust in November and December 2020 between Mobile Concreting and the native title party, which included

reference to dust and that the company 'are considering bitumising our access track in a way to further mitigate dust issues'. However, there appeared to be no systematic consideration of dust from mining operations, including during the proposed lease negotiation period. Mobile Concreting did not appear to provide a response particularly to the 26 October 2021 letter, and referred the matter to Tribunal mediation in December 2021. The mediation was held over five sessions until May 2022. Mediation did not reach an agreed outcome. I note there appeared to be no conferral with the native title party in relation to the referral of the matter to mediation, or to the possible utility of mediation to assist the negotiations. While nothing turns on this as a single action, it is indicative of the grantee party taking unilateral action during negotiations, including the application for s 18 Ministerial approval, as outlined below.

[77] On 14 March 2022, Mobile Concreting provided Wintawari Guruma with a notice of intent to lodge a notice under s 18(2) of the AHA (which ultimately may allow a grantee to disturb or interfere with Aboriginal heritage sites) over tenure including the proposed lease. On 4 April 2022, Mobile Concreting provided Wintawari Guruma a further proposed agreement, which the native title party responded to on 28 April 2022.

[78] On 12 April 2022, Wintawari Guruma sent a letter to the State and on 11 April 2022 to Mobile Concreting, regards allegations of breaches of the States heritage regime (as referred to at [11] and [30] above). The State responded, advising they were making inquiries into the allegations, and as outlined at [12] above, subsequently advised the grantee party that no breach had been found.

[79] The 2019 Archaeological Survey Report and 2019 Ethnographic Survey Report made various recommendations on how to minimise interference with the area of cultural concern (as outlined at 26 of the native title party contentions), which included areas on and around the proposed lease. Clearly, these reports pre-dated the negotiations for the proposed lease, which are the focus of my good faith considerations. However, because of the underlying exploration tenement, and the history between the grantee and the native title party, this has influenced their interactions regards the proposed lease. For example, the native title party contentions allege (at 28-29) that Mobile Concreting have not implemented any of the Report recommendations despite requests

from the native title party that they consider doing so before expanding operations.

[80] I have addressed issues regarding the State and their investigations in the section above regarding good faith allegations against the State. Mobile Concreting's contentions (at 34.32-34.33, for example) refer to the updates in relation to a State investigation, and direct my attention to the grantee's Document 26, which is an email dated 18 May 2020 from the State to Mr Clarke (at Mobile Concreting) and copied to James Cook (presumably also at Mobile Concreting). It is illustrative to quote the entire email:

> Morning Richard
>
> Hope all is well up north and that you are staying safe.
>
> At our last conversation you stated that you had a video and photographs of the current condition of the creek that had some remediation work carried out where the bypass road intersected.
>
> Can you please supply a copy of the above so that I can close the investigation if the creek has naturally reinstated itself due to the recent heavy rain events over the summer.
>
> If further rehabilitation work is required the [sic] I would suggest that a Regulation 10 consent be applied for from the Registrar of Aboriginal Heritage to allow for the work to be legally conducted. If such an application is made I would suggest that the application includes the willingness to use local Aboriginal Monitors on site whilst the work is being conducted and if possible a letter of support from the local Aboriginal elders/custodians.
>
> The registrar can be contacted by email at registrar@dplh.wa.gov.au
>
> It is not at this stage the intention of the Department to take any action against MCS in regards to the rehabilitation work that has already been completed as this was done in good faith and after following a close down of the use of the bypass road due to instructions issued by DMIRS, the supply of the above information (Photos and video) will further support this approach.
>
> Thanking you in anticipation

[81] This email does not appear to address the native title party concerns that the State did not close off this investigation with the native title party, nor does any part of the State's contentions or evidence address how and when the complaint which led to this investigation was closed to the complainant. I did not note any email or correspondence from the State to the native title party, as the complainant, which did close that investigation or advise of the outcome. In addition, it is not clear: if the 'Regulation 10 consent' was applied for; if Mobile Concreting did express a willingness to use local Aboriginal Monitors on site 'whilst the work is being conducted'; or whether a letter of support was obtained. From the information provided, it does not appear that any of that was done, in relation to this previous

investigation. I am aware this is outside of the good faith negotiation period, and I have already made general comments on the State's investigation process above.

[82] The native title party contentions (at 33) summarise this situation as follows:

> Notwithstanding the survey reports, government investigations and questions to Parliament, there have not been any meaningful attempts by MCS to address the heritage concerns of the NTP – before or after the notification of the Future Act. The GP's actions over several years, including within the mandated good faith negotiation period, have made it clear that MCS is seeking to expand operations without regard to any of the recommendations of the reports prepared, any of the issues raised by the NTP and without any meaningful input from the NTP.

[83] The native title party contentions add (at 34) that there were two draft agreements provided by Mobile Concreting to the native title party during the course of negotiations relating to this future act, 'neither of which attempted to address any of the NTP's concerns in respect of cultural heritage'. The situation is explained in Mr Rayner's 26 October 2021 letter to Mobile Concreting (AR- 23) (see [60] above), outlining that:

> The land use activities detailed in the Mining Proposal will irrevocably change the land. WGAC is concerned that the proposed impacts have not been properly assessed and consequently there is no effective plan to mitigate the potential loss to the native title holders in terms of access, cultural heritage protection, and protection of the social environment.

[84] The 26 October 2021 letter also proposed the following (emphasis in original):

> **Proposed Way Forward**
>
> The WGAC Board would welcome face-to-face dialogue to resolve these matters and agree new provisions that modernise the existing agreement including improvements to the cultural heritage protection measures...

[85] I note that Dr Przywolnik's affidavit (at 55) outlines the survey undertaken on part of the exploration tenement underlying the proposed lease that informed the 2019 Archaeological Survey Report – this survey was in accordance with the existing exploration agreement between the grantee and native title parties. It was undertaken on approximately 46 hectares of land at the request of Mobile Concreting on the basis they intended to extend their exploration work into that underlying exploration tenement. Dr Przywolnik outlines (at 57) that cultural materials were found during the survey, including:

> large blades, cores, spear points, woodworking tula adze tools, flakes, and large numbers of grinding bases and millstones. The accumulation of cultural material was observed to be continuous across the surface of the northern part of the tenement, with concentrations where density of cultural material increased.

[86] Dr Przywolnik (at 59-63) also refers to her 2019 Archaeological Survey Report from this survey (Annexure KP-3) and notes that:

> The report recommended that MCS work with WGAC to prepare a cultural heritage management plan to appropriately identify and care for the important cultural sites within the tenement...
>
> To date, I understand that no cultural heritage management plan has been prepared.

[87] Dr Przywolnik (at 67-68) further notes that:

> ...the grassy plains between Narraminju Wuntu and the ranges in E47/3473 were a key camping place and cultural area, where generations of Guruma people have lived, camped and travelled through, leaving behind a rich assemblage of stone objects and implements and forms a critical part of the Bigaan Cultural Area.
>
> The continued expansion of MCS into this area will see the destruction of this cultural material, which to date has only been recorded, and therefore understood, to a very preliminary degree. This constitutes further damage and diminishment to the cultural legacy of Eastern Guruma people.

[88] The report prepared by Phil Czerwinski (GP Document 39) for Mobile Concreting also showed there were archaeological sites in and around their tenure (as noted at [32] above).

[89] Mr Romano's affidavit (at 32-36 for example) outlines the circumstances of Mobile Concreting's 14 March 2022 notice of the s 18 application on the eve of the fourth mediation session, which is consistent with the Tribunal's mediation outcomes. It appears the notice was made, without any advance discussion with Wintawari Guruma. It is certainly open to a grantee to make such an application at any time it saw fit. However, given the area included the proposed lease parties were undertaking negotiations on, and that heritage had been raised throughout negotiations by the native title party as being an important aspect of the negotiations, it seems at best an action which would not assist a positive environment in which to negotiate, and at worst, an action showing a lack of good faith. In considering good faith negotiations, I am looking at a course of conduct, rather than one single action.

[90] Wintawari Guruma's final submissions (at 14(a)) summarises their perception of the

s 18 notice of intention:

> In addition to the communications of the NTP regarding the importance of cultural heritage prior to the notification of the Future Act, the GP had been informed by the NTP on at least six occasions after the notification of the Future Act of the importance that protecting (as opposed to destroying) cultural heritage held to the NTP as part of any agreement to be negotiated [the six occasions are referred to as the 26 October 2021 letter and 21 December 2021 letter, the 22 February 2022 letter, and the First, Second and Third Tribunal Mediation Conference].

[91] In the letter from the native title party to Mobile Concreting on 22 February 2022, (at point 22), the native title party made it clear it was considering Mobile Concreting's 'revised Deed of Variation and preparation of a further draft Deed of Variation which will, inter alia, provide for more appropriate cultural heritage management'. They also raise concerns (at 24 for example), that Mobile Concreting are 'dismissive' of their cultural heritage concerns. They are also clear that 'any consents to destroy or impact upon Aboriginal heritage sites are sensitive matters which need to be discussed as part of the negotiations and is a matter which Eastern Guruma people and MCS employees should discuss directly'. It was in this context, on the eve of a mediation session, that Mobile Concreting served the notice of intention for a s 18 application over the whole of their works area, including the proposed tenement upon which they were in the process of negotiating.

[92] In an 8 March 2022 letter to Mobile Concreting, Wintawari Guruma provided a list of proposals regarding issues such as: dust controls (under environmental management considerations) and cultural heritage management (including survey costs), and asked that Mobile Concreting addressed these proposals in any revised draft agreement. There were other provisions raised which I considered were on the periphery of negotiations, such as liaison committees and contracting. While those other provisions were on the table, they did not have the ongoing emphasis and highlighted importance from the native title party as issues such as cultural heritage and dust control throughout the negotiations focused on the doing of this act.

[93] The mediation synopsis for 15 March 2022 (at AR-10 of Mr Romano's affidavit) notes that Mr Green indicated 'the [s 18] notice made it clear that MCS did not intend to accept any of the proposals outlined under Proposal 2 [being Wintawari Guruma's proposal regarding cultural heritage management provisions outlined in the 8 March 2022 letter]'. He invited WGAC to make a more detailed proposal regarding

cultural heritage protection, but advised that MCS would be seeking s 18 approval in any event'. Mobile Concreting contentions (at 20.35) argue that the native title party 'declined to advise the NTP's expectations as to its desired cultural heritage management plan or to provide a cultural heritage management plan'.

[94] As outlined in the Wintawari Guruma final submissions (at 28):

> ...following the suggestion of the mediator in the Third Mediation Conference, the NTP, rather than providing a further Draft Deed of Variation, obtained instructions to provide a list of proposals (which was done on 8 March 2022) for the parties to consider. The Parties subsequently engaged on these proposals on multiple occasions, including two further Mediation Conferences, without complaint from the GP. For the GP to now complain that the NTP failure to provide a further draft Deed of Variation somehow impacted the GP's ability to understand what the NTP sought in a cultural heritage management plan is disingenuous.

Funding

[95] The 26 October 2021 letter from the native title party to Mobile Concreting outlined the following (emphasis in original):

> **Proposed Way Forward**
>
> ...We note that, under s60AB of the Native Title Act 1993 (Cth), WGAC is entitled to charge third parties a fee for costs incurred when negotiating an agreement or agreements of the kind required to allow for the grant of M47/1584. Considering this, can you confirm that MCS agrees in principle to pay WGAC's legal and administrative costs relating to the drafting and negotiation of a Deed of Variation to the existing agreement. WGAC retains Chalk & Berendt to provide legal advice. Please advise how you wish to proceed at your earliest convenience.

[96] Commentary about s 60AB and funding is outlined at [39]-[46] above. Mr Romano's affidavit (at 17, for example) refers to the rejection by Mobile Concreting by letter in January 2022 of the negotiation protocol proposed by Wintawari Guruma. Allegations by the native title party argue Mobile Concreting engaged in delaying negotiations, and diverting the resources of the native title party including by refusing to enter into a negotiation protocol governing the conduct and funding of the negotiations.

[97] Mr Romano's affidavit (at 21, for example), also refers to the confirmation at the second mediation session in February 2022 that Mobile Concreting would not agree to fund Wintawari Guruma's participation in a face to face meeting. On 22 February 2022, Wintawari Guruma wrote to Mobile Concreting (see annexure AR-6 to Mr Romano's affidavit). That letter confirms (at point 17) that the native title party is not funded to undertake s 31(1)(b) negotiations. The letter also is concerned at Mobile

Concreting's request for 'full particulars of the exercise of native title rights and interests on, and proximate to, the Tenement' prior to any agreement being reached, and the native title party suggests that a 'more appropriate way for impacts on native title to be managed, particularly where native title has been determined to exist, is via mutually agreed processes articulated in an agreement'.

[98] To enable Wintawari Guruma to consider the revised Deed, their 22 February 2022 letter (at 33) requests information from Mobile Concreting including on revenue and costs for the tenements which are to be covered, and estimates of royalty payments to be made should G47/1273 and M47/1584 be added to the existing agreement. Mr Green provided information in his letter to the native title party on 1 March 2022, and further clarification of some of that information was sought by the native title party in their letter dated 8 March 2022 (see AR-9 to Mr Romano's affidavit).

[99] Mobile Concreting contentions assert (at 11.11 for example), that 'There is no absolute obligation on the GP to fund the NTP', and relies in part on *WA v Daniel.* However, I note this decision, which includes commentary about funding of s 31(1)(b) negotiations, was made prior to the introduction of s 60AB and s 60AC. I do not understand the native title party to be asserting there is an 'absolute obligation' on the grantee party to fund the native title party. I do understand them to be asserting that if they do not participate in an agreement making process (for which they have a statutory basis to charge a fee for service), they know a grantee party can apply for a future act determination application (for which participation they do not have a statutory basis to charge a fee for service).

[100] Presumably, a grantee is undertaking mining in the pursuit of some profit making or other benefit for the grantee party, and the State will obtain royalties from the mining project, should the exploration be successful. Once the grantee makes an application for a mining tenement, a native title party is then a negotiating party under s 31(1), whether they like it or not. Mobile Concreting contentions argue (at 18.5) that the native title party chose to have their native title recognised and so should be aware of their right to negotiate obligations – I do not find this a compelling or particularly relevant assertion.

[101] Mobile Concreting (at 16 for example) outlines the native title party financial position

(according to public financial statements) and comments that the native title party 'does not explain why it should be indemnified' given its financial position. However, a party's financial position generally is not necessarily an indicator of how it should pay or be indemnified in relation to a particular project. I have noted many grantee parties who have substantial financial balance sheets, yet say a particular project is speculative and they cannot afford to set aside certain funds for the negotiation of an agreement with a native title party. I note also that the native title party's financials are for the Eastern Guruma people as a whole, as outlined in the 2021 Financial Statement preamble:

> The Corporation has continued to develop capability so that it can better achieve its objectives. These objectives are important to the Eastern Guruma people, in particular the protection and promotion of culture, traditions and customs through the protection and preservation of important sites and country.

[102] In their letter to the grantee party and the State dated 22 February 2022, the native title party (at 31) states 'In light of the MCS position to not fund WGAC in relation to these negotiations...'. Mobile Concreting has not argued to the contrary that their position is not to fund the native title party in these negotiations. It is not clear that any reason has been provided as to why the grantee party have taken that position.

[103] There does not appear to be an articulated position from the grantee party about funding of the native title party for the s 31(1)(b) negotiations, apart from that they would not be providing such funding. I understand Mobile Concreting's argument in relation to funding is, in effect, that the native title party can afford to undertake their costs for such a negotiation from a pool of funds which is set aside for their own community.

Conclusion on the lack of good faith allegations against Mobile Concreting

[104] I do not consider Mobile Concreting declining to enter into the native title party preferred negotiation protocol shows a lack of good faith. It is unfortunate that the usefulness of a protocol was not discussed prior to its preparation, which may have saved the native title party using its resources to prepare same. However, the grantee party considered the protocol once it had been prepared, and gave reasons why they did not consider such would advance the negotiations from their point of view (as outlined in some detail in Mr Green's letter of 20 January 2022, at annexure AR-4 of

Mr Romano's affidavit).

[105] Both Mobile Concreting and Wintawari Guruma's negotiations were of the nature of varying an existing agreement to incorporate other tenements including M47/1584. As such, it is not unreasonable for Wintawari Guruma to put on the table for discussion concerns they had about the operation of the existing agreement so that such concerns could be addressed to the extent possible, and to avoid such concerns arising in relation to the operation of mining activities on M47/1584. These issues included dust suppression and cultural heritage management.

[106] With reference to *FMG Pilbara v Cox* (at [20]), the requirement for good faith is directed to the quality of a party's conduct 'to be assessed by reference to what a party has done or failed to do in the course of negotiations'. It is this broad, overall assessment that directs my inquiry. It is not restricted to a moment or portion of time, but rather I must look at the overall conduct of Mobile Concreting in the context of these allegations, and decide whether I am satisfied on the basis of this overall conduct, they negotiated in good faith. It is also to be noted that it is the conduct relevant to the grant of M47/1584 and the attempts to reach agreement with the native title party on the grant of that lease which I must focus on in this inquiry. I have examined the Wintawari Guruma assertions about Mobile Concreting's conduct in that context.

[107] Good faith focuses on an assessment of whether conduct is 'unreasonable', 'unexplained' or 'unnecessary'. Looking at the good faith indicia as a guide to drawing my conclusions in this matter, I conclude there has been unreasonable behaviour by Mobile Concreting, in that they did not meaningfully engage with the concerns raised by the native title party and failed to make substantive proposals regarding cultural heritage and dust controls. I believe the behaviour of Mobile Concreting in these negotiations does not meet the threshold of good faith – it did not reflect a subjective honesty of intention and an objective standard of overall reasonableness in the circumstances.

Good Faith Determination

[108] I am satisfied the State of Western Australia negotiated in good faith as required by s 31(1)(b) of the Act.

[109] I am not satisfied Mobile Concreting Solutions Pty Ltd negotiated in good faith as required by s 31(1)(b) of the Act. According to s 36(2) 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 M47/1584. I dismiss the future act determination under s 148(a) of the Act.

Helen Shurven
Member
17 August 2022