

NATIONAL NATIVE TITLE TRIBUNAL

Pathfinder Exploration Pty Ltd v Malarngowem Aboriginal Corporation RNTBC and Others [2022] NNTTA 52 (28 July 2022)

Application No: WF2021/0010

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

- and -

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

**Malarngowem Aboriginal Corporation RNTBC (WCD2019/005)
(native title party)**

- and -

**Ngarrawanji Aboriginal Corporation RNTBC (WCD2019/004)
(native title party)**

- and -

**Pathfinder Exploration Pty Ltd
(grantee party)**

- and -

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

**DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN
INQUIRY**

Tribunal: Mr Glen Kelly, Member

Place: Perth

Date: 28 July 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 – use of negotiation protocol – reasonableness of funding request – funding of native title parties for future act negotiations - failure to provide relevant information – rigid non-negotiable approach – Tribunal does not have power to proceed with future act determination inquiry.
- Legislation:** [Mining Act 1978](#) (WA) ss 75, 78, 85
[Mining Regulations 1981](#) (WA)
[Native Title Act 1993](#) (Cth) ss 29, 31, 35, 36, 38, 60AB, 109, 151, 190
- Cases:** *Brownley v State of Western Australia* [1999] FCA 1139 (**Brownley**)
Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales, [2012] NNTTA 145 (**Coalpac**)
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**)
June Ashwin, Geoffrey Alfred Ashwin, Ralph Edward Ashwin and Raymond William Ashwin on behalf of the Wutha People/Western Australia/Contact Uranium Limited [2008] NNTTA 129 (**Wutha**)
Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another [2022] NNTTA 40 (**De Roma**)
Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia, [2010] NNTTA 211 (**Magnesium Resources**)
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21; (1999) ALR 577 (**Eshetu**)
Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597; (2002) 187 ALR 117 (**Bhardwaj**)
Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd [2009] NNTTA 35 (**Cosmos**)
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144; (2011) 280 ALR 18 (**Plaintiff M70/2011**)

Rusa Resources (Australia) Pty Ltd v IS (deceased) and Others on behalf of Wajarri Yamatji [\[2015\] NNTTA 15](#) (**Rusa**)

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

Sunstate Sands Bundaberg Pty Ltd and Another v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC [\[2021\] NNTTA 44](#) (**Sunstate Sands**)

The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia [\[2005\] NNTTA 100](#) (**Griffin Coal**)

Western Australia/David Daniel & Ors on behalf of the Ngarluma and Yindjibarndi People; Valeria Holborow & Ors on behalf of the Yaburara and Madudhunera People; Wilfred Hicks & Ors on behalf of the Wong-goo-tt-oo People [\[2002\] NNTTA 230](#) (**Daniel**)

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**)

Representatives(s) of the native title parties: Ash Mumford, Kimberley Land Council

Representative(s) of the grantee party: Ken Green, Green Legal

Representatives(s) of the Government party: David Reger, State Solicitor's Office

REASONS FOR DETERMINATION

- [1] On 25 September 2019, the State of Western Australia (**the State**) issued a notice pursuant to s 29 of the *Native Title Act 1993* (Cth) (**NTA**) that it intends to grant mining lease M80/643 (**the lease**) to Pathfinder Exploration Pty Ltd (**Pathfinder**) as the grantee party (**GP**). As is set out in the notice, the lease comprises an area of 57.41 Ha and is located approximately 51km in a northerly direction from Halls Creek in Western Australia.
- [2] At the time the State issued the s 29 notice the Ngarrawanji People (WAD41/2019) were the registered native title claimants for approximately 28.94% of the area of the lease. On 28 April 2022 the Ngarrawanji People nominated the Ngarrawanji Aboriginal Corporation as the prescribed body corporate (**PBC**) for the Ngarrawanji common law holders. As such, pursuant to the orders of Justice Mortimer made 21 May 2019 and 10 December 2021, the Ngarrawanji Aboriginal Corporation is the registered native title body corporate for the area of the lease which was covered by the Ngarrawanji native title claim at the time of the s 29 notification (WCD2019/004).
- [3] I note that submissions concerning the status of Ngarrawanji as a native title party were made during the course of this Inquiry. For a further exploration of these issues please see paragraphs [25]-[32].
- [4] Additionally, at the time the State issued the s 29 notice the Malarngowem People (WAD43/2019) were the registered native title claimants for approximately 71.04% of the area of the lease. On 8 June 2021 the Malarngowem People nominated the Malarngowem Aboriginal Corporation as the PBC for the Malarngowem common law holders. As such, pursuant to the orders of Justice Banks-Smith made 11 August 2020 the Malarngowem Aboriginal Corporation is the registered native title body corporate for the area of the lease which was covered by the Malarngowem native title claim at the time of the s 29 notification.
- [5] For the purposes of this inquiry I will refer to the Ngarrawanji People, Ngarrawanji Aboriginal Corporation, Malarngowem People and the Malarngowem Aboriginal Corporation collectively as the **native title parties** or **NTP**.

- [6] 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 parties to perform the future act (NTA s 31(1)). The parties did not reach agreement and on 7 December 2021 Pathfinder applied to the National Native Title Tribunal (**the Tribunal**) for a determination that the future acts may be done pursuant to s 38 of the NTA.
- [7] On 10 December 2021, I was appointed by the President of the Tribunal to conduct the inquiry in this matter.
- [8] 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 parties satisfy me that either the State or Pathfinder failed to negotiate in good faith as required by s 31(1) of the NTA. The native title parties allege that Pathfinder did not negotiate in good faith, however make no such assertion against the State.
- [9] For the reasons outlined, I am satisfied the native parties' allegation against Pathfinder has been made out.

Tribunal proceedings

- [10] The application for a s 38 future act determination from Pathfinder was accepted by the Tribunal on 13 December 2021. The parties were notified that a preliminary conference to discuss directions for the subsequent inquiry process was to be held on 18 January 2022. Draft directions were circulated to the parties in advance of this conference.
- [11] Prior to and during the conference, the parties were advised it was my intention to run any good faith inquiry in advance of the s 35 inquiry should there be any allegations of a lack of good faith. As the native title parties had indicated this was to be the case and they would allege a lack of good faith on the part of the Pathfinder, directions were made accordingly.
- [12] On 22 February 2022, the native title parties provided a statement of contentions and supporting affidavit addressing their good faith allegation against Pathfinder. On 1 March 2022, the grantee party requested a one week extension to compliance dates. Given the circumstances noted in the request this was granted and the grantee party

then provided contentions on 8 March 2022. No contentions were provided by the State.

[13] Following a one week extension to the directions, the native title parties provided their contentions in reply on 22 March 2022 along with a List of Authorities referred to in the native title parties' contentions.

[14] The views of the parties were then sought as to whether they were content for the inquiry to proceed on the papers. All the parties replied confirming they were content for this to occur. As such I determined pursuant to s 151 of the NTA that the matter could proceed to determination on the papers.

Good Faith Material

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

Native title parties:

- a) Contentions dated 22 February 2022 (**native title party contentions**);
- b) Affidavit of Ash Mumford dated 22 February 2022 (**Mumford affidavit**);
- c) Contentions in reply dated 22 March 2022 (**native title party reply contentions**); and
- d) List of Authorities.

Pathfinder:

- a) Contentions dated 8 March 2022 (**Pathfinder contentions**); and
- b) Supporting documentation comprising the documents found at Annexure 1 of this determination.

Legal Principles for assessing negotiation in good faith

[16] I set out the legal principles for assessing negotiation in good faith (as outlined in s 31 of the NTA) in my decision *De Roma* at [16] – [30]. I adopt those paragraphs and reasoning for the purposes of this inquiry.

The lease and summary of the Project

- [17] The lease is a mining lease which is to be granted pursuant to s 75 of the *Mining Act 1978* (WA) (*Mining Act*). Pursuant to s 78 of the *Mining Act* the lease would be granted for a period of 21 years, after which it may be renewed. The rights of the holder of the lease are set out in s 85 of the *Mining Act*, and are subject to the *Mining Regulations 1981* (WA) as well as any endorsements and conditions the State proposes to impose on the lease.
- [18] The lease converts a portion of an exploration licence, E80/4753, granted to Pathfinder in 2014 (Mumford affidavit AM-3).
- [19] The material which has been provided by Pathfinder notes the licence relates to the semi-precious gemstone iolite - a “relatively low value product that has no current market... on the off chance that a commercial product can be achieved” (Pathfinder documents 6, 17). The material also notes “[a]ny future mining operation would be on a very small scale” (Pathfinder document 17).
- [20] Whilst the area of the licence has been geologically mapped, Pathfinder proposes to undertake additional work in order to define the width and depth of the iolite lenses (Pathfinder document 6). To this end Pathfinder proposes digging, and then backfilling, approximately eight 25 metre long costeans across the identified iolite lenses (Pathfinder document 6). Pathfinder also intends to test and investigate the finishing of iolite in the form of beads, cabochons and decorative panels (Pathfinder document 6).

Preliminary Issues

Reliability of Native Title Parties’ Material

- [21] In their submissions Pathfinder comments on the material lodged by native title parties’ representatives, the Kimberley Land Council (**KLC**), contending that ‘it is not clear that all attachments to emails are annexed to the Mumford Affidavit’ (Pathfinder contentions [2.6]) and that ‘some annexures to the Mumford affidavit have clearly been edited’ (Pathfinder contentions [2.7]).

- [22] Pathfinder points to certain differences between the documents it has provided and the documents annexed to the Mumford affidavit, such as excluded letterhead, and contends they have been ‘improperly removed’ (Pathfinder contentions [2.7]). Pathfinder submits that these documents are ‘not a true copy’ as is provided in the Mumford affidavit (Pathfinder contentions [2.7]-[2.8]).
- [23] The native title parties contend any letterhead removal was an inadvertent result of file compression, that the text of the correspondence has not been edited and comparison with Pathfinders copy of the document confirms this (native title party reply contentions [3]). The native title parties also contend that little turns on this issue and it cannot be seriously suggested that Mr Mumford’s evidence is unreliable or lacks credibility (native title party reply contentions [4])
- [24] The Tribunal is not bound by the rules of evidence and instead takes a common sense approach to the material (s 109(3) of the NTA; see also *Waljen* at pp 46, 51). As such, having performed a comparison myself on this and other documents provided by the parties, I agree with the native title parties and accept the Mumford affidavit and other material provided by the KLC and Mr Mumford.

Ngarrawanji as a ‘Negotiation Party’

- [25] Pathfinder contends that Ngarrawanji does not have standing in this matter as they are not a negotiation party for the purposes of s 36(2) of the NTA (Pathfinder contentions [4.2]). In making this contention Pathfinder noted the position of the Ngarrawanji common law holders, having neither an entry on Register of Native Title Claims (Register) nor being a registered native title body corporate (Pathfinder contentions [4.5]-[4.26]).
- [26] On 21 May 2019, Justice Mortimer made orders in WAD 41/2019 that there be a determination of native title in the terms of the of the Minute of Consent Determination of Native Title which was filed by the parties in that matter. That determination was to ‘take effect immediately upon the making of a determination under section 56(1) or 57(2) of the *Native Title Act 1993* (Cth), as the case may be.’
- [27] This appears to be have been followed by a number of delays in the nomination of a body to hold the determined native title. As such on 10 December 2021, Justice

Mortimer made orders providing that the rights and interests comprising the native title of the Ngarrawanji people set out in the Court's Orders of 21 May 2019 be held, pursuant to s 56(2)(c) of the NTA, by the common law holders described.

[28] Those orders also required that the KLC, upon instruction by the common law holders, nominate in writing an agent PBC to hold the native title under s 57(2)(a) of the NTA by no later than 5 May 2022. If no PBC nomination was filed with the Court, then the Indigenous Land and Sea Corporation would be appointed as the PBC under s 57(2)(c) of the NTA.

[29] Following this, and as noted above at [2], on 28 April 2022 the Ngarrawanji common law holders nominated the Ngarrawanji Aboriginal Corporation as the PBC for the purposes of the determination.

[30] It appears that at some point between the making of the 10 December 2021 orders and the lodgement of the present application, the entry relating to the Ngarrawanji application no longer appeared on the Register. I have reviewed Tribunal records and accept that no entry relating to the Ngarrawanji application appeared on the Register of Native Title Claims at the time the application was lodged. I understand that the entry relating to the Ngarrawanji application reappeared on the Register on 23 March 2022.

Consideration

[31] Part 5 of the NTA establishes the position of the Native Title Registrar (**Registrar**) and provides relevantly at s 98 that the 'Registrar has the powers set out in Parts 7, 8 and 8A in relation to the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements'. These powers include the Registrar's powers to maintain the Register of Native Title Claims (**Register**) as laid out in s 190 of the NTA. For the purposes of this determination it is worth extracting the portion of s 190 which addresses the Registrar's power to remove or amend entries once they are on the Register:

Entries removed or amended after determination, decision or withdrawal

- (4) If:
 - (a) the Registrar is notified under section 189 or 189A of a decision or determination covering a claim; or

- (b) the Registrar is notified by a recognised State/Territory body of a decision or determination covering a claim; or
- (c) the Registrar is notified that an application that contained a claim has been withdrawn;

the Registrar must, as soon as practicable:

- (d) if the application in question has been withdrawn, dismissed or otherwise finalised—remove the entry on the Register that relates to the claim; or
- (da) if an approved determination of native title is made to the effect that native title exists in relation to an area:
 - (i) but no determination has yet been made under section 56; or
 - (ii) a determination has been made under section 56 that the native title rights and interests are to be held by the common law holders, but no determination has yet been made under subsection 57(2) of which prescribed body corporate is to perform the functions mentioned in subsection 57(3);

amend the entry on the Register that relates to the claim so that it reflects that fact; or

- (e) in any other case—amend the entry on the Register that relates to the claim so that it only relates to the matters in relation to which the application has not been finalised.

Note: If an application has been finalised in relation to part of the area claimed, the Register would be amended to remove references to that area. If the application has been finalised by an approved determination of native title, that determination would be entered on the National Native Title Register.

[32] Having reviewed the orders of Justice Mortimer, as discussed above, I am satisfied that the Ngarrawanji application was not withdrawn, dismissed or otherwise finalised as is. In my view, on a plain reading of s 190(4)(d), this is an essential precondition, or ‘jurisdictional fact’ of the Registrar’s power to remove an entry from the Register (see *Eshetu* [127]-[146], *Plaintiff M70/2011* [57]). The role of the Registrar is a statutory position and I am satisfied that s 190(4)(d) is the only source of the Registrar’s power to remove an entry from the Register. In these circumstances I am therefore of the view that any purported removal of the Ngarrawanji entry must be considered as a nullity and of no effect. (see for example *Bhardwaj* [53]). As such, I am satisfied that at all relevant times the Ngarrawanji people remained a ‘Negotiation Party’ for the purposes of s 36(2) of the NTA.

What occurred during the negotiation period

[33] Perhaps unintentionally, the larger part of the negotiation process occurred through the exchange of correspondence. It appears this wasn’t the original intention of the parties, however the COVID-19 pandemic and associated measures such as isolation protocols and border closures look to have stymied the parties’ ability to conduct face to face meetings even though other measures may have been available. As a result of

this, much of the process was documented in the exchange of correspondence, which I summarise here in order to make a proper assessment.

- [34] Following the initial s 29 notification, the State provided correspondence to the parties on 1 October 2019 detailing the tenement application and seeking submissions. Through its agent, Hetherington Exploration and Mining Title Services (**HEMTS**), Pathfinder provided a proposed work program to Malarngowem via their representatives the KLC on 5 November 2019. This contained a broad and summarised description of the project and includes maps showing the lease location and possible mineralisation lenses within it (Mumford affidavit AM-3). A similar work program was not provided for Ngarrawanji, however I consider this to be a simple omission which is mitigated by the KLC also being the legal representative for this party.
- [35] On 16 January 2020, the native title parties provided copies of a proposed negotiation protocol to the grantee party on behalf of each of them (native title parties contentions [22], Mumford affidavit AM-6) which HEMTS confirmed it had forwarded to Pathfinder (Pathfinder document 16). The content of both copies appears to be effectively identical. This correspondence also stated that a proposed budget would be provided in the near future (Mumford affidavit AM-6).
- [36] Pathfinder corresponded with the KLC on 30 January 2020, pointing out that this was an unusual case in that the lease overlapped two native title applications (as they were at the time) and whether it could be expected that the negotiation protocol and the terms of agreements arrived at would be similar. Pathfinder also outlined it had a positive relationship with the native title parties and was intending to visit both groups in March and April of 2020 ‘to progress negotiations over the tenement and involve the KLC in finalizing the agreement to the satisfaction of all parties’ (Mumford affidavit AM-8).
- [37] The KLC responded on February 5 setting out that while instructed by the native title parties separately, they would seek further instruction from each group regarding the extent to which any negotiations could be conducted jointly. This correspondence also set out that the two negotiation protocols were effectively the same and that as the KLC is the legal representative of both groups, correspondence should be directed to

them rather than communicating directly with the native title parties (Mumford affidavit AM-9).

- [38] Through the period January to March of 2020, the parties discussed a possible meeting in Broome in March of 2020 (native title party contentions [22]). There was a free and what appears to be well intended exchange of information attempting to organise this meeting, however these plans were interrupted by the emergence of COVID-19 and the subsequent restrictions put in place. Ultimately, no in-person meeting was able to occur at this point in time.
- [39] In this time period, on 10 March 2020, the native title parties provided a copy of the initial negotiation budget to Pathfinder for the sum of \$713,744.24 for its comment. This consisted of a \$419,580.84 sum for Malarngowem and \$294,163.40 for Ngarrawanji and included budget for negotiation teams, cultural advisors, legal and logistical support, meeting costs, travel and accommodation and meetings to authorise agreements (Mumford affidavit AM-11, AM-12).
- [40] On 12 May 2020, Pathfinder advised that it was ‘reconsidering the potential economics of the project’ noting the ‘complication’ caused by having two native title parties and ‘staggering costs’ accounted for in the budget with no guarantee of success (Mumford affidavit AM-16).
- [41] The KLC responded to this correspondence on 15 May 2020 setting out that it has no control over the fact of there being two native title parties and that this is a function of the footprint of the lease itself. It also noted that it would be seeking instructions to conduct negotiations jointly, although this had been stymied by COVID-19 and related control measures put in place by both Commonwealth and State Governments (Mumford affidavit AM-18).
- [42] The KLC further set out that the budgets provided were not intended to be prohibitive but are the costs of ‘convening meetings of all native title holders for the purpose of obtaining their free, prior and informed consent’. The KLC noted ‘[t]he purpose of the budget is to ensure the costs associated with the negotiations can be recovered. The KLC and the native title holders are not funded to convene such meetings and to bare [sic] such costs and the native title holders, pursuant to the NTA have a right to recover their costs with respect to negotiations of this kind.’ The KLC then committed

to working through a process to determine whether this budget might be reduced '[i]n the interests of finding a workable budget estimate' (Mumford affidavit AM-18).

[43] On 18 May 2020, the native title parties provided an updated copy of the proposed budget in the sum of \$513,605.65. In providing that budget the native title parties requested that Pathfinder advise 'if there is a meeting cost... which you consider would be acceptable to you, or any costs provided in the estimate which you are unclear about' (Mumford affidavit AM-19). The native title parties also noted that they were looking 'forward to receiving your comments in relation to the draft Negotiation Protocols' (Mumford affidavit AM-19).

[44] Also on 18 May 2020, Pathfinder responded to the native title parties noting '[t]hat is still a significant amount of money' (Mumford affidavit AM-20).

[45] On 25 June 2020, the KLC advised that with the easing of COVID-19 restrictions a meeting of the native title parties was becoming more of a possibility. In this same correspondence, the KLC sought an indication of when comments may be expected from Pathfinder in relation to the proposed negotiation protocol and budget (Mumford affidavit AM-22).

[46] The KLC again asked when comment from Pathfinder might be expected on the negotiation protocol in correspondence on 6 August 2020 (Mumford affidavit AM-24) and again on 17 August 2020 (Mumford affidavit AM-26). In this 17 August correspondence, the KLC noted that 'we have not heard from you since May' in relation to concerns over the negotiation protocol or budget; enquired whether Pathfinder still intended to apply for the mining lease; whether, if so, Pathfinder would enter into the negotiation protocol and noted that the budget provided was indicative. The KLC requested that if there were particular issues with the budget or the protocol, Pathfinder please identify them and advise (Mumford affidavit AM-26). Pathfinder responded on 17 August 2020 stating that it would provide an offer to the native title parties 'over the next few days' (Mumford affidavit AM-26).

[47] Various points of contact occurred over the following weeks (Mumford affidavit AM-27 – AM-31), with Pathfinder again indicating it would have 'an offer to the KLC shortly' in correspondence dated 31 August 2020. This advice was provided to the

State only, with the State then passing this communication on to the KLC on 2 September 2020 (Mumford affidavit AM-30).

[48] As this counter-offer did not materialise, on 8 September 2020 the KLC sent further correspondence to Pathfinder seeking an update and indicating that once a negotiation protocol had been agreed, confirmation of a time would be made for Pathfinder to present about its proposed mining lease to the native title groups (Mumford affidavit AM-32).

[49] This correspondence also notes that while Pathfinder had expressed concerns relating to the budget and negotiation protocol, the native title parties did not have enough information on the project to properly assess its impact on native title rights and interests or to understand why the costs of convening a meeting of the native title holders to negotiate would not be financially viable in the context of the project (Mumford affidavit AM-32). To this end the KLC requested (as quoted from Mumford affidavit AM-32):

- Information on the type of minerals to be mined – the RTN submissions refer to iolite bead and cabochons;
- Information on the method of mining;
- Information on the depth of ground-impacting works – the RTN submissions state that additional work is required to define the width of the [iolite] lenses and potential depth extension of the lenses;
- Information on proposed fences, access roads, buildings, plant and machinery, electrical- and telecommunications;
- Any additional plans and/or drawings of the operation;
- Estimated annual expenditure in connection with the mining operation;
- Expected annual output;
- Relevant company details, including details of any joint venturers and partnership/business arrangements regarding M80/643;
- Any dealings on the tenement, formal or informal, with any other companies operating in the Malarngowem or Ngarrawanji native title determination areas;
- A list of dealings and associated documents or approvals by the Department;
- Any other correspondence between yourself and the Department regarding the negotiation protocol or any offers relating to M80/643.

[50] In this 8 September correspondence, the KLC also note that Pathfinder had made reference to non-ground disturbing exploration activity on the underlying granted tenement E80/4753 in its initial s 29 submissions to the State. With this in mind, the KLC note that no notice of any exploration activity had been received so they

remained unaware of whether activity had taken place which would trigger processes under heritage protection agreements entered into between Pathfinder and the native title parties for the grant of E80/4753. As such, the KLC requested further information on activity of this type that may have occurred (Mumford affidavit AM-32).

- [51] Rather than provide comment on the proposed negotiation protocol, heritage matters or the information request, on 11 November 2020 Pathfinder provided the native title parties with two copies of a fully drafted agreement entitled ‘Agreement for Grant of M80/643’ (Mumford affidavit AM-35, AM-37). In the covering correspondence Pathfinder noted it was seeking that these be presented to the native title groups and that:

I am not currently in a position to satisfy the extreme charges demanded by the KLC to facilitate the initiation of these agreements. However, I am willing to work closely with the Native Title Groups in Halls Creek and Warmun to ensure that potential advantages in terms of training and professional development will flow their way in the future. (Mumford affidavit AM-36)

- [52] The native title parties responded on 25 November 2020 further seeking information on exploration activity and, seemingly under the impression that exploration activity had occurred on the underlying tenement E80/4753 without their knowledge, raised the prospect of a Dispute Notice under the heritage protection agreements with Pathfinder relating to that tenement (Mumford affidavit AM-38).

- [53] On the request made by Pathfinder for the agreement to be presented to the groups, the KLC stated their instructions, as previously communicated, were to enter into the negotiation protocol prior to negotiating an agreement. This, the KLC asserted, was due to previous interactions with the grantee party which they alleged involved heritage site damage (consideration of which does not form part of this determination) and due to not being funded to convene meetings for the purpose of authorising agreements (Mumford affidavit AM-38). The KLC stated:

For this reason, the Negotiation Protocol establishes a process and funding arrangement for conducting negotiations which is consistent with the right of the Native Title Holders under the Native Title Act to recover their costs with respect to negotiations of this kind. (Mumford Affidavit AM-38)

- [54] On the questions surrounding the budget provided by the KLC, the KLC requested ‘further information so we can understand why the budget ... would endanger the financial viability of the proposed mining project’ (Mumford affidavit AM-38). The

KLC then made the allegation that Pathfinder has ‘unreasonably failed to provide ... information about Pathfinder’s estimated annual expenditure in connection with the mining operation or the estimate annual output’ (Mumford affidavit AM-38). In addition to this, the request for information outlined at paragraph [49] was reiterated by the KLC (Mumford affidavit AM-38).

- [55] On 2 December 2020, Pathfinder responded to the native title parties, providing some further but limited information concerning tenement E80/4783 and referencing a heritage site survey carried out in 1988 (Mumford affidavit AM-39, Pathfinder document 84). In reference to this 1988 heritage survey, Pathfinder pointed out the area has been previously explored by what are termed ‘major Companies’ which gave rise to the 1988 heritage survey and resulted in ‘no heritage sites being gazetted’ (Mumford affidavit AM-39).
- [56] Pathfinder noted it had not conducted ground disturbing activities and its exploration activities had been based on examination of historic data and ground truthing on areas or previous disturbance. Pathfinder provided in relation to its activities that ‘[a]nnual reports have been submitted to the DMIRS and are confidential’ (Mumford affidavit AM-39).
- [57] Pathfinder also noted a programme of work related to the lease for the construction of costeans had been approved by DMIRS and that these activities would be subject to heritage surveys. Information in this correspondence shows this approval was valid until September 2021 with an overall budget for the activity being \$20,000 (Mumford affidavit AM-39). This would appear to be more in line with exploration activity however why this was not conducted through E80/4753, as would normally be expected, is not explained.
- [58] A response was provided by the KLC on 18 December 2020 (Mumford affidavit AM-40). The most relevant part of this response was the reassertion of the need for a negotiation protocol, which the KLC stated was attached to this correspondence along with an invitation to comment or mark-up proposed redrafts and a further request for the information requested in September 2020. It would appear the draft negotiation protocol was inadvertently omitted from this 18 December correspondence, which was

rectified with further correspondence from the KLC on 13 January 2021 (Mumford affidavit AM-42).

- [59] On 8 March 2021 the State sought information from the KLC on whether the native title parties would be responding to the agreement provided by Pathfinder on 11 November 2020. Inexplicably, the State also enquired when, if a negotiation protocol is a requirement of the native title parties, this would be provided. The State also set out it was considering referring the matter to mediation before the Tribunal (Mumford affidavit AM-45). On 23 March 2021, the KLC confirmed a response had been provided to Pathfinder's draft agreement on 25 November 2020, that a negotiation protocol remained a requirement and that it had been previously provided to Pathfinder (Mumford affidavit AM-46).
- [60] The KLC provided further correspondence on 22 April 2021 which reiterated issues raised previously on matters of heritage and previous exploration activity. In particular, the KLC confirmed that 'our instructions are to enter into the Negotiation Protocol with Pathfinder' and that the KLC were still awaiting a substantive response from Pathfinder on the negotiation protocol. The KLC also inquired as to whether a meeting cost by way of flat fee or other calculation may be acceptable to Pathfinder (Mumford affidavit AM-48).
- [61] On 27 May 2021, following enquiry by the State, Pathfinder confirmed it had received a copy of the negotiation protocol however noted the 'astronomical' estimated costs and advised it was not prepared to sign unless it knew the 'actual (or close to the estimate of the costs) leading to a successful conclusion' (Mumford affidavit AM-53). Pathfinder provided a cost estimate, based on a half day on-site meeting for negotiations and a further day for agreement drafting, of '\$10,000 to achieve something tangible' (Mumford affidavit AM-53). The half day on-site component included provision for 10 traditional owners, an anthropologist, travel allowance for traditional owners in the Halls Creek area and legal fees (Mumford affidavit AM-53).
- [62] On 31 May 2021, on the basis that negotiations had stalled, the State referred the matter to the Tribunal for mediation assistance (Mumford affidavit AM-54, AM-55). On 16 August 2021, in the lead up to the mediation, the KLC communicated that the Malarngowem board had considered the draft agreement provided by Pathfinder on 11

August 2021, had raised ‘a number of fundamental issues’ with it and that they had instructed the KLC to negotiate these terms subject to a negotiation protocol being agreed (Mumford affidavit AM-57). This correspondence also asserted the budget provided by Pathfinder on 27 May 2020 was not sufficient for traditional owners to participate in negotiation meetings and for agreement to be authorised by the groups (Mumford affidavit AM-57).

[63] On 1 October 2021, Pathfinder, via its representative Mr Ken Green, provided a lengthy response to the native title parties’ requests for information relating to the tenements (Mumford affidavit AM-59, Pathfinder document 134). This correspondence acknowledged that ‘it may be that some of the [native title parties]’ requests for information have not been fully responded to by the [grantee party]’ (Pathfinder document 134, [1.3]) and accordingly, provides a comprehensive set of information including:

- Information requested on 8 September 2020 (see paragraph [49]) and as part of this:
 - West Springvale Project E80/4753 Cordierite Lenses Mineralisation Report, 10 July 2019;
 - West Springvale Project E80/4753 Cordierite Lenses Mineralisation Report – Mining Statement, 12 July 2019;
 - Springvale Project E80/4753 Annual Report for period ending 15 May 2015;
 - Springvale Project E80/4753 Annual Report for period ending 15 May 2016;
 - Springvale Project Combined Report for E80/4753, 4934 and 4985, Annual Report for period ending 1 August 2017;
 - Mining Tenement Register Search, Exploration license 80/4753 dated 22 September 2021; and
 - Programme of Work approval from 13 July 2020 - 30 October 2020 and cover letter.
- A response to correspondence from the KLC dated 25 November 2020 regarding exploration activity on E80/4753.
- A response to correspondence from the KLC dated 18 December 2020 concerning additional information request for exploration activity on E80/4753.
- A response to correspondence from the KLC dated 22 April 2021 concerning additional information request for exploration activity on E80/4753.

- An extensive response relating to the proposed negotiation protocol including comment on budget, clauses of the negotiation protocol and the utility of the negotiation protocol itself.

- [64] I assume the annual reports listed here are the same Pathfinder had previously submitted to DMIRS but which were stated to be confidential. This correspondence also confirmed that Pathfinder had further considered the negotiation protocols and had ‘resolved to decline to agree to them’ (Pathfinder document 134, [6.8]).
- [65] On 12 October 2021, the Tribunal convened the first mediation in this matter (Mumford affidavit AM-61). The synopsis of this meeting provided by the Tribunal shows Pathfinder declined to enter into the negotiation protocol, that the KLC expressed a funding framework was required to progress negotiation and that a response to Pathfinder’s correspondence of 1 October 2021 would be forthcoming (Pathfinder document 138).
- [66] On 9 November 2021, the native title parties provided a response to Pathfinder’s correspondence of 1 October, responding in detail to the comments concerning the negotiation protocol made by Mr Green for Pathfinder, amongst other things. Accompanying this correspondence was a revised and marked up copy of the negotiation protocol as well as a copy of the 1988 heritage survey report, as requested by Pathfinder in its 1 October correspondence. As acknowledged by the KLC however, this copy was heavily water damaged and largely illegible (Mumford affidavit AM-62-AM-65).
- [67] On 29 November 2021, Pathfinder foreshadowed a number of issues which it intended to raise at the next mediation conference, these issues included ‘the respective merits of (1) continuing mediation/negotiations and (2) an arbitral determination pursuant to s 35 of the *Native Title Act 1993* (Cth)’ (Mumford affidavit AM-68).
- [68] On 6 December 2021, the Tribunal convened a further mediation session in this matter (Mumford affidavit AM-70). The Malarngowem native title party sought support for the attendance of six traditional owners in this mediation (Mumford affidavit AM-66). Pathfinder offered a capped amount of \$2000 to indemnify costs associated with facilitating the mediation (Mumford affidavit AM-68) however were subsequently advised this was insufficient due to travel costs, video conferencing hire in various

locations and support costs (Mumford affidavit AM-69). The mediation proceeded without these traditional owner representatives.

[69] The Tribunal synopsis shows that due to the parties reaching an impasse, agreement was said to be unlikely and Pathfinder intended to lodge a s 35 application (Pathfinder document 157). Following this conference, the mediation was terminated by the Tribunal and it was determined this matter would proceed to determination.

The contentions of the Parties

[70] The native title parties contend that Pathfinder had no real intention of reaching an agreement, the final evidence of which they say, is the immediate termination of the mediation process and refusal to engage further even though steps had been offered for substantive negotiations to occur (native title party contentions [19]). From this the native title parties contend at [20] that:

- (i) The GP was unreasonable in its failure to engage with the NTPs about the Negotiation Protocols;
- (ii) The GP failed to take reasonable steps to facilitate and engage in negotiations between the parties;
- (iii) The GP failed to make counter proposals;
- (iv) The GP failed to make appropriate concessions as to meeting costs;
- (v) The GP failed to respond to reasonable requests for relevant information by the NTPs within a reasonable time;
- (vi) The GP made unreasonable statements during negotiations which indicate it did not hold a genuine intention to reach agreement with the NTPs about the doing of the future act; and
- (vii) The GP threatened to undermine the negotiation process by repeatedly indicating an intention to talk directly with KLC's clients when directly requested not to.

[71] These contentions mainly centre around the inability to progress the negotiation protocol and the asserted need for it, an inability to agree on costs and a failure to provide adequate information.

The role and use of Negotiation Protocols

[72] Two issues emerge in relation to the proposed negotiation protocol: that of the content of the protocols and that of the budget attached to or associated with the protocols that the native title parties sought be met by Pathfinder. The main emphasis of the exchange of correspondence, from Pathfinder in particular, was on the proposed

budgets, however there is utility in examining the process that took place surrounding the content of the protocols themselves.

- [73] According to the native title parties, the negotiation protocol was provided in order to assist the parties to understand the scope of the negotiation, provide certainty as to the authority of the negotiators and the agreement authorisation processes, detail costs involved and provide certainty around costs and timeframes (native title party contentions [26]).
- [74] The native title parties contend that although first provided in January 2020 (native title party contentions [22]) and despite being invited to on several occasions (native title party contentions [50]), Pathfinder failed to provide comment on the content of the negotiation protocols until 1 October 2021, a period of almost 2 years. The native title parties also contend that Pathfinder had at no point prior to this, made any attempt to engage on the terms of the protocols other than on costs (native title party contentions [51]). Further, the native title parties contend Pathfinder made no indication that it would not enter into the protocol until this 1 October 2021 correspondence (native title party contentions [51], [47]).
- [75] Pathfinder states that it's primary criticism of the native title parties contentions surrounding the negotiation protocol (including on funding matters) is that such protocols are beyond the scope of negotiation requirements as set out in s 31(2) of the NTA (Pathfinder contentions [9.17]). Section 31(2) states that:
- If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.
- [76] Pathfinder contends '[i]t is not a failure to negotiate in good faith to decline to negotiate about a subject matter about which there is no obligation to negotiate in the first place' (Pathfinder contentions [9.18]). This argument was echoed in the 1 October 2021 correspondence from Pathfinder which stated '[t]he proposed Negotiation Protocols do not contemplate negotiations directed to the grant of the Tenement' (Pathfinder document 134, [6.14]).
- [77] Pathfinder states that it's second criticism surrounding the negotiation protocol is the failure of the native title parties 'to address why it would, to any extent, have been in

the interests of the GP to enter into the proposed negotiation protocols' (Pathfinder contentions [9.19]). To make clear its perspective, in its contentions at [9.19], Pathfinder quotes paragraph [6.11] from its 1 October 2021 correspondence, which reads:

The GP's position is also influenced by the lack of benefit arising to the GP under the Proposed Negotiation Protocols. The GP does not, in principle, reject the concept of a "negotiation protocol". However, the GP is unlikely to enter into any "negotiation protocol" unless it is, alternatively perceived to be, beneficial to the GP. The GP does not regard the NTP's proposed Negotiation Protocol as being of any benefit to the GP.

[78] Notwithstanding this, Pathfinder provided a detailed response on the content of the negotiation protocol in its 1 October 2021 correspondence to which the native title parties responded with a modified draft in their correspondence dated 9 November 2021 (see [63] and [66] above).

General Remarks on the Negotiation Protocols

[79] Previous Tribunal consideration of negotiation protocols and whether they are a matter unrelated to the effect of the act on the registered native title has generally revolved around the funding aspects of these protocols rather than their content, see *Coalpac* for example. Setting aside such funding aspects, which I will address shortly, I don't accept that the negotiation protocol proposed in this case is unrelated to the effect of the future act given its proposed content and neither do I agree that it does not contemplate negotiations towards the grant of the tenement.

[80] In saying this, I am not of the view that a formal negotiation protocol is absolutely necessary, but to take a reductive reading of s 31(2) and determine that, in general, negotiation protocols are an unrelated matter would seem to ignore much of the praxis of negotiation, or indeed approaches such as those set out in *Griffin Coal* at [34] or *Cosmos* at [29]. Instead, in my view, a case by case approach needs to be taken with the view arrived at in any particular circumstance being dependant on the content of the negotiation protocol as well as the approach of the parties in that instance.

[81] Moreover, in any negotiation process, there are a series of preliminaries that parties are required to work through in order to establish the conduct and content of negotiations. This is a manifestly unavoidable and inseparable component of any negotiation process. Negotiations also need to decide on subject matter and other

things that are substantive to the content of an agreement. This can be performed through informal means, or more formally through mechanisms such as correspondence, formal meetings or through the use [and/or aid] of tools such as negotiation protocols.

[82] As set out in *Cox* at [38]:

The Act does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith and was with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied.

[83] It is my view, given their content and purpose, that the proposed negotiation protocol in this case should be viewed in this way.

[84] The negotiation protocol proposed in this matter by the native title parties includes clauses on the following:

- (i) Warranties relating to the authority of the parties and representatives to act.
- (ii) Broad remarks on the negotiation process and its conduct.
- (iii) That there will be a Traditional Owner negotiation committee, confirmation of their ability to act and their discretion to have legal assistance.
- (iv) That the negotiation committee, while authorised to act, are not authorised to execute a final agreement due to native title or claim group decision making requirements.
- (v) How the parties will make decisions together on the scheduling and coordination of negotiation meetings.
- (vi) Costs, with each native title party seeking that Pathfinder acknowledge they and KLC have limited resources for such matters and participation may be contingent on reasonable costs being covered by Pathfinder, government or other funding.
- (vii) Communications intended for the native title parties to be directed to their representative.
- (viii) Subject areas for negotiation in a s 31 agreement, including a list of 12 topic areas that include cultural heritage, business collaboration, reducing impact, native title access, benefits/compensation and employment.
- (ix) Social impact assessment.
- (x) The steps required of the native title parties to authorise agreements.
- (xi) General agreement terms such as confidentiality, dispute resolution, termination and general clauses.

- [85] Much of this subject matter would seem to be uncontroversial and, in line with my previous comments, much of this could be achieved through exchange of correspondence with the native title parties simply advising the grantee party of its approach on points (i)-(iv), (vii), (x) and portions of (xi). In respect of a PBC, this approach could likely be taken on point (vi), costs, invoking s 60AB of the NTA and advising of a cost recovery schedule. That these things could simply be advised goes towards my view that negotiation protocols are not completely necessary, depending on the circumstances.
- [86] Progress it seems, was stymied by the matter of negotiation costs. Setting this component aside however, I cannot accept that in general, not being able to come to agreement on preliminary and functional matters by way of a negotiation protocol is any different to not being able to agree to these same things via a different mechanism. If, for example, parties were not able to agree on the topics of negotiation and inclusion into a s 31 agreement in the first instance, this would be a consideration in determining good faith depending on the particular circumstances and facts of that matter. Whether such a failure were to occur in the context of in person meetings (for example) or in the context of a negotiation protocol makes no difference. It is not the mechanism that is of significance, it is the substance.
- [87] It must be said, however, that the addition of various process and other clauses of this type may diminish its attractiveness to a grantee party, in addition to any implications brought through its contractual nature. This latter point in particular looks to be a strong contributing factor for Pathfinder declining to enter into the negotiation protocol.

Approach to Negotiation Funding

- [88] The Tribunal has previously held there is no statutory obligation set out in the NTA requiring a grantee party to fund the native title party, therefore a refusal to provide negotiation funding does not show a want of good faith (*Daniel* [146]), even though it may be in the interest of a grantee party to do so (*Drake Coal* [189]). The Tribunal has also regarded this as an ‘unrelated matter’ for the purposes of s 31(2) in determinations such as *Coalpac* (at [92]) and *Magnesium Resources* (at [65]).

- [89] Pathfinder notes s 31(2) of the NTA which provides that where a party ‘refuses or fails to negotiate about matters unrelated to the effect of the act’ on registered native title rights and interests, this does not mean that party has not negotiated in good faith (Pathfinder contentions [9.17]). In line with this and previous Tribunal determinations, Pathfinder submitted there is ‘no absolute obligation’ to fund the native title parties (Pathfinder contentions [6.12]) nor is funding a negotiation subject matter pursuant to s 31(1)(b) (Pathfinder contentions [9.17]). Pathfinder contends ‘[i]t is not a failure to negotiate in good faith to decline to negotiate about a subject matter about which there is no obligation to negotiate’ (Pathfinder contentions [9.18]).
- [90] Pathfinder also points to the decision from President Dowsett in *Gnulli*, particularly at [100] in which he stated:
- 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.
- [91] This provides useful context to the previously referred to determinations and I examined and adopted this view in *De Roma* at [160] as I do here. In particular this clarifies that negotiation on matters such as negotiation expenses is not alone a basis for a lack of good faith but is a relevant circumstance when considered alongside other things.
- [92] It is worthwhile noting that many of the determinations establishing the Tribunal’s approach to negotiation expenses were made at the native title claim application stage, that is, prior to a determination of native title being made. It is also worth noting that these determinations were made in a time when there was more of an expectation that native title parties were supported by native title representative bodies and funded from Government sources, as is expressly stated in *Daniel* at [145]. The extent to which this can still be assumed is unclear. While the parties have made contrasting contentions on the state of PBC resourcing, no evidence either way has been put before this inquiry.
- [93] Nonetheless, as has been accepted in Tribunal determinations such as *Daniel*, *Coalpac* and *Magnesium Resources*, there is no statutory obligation for a grantee party to fund

the negotiation activities of a native title party. After a determination is made and a PBC is appointed however, the statutory context appears to change as there is then a statutory right on the part of the PBC to charge a fee for the recovery of costs incurred when negotiating s 31 agreements, pursuant to s 60AB of the NTA.

[94] While this context changes and perhaps the considerations along with it (a factor briefly examined in *De Roma* at [162]-[165]), at the point at which the lease in this inquiry was applied for, the native title applications had been determined but no PBCs had been appointed in either area, thus s 60AB had not been enlivened. This did change part way through the negotiation process for Malarngowem with the appointment of the Malarngowem PBC in June of 2021, however the approach to negotiation funding did not.

Negotiation funding in this matter

[95] In this matter, the funding sought by the native title parties was very substantial, in the first instance being \$713,744.24 (Mumford affidavit AM-12). This included negotiation meetings, negotiation team support, KLC costs, authorisation meetings and other items across the two separate native title parties, each of which are set out in detailed materials provided to Pathfinder.

[96] Pathfinder responded on 12 May 2020 stating it wasn't able to 'accommodate the staggering costs that you have budgeted for' (Mumford affidavit AM-16), after which the KLC committed to revising the budget and further stated 'if there is a meeting cost (such as by way of flat fee or by some other calculation) which you consider would be acceptable to you, please advise accordingly' (Mumford affidavit AM-18). A revised budget of \$513,605.65 was provided to Pathfinder on 18 May 2020 (Mumford affidavit AM-19) to which Pathfinder responded '[t]hat is still a significant amount of money' (Mumford affidavit AM-20).

[97] Despite an ongoing exchange of correspondence, there was no real engagement on or response to this specific issue until 27 May 2021. Pathfinder, noting what it termed the 'astronomical' costs of the native title parties' budgets, advised that it was not prepared to agree the negotiation protocol unless it knew the 'actual (or close to the estimate of the costs) leading to a successful conclusion' (Mumford affidavit AM-53).

In the same correspondence Pathfinder provided cost estimates to achieve something ‘tangible’ as \$10,000 (Mumford affidavit AM-53).

[98] Pathfinder contends that this was to ensure the negotiation protocol was subject to the proviso that any indemnification be ‘capped at \$10,000 and be payable in the event of the [native title parties’] agreement to the grant’ (Pathfinder contentions [9.46]). Pathfinder further contends there was nothing unreasonable about that proposal and no reason the native title parties could not have agreed to it (Pathfinder contentions [9.47]). Similar comments were also made directly on this topic by Pathfinder in its 1 October 2021 correspondence (Pathfinder document 134).

[99] It’s clear the parties are distant on this issue. It’s difficult to view the budgets put forward by the KLC as reasonable, even though they include negotiation and agreement authorisation processes for two separate native title parties. Even so, it was also put to Pathfinder that the costs outlined were indicative (Mumford affidavit AM-26), providing scope for further discussion. Additionally, on at least two separate occasions (Mumford affidavit AM-33 and AM-38) the native title parties sought information to assist them to ‘understand why the budget associated of [sic] convening a meeting of the Native Title Holders ... would endanger the financial viability of the mining project’ (Mumford affidavit AM-38). The provision of such information may well have moderated the approach of the native title parties.

[100] I will not make a specific finding on negotiation funding at this point, preferring to examine these issues alongside the overall approach of the parties. The negotiation protocol encompasses a broader range of topics than negotiation funding alone though, the approach to which I examine below.

Pathfinder’s approach to the negotiation and subsequent events

[101] As the negotiation protocol covers a wider range of topics than just negotiation funding, the native title parties contend that Pathfinder was unreasonable in its failure to engage with the native title parties about the negotiation protocol, that Pathfinder failed to take reasonable steps to facilitate and engage in negotiations and therefore failed to negotiate in good faith (native title party contentions [20]).

- [102] Pathfinder contend that on 12 May 2020 it confirmed it was unwilling to enter into the negotiation protocol (Pathfinder contentions [8.5]). In my view, an overall unwillingness to enter into the negotiation protocol is an overly strong reading of the 12 May 2020 correspondence. Instead, Pathfinder said it cannot accommodate what it termed ‘staggering’ costs (Mumford affidavit AM-16) which elicited an effort from the KLC to provide a reduced budget which Pathfinder acknowledged at the time (Mumford affidavit AM-18). This revised budget was also very substantial and was responded to similarly by Pathfinder.
- [103] Pathfinder’s approach did appear to harden to some degree with the correspondence of 27 May 2021, some 12 months later, but again this is not a rejection of the negotiation protocol. Rather it is conditional, in that Pathfinder states it is ‘not prepared to sign [the negotiation protocol] unless I know the actual (or close to the estimate of costs) leading to a successful conclusion’ (Mumford affidavit AM-53).
- [104] The first explicit rejection of the negotiation protocol comes in Pathfinder’s 1 October 2021 correspondence where it states that ‘[t]he GP has again considered the Proposed Negotiation Protocols. In doing so, the GP has resolved to decline to agree to them’ (Pathfinder document 134, [6.8]).
- [105] Although the issue of negotiation funding was a primary matter of concern, the remaining content of the negotiation protocol was still capable of being addressed by Pathfinder given it contained subject matter directed to the negotiation of an agreement. To this end, the native title parties sought comment from Pathfinder on several occasions, contending they did so on 15 May 2020, 18 May 2020, 25 June 2020, 6 August 2020, 17 August 2020, 25 November 2020 and 22 April 2021 (native title party contentions [30]).¹
- [106] Alongside this, there are two related streams of action that are of note. The first stems from Pathfinder stating that it would ‘be providing an offer over the next few days’ on 17 August 2020 (Mumford affidavit AM-26), although there was no information on the form or content of this offer. As a result of this advices, the native title parties contacted Pathfinder on 26 August 2020, 31 August 2020, 8 September 2020 and 2

¹ Referencing documents contained in Mumford affidavit AM-18, AM-19, AM-22, AM-24, AM-26, AM-38, and AM-48.

November 2020 to enquire when this offer may be expected to be received (native title party contentions [31]).²

[107] On 11 November 2020, Pathfinder provided to the native title parties a complete draft agreement for the grant of the lease seeking the KLC present it to the native title parties and stating the principal of Pathfinder would likely visit traditional owners (Mumford affidavit AM-36).

[108] From the materials provided, it can be seen that the subject matter of this draft agreement is considerably more limited than the topics of negotiation put forward in the negotiation protocols. In particular, the draft agreements made no mention of heritage which gives rise to a further set of issues examined shortly.

[109] The KLC communicated that it placed this draft agreement before the board of the Malarngowem PBC on 11 August 2021 some 2 months following the PBC's appointment. In its communication to Pathfinder, the KLC stated:

The board of the Malarngowem PBC raised a number of fundamental issues with the Proposed Agreement, and instructed the KLC to negotiate these terms further with Pathfinder, subject to the Negotiation Protocol. As to the portion of the lease that covers the Ngarrawanji native title determination, we will advise you as soon as any further instructions are given by the Ngarrawanji registered native title claimant (Mumford affidavit AM-56).

[110] The second stream of action occurred both prior to and parallel to the mention and delivery of this offer by Pathfinder. It revolved around requests from the KLC on two separate sets of information: that relating to Pathfinder's actions around heritage and that relating to information on the proposed operation as was outlined in paragraph [49] of this determination. These are dealt with in turn below.

Heritage

[111] The KLC made initial inquiries on heritage matters on 8 September 2020 (Mumford affidavit AM-32). Following receipt of the Pathfinder draft agreement these inquiries were repeated in the 25 November 2020 correspondence in which the KLC sought information on any heritage survey or clearances which may have occurred (Mumford affidavit AM-38). Pathfinder indicated that no heritage surveys had been conducted on E80/4753, from which M80/643 was derived, but that it relied upon heritage survey

² Referencing documents contained in Mumford affidavit AM-27, AM-28, AM-32 and AM-34.

work conducted in 1988 commissioned by a separate and unrelated grantee party, and this showed there were no sites in the area (Mumford affidavit AM-39).

- [112] The native title parties contend that when Pathfinder was requested to provide a copy of this report, it became apparent Pathfinder neither possessed a copy nor were aware of its contents (native title party contentions [69]). Pathfinder in fact requested a copy of this report from the KLC in its 1 October 2020 correspondence (Pathfinder document 134, [2.2(5)]) which the KLC provided as an attachment to its 9 November 2020 correspondence (Mumford affidavit AM-62, AM-64, AM-65), however this copy is heavily water damaged and much of it is illegible.
- [113] It seems remarkable that Pathfinder would request a copy of this report from the native title parties despite implying it was relying on it. The significance of this lies not so much in compliance with a previous heritage protection agreement, but with what is revealed to be a lack of actual knowledge, and therefore previous inaction, in regard to this key topic area. This was compounded by the subsequent non-provision of information on its activities, actions and intentions in relation to heritage matters. The position held by Pathfinder on this topic is perhaps revealed by the agreements it drafted, from which matters of heritage and heritage sites are entirely absent.
- [114] In the normal scheme of operation, it would be expected that Pathfinder would conduct heritage surveys in line with commitments made while entering into heritage protection agreements for the grant of E80/4753, as was also observed by the KLC (Mumford affidavit AM-40). Any issues would then be well understood, able to be managed by the parties well prior to any mining lease application and then catered for in a s 31 agreement for the grant of that lease. This, however, did not occur.
- [115] Additionally, the activities of Pathfinder set out in the work program for the lease (costeasing) seem more akin to exploration activities. What is being applied for here, however, is a mining lease, which provides a greater suite of rights to a grantee party. Once an agreement is entered into and tenure granted, should the work program expand to what would more regularly be understood as a mining operation, as enabled by such a lease, there is no recourse for the native title party in the event of an omission from the agreement.

[116] This would apply in relation to heritage surveys if required by the native title parties, in the instance where no provision has been made in the agreement. Despite Pathfinder stating that costeaning will be subject to heritage survey (Mumford affidavit AM-39), the draft agreement actually contains no provision for heritage survey and management, and is in fact completely silent on the matter of Aboriginal heritage. It may be that factors such as these are what at least one of the native title parties referred to as fundamental issues in the agreement draft.

Information on Operations and Standard of Engagement

[117] In relation to information on the proposed operation (outlined at paragraph [49] of this determination), in my view the material requested was a relatively routine set of information designed to allow the native title parties to develop a more informed approach to negotiations.

[118] This information was requested prior to and following the provision of the agreement draft by Pathfinder. This occurred on 8 September 2020 (Mumford affidavit AM-32), 25 November 2020 (Mumford affidavit AM-38), 18 December 2020 (Mumford affidavit AM-40) and 22 April 2021 (Mumford affidavit AM-48).

[119] While this request was made a number of times, no information of this type was provided until 1 October 2021, immediately prior to the scheduled Tribunal mediation. As mentioned at paragraph [63], this included a suite of reports from Pathfinder, some of which dated back several years and including material Pathfinder had previously identified as confidential.

[120] Because of this lack of information, the native title parties contend:

Having regard to the information that had been sought (but not provided), the NTPs were not reasonably in a position to form any assessment as to the likely impact of the proposed project on their registered native title rights and interests or the sufficiency of the Proposed Mining Agreements. Provision of those proposed agreements, and unexplained silence as to the information necessary to allow those agreements to be meaningfully considered, denied any opportunity to the NTPs to negotiate about those matters (native title party contentions [35])

[121] Pathfinder contend the agreement drafts provided on 11 November 2020 ‘were in a form capable of being immediately signed by each NTP’ (Pathfinder contentions [8.5]), that each of these drafts constituted an offer to the native title parties capable of

acceptance and provides evidence of an intent by Pathfinder to enter into an agreement with the native title parties (Pathfinder contentions [9.2]). On these points the native title parties replied:

[T]he fact that a document may be capable of execution and may, in the GP's view, have contained 'standard' clauses is to look to the form and disregard the substance ... the NTPs were in no position to consider the reasonableness and sufficiency of those agreements. It is not sufficient to look to the mere fact that the draft agreements were provided. The entire context and engagement between the parties must be considered (native title party reply contentions [24]).

- [122] In *Sunstate Sands*, Member Shurven set out that the extent to which a grantee party provides information in a timely manner is important for a native title party to be able to participate in negotiations (*Sunstate Sands* [46]). A similar conclusion was reached in *Rusa* where Member McNamara set out that a failure to provide sufficient information regarding project activities inhibited the native title party's 'ability to assess the scale or impact of the future act on its registered native title rights and interests' and while this on its own does not amount to a lack of good faith, it does adversely affect the position of the grantee party (*Rusa* [59]).
- [123] On this topic and more generally, Pathfinder contends that it is 'neither a large nor a funded party' being a single director/shareholder company without legal representation for much of the negotiation period. Noting the decision in *Drake Coal* that the 'standard of negotiating behaviour expected of an entity such as QCoal would necessarily be different for that of a small and impecunious miner with few resources and possibly no legal representation' (*Drake Coal* [190]), Pathfinder contends that the standard of its negotiating behaviour must be considered in that context (Pathfinder contentions [8.2]-[8.4]). This is in contrast, Pathfinder say, to the native title parties and the KLC who receive 'substantial government funding, and which employs multiple lawyers' (Pathfinder contentions [9.32]).
- [124] The native title parties contend the standard is not altered, that being one of negotiating in good faith with a view to obtaining the agreement of the native title parties (native title party reply contentions [20]). In any case, by his own admission the sole director and shareholder of Pathfinder has 'at least 50 years' experience in the mining and exploration industries', also noting his past 'successful and pleasant dealings with both the Malarngowem and Ngarrawanji peoples' (native title party reply contentions [23], Pathfinder document 167 [4], [9]).

[125] I find no compelling reason the information requested could not be provided to the native title parties in a timely manner and am not of the view this would have been overly onerous for Pathfinder in the manner contemplated in *Drake Coal*. This is particularly in light of the provision of reports previously identified as confidential by Pathfinder which, inadvertently or otherwise, had the effect of holding key information from the native title parties.

[126] Following on from this, and while referencing a Government party, *Brownley* at [25] is relevant here. This sets out that if a party seeks to act without considering or responding to submissions put to it by the native title party, it would not be operating in good faith. The main submissions here are more basic than responses to proposals, they are requests for information upon which to make an assessment of the reasonableness or otherwise of the offer put before them and to then make a response to proposals. The secondary submission, following consideration by the Malarngowem board, was that there were fundamental issues with the draft agreement provided.

[127] In my view, it was not reasonable for Pathfinder to effectively ignore information requests and subsequently the submission by one of the native title parties on the fundamentals of the agreement draft. Not only does this not allow the native title parties to properly engage, it would seem to indicate a lack of regard for their basic information [and/or] negotiation requirements, which were communicated clearly on a number of occasion.

[128] Further to, and despite this, Pathfinder appears to have held the view that it provided a signature ready agreement, ‘capable of being immediately signed by each [native title party]’ (Pathfinder contentions [8.5(5)]), a position it maintained. *Wutha* at [40] states:

[T]he 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.

[129] In my view, this characterises Pathfinder’s conduct in this case. It ignored information requests on mining operations for more than a year, thereby not enabling the native title parties to create an informed view. It failed to acknowledge the submission from at least one native title party that there were fundamental issues with the agreement

draft and, even with this submission, maintained the view the draft agreement was signature ready, despite strong indications to the contrary.

Conclusion

- [130] The Tribunal's task is to make an overall assessment of the negotiations and to assess the relative weight of each individual element in the context of the matter. As in *Sunstate Sands* at [45], this will involve an assessment of whether conduct is unreasonable, unexplained or unnecessary and whether a party discharged its duty fairly and conscientiously (*Cox* [26]).
- [131] Concerning the negotiation protocols, as mentioned, I am of the view these are not absolutely necessary and can on occasion have a negative impact. I hold the view however that the content of the negotiation protocols in this matter was material to the development and conduct of negotiations and on reaching agreement on the doing of the act. Aside from comments on negotiation funding, Pathfinder made no comment on the actual content of the negotiation protocol until 1 October 2021, almost 2 years after it was first provided. Engagement on this content would have been of utility, particularly around the topics of negotiation set out in these negotiation protocols. This is a standard discussion in any negotiation context and may have overcome significant omissions in the agreement unilaterally drafted by Pathfinder.
- [132] Similar could be said in relation to heritage matters. The native title parties first raised heritage matters in late 2020. Pathfinder had previously entered into heritage protection agreements with the native title parties during the process of application for E80/4753, but no effort had been undertaken by Pathfinder to give notice of exploration activity or conduct heritage works. Pathfinder's defence of this is that only non-ground disturbing activity took place (Mumford affidavit AM-39) in addition to its reliance on a 1988 heritage survey that did not record sites, but that, as it transpired during the course of negotiation, Pathfinder did not appear to have access to. This would seem to defeat the purpose of such an agreement which is to understand any heritage values of the area and make decisions on how these might be managed prior to applying for a mining lease.
- [133] The absence of this process at the exploration phase, the subsequent absence of any information from Pathfinder and the complete omission of the topic of heritage in the

draft agreements provided would give any native title party reason to pause. As mentioned, the tenure applied for is a mining lease which provides an expanded suite of rights to the grantee. Once agreement is entered into and this lease is granted, there is no further recourse for the native title party in the event of an omission. For this reason, seeking and receiving relevant information on key topics such as this so as to be able to properly engage is a critical component of any negotiation process.

[134] What occurred instead was the delivery of a draft agreement which was constructed unilaterally by Pathfinder with what seems to be little regard to the above concerns and pre-empting any discussion or negotiation. The native title parties did not make direct comment on the text of the agreement drafts, it was however communicated that there were ‘fundamental issues’. Despite this, there remained no response to information requests or this submission on the draft until immediately prior to the Tribunal mediation. The manner in which the mediations were subsequently conducted after such a long period of non-engagement leads me to the view that Pathfinder were going through the motions during the mediation, seeking to eke out the minimum required to meet the threshold of good faith.

[135] The misgivings of Pathfinder in relation to the negotiation funding put forward by the native title parties are understandable, given even the revised budget was a very large sum. A key consideration is whether the apparent unreasonableness on the part of the native title parties in regard to this funding request overcomes the impacts of any actions Pathfinder did or did not take or explains the manner of its engagement. In my view it is a strong mitigating factor, but this does not overcome the shortcomings of Pathfinder’s approach.

[136] While there may have quite legitimately been some distance between the parties on negotiation funding, this did not need to prevent Pathfinder from engaging on the broader content of the negotiation protocol which sought to establish the fundamentals of a negotiation and agreement. Neither should it have prevented Pathfinder from engaging on heritage matters which were clearly of some significance to the native title parties in addition to responding to information requests. In this, it also needs to be acknowledged that the native title parties had no real information at their disposal which may have moderated their approach on the negotiation funding issue as raised in paragraphs [49] and [99] of this determination.

- [137] Instead, Pathfinder put forward a draft agreement it had generated unilaterally with no regard for, and omitting, key topics put forward in the negotiation protocol with the expectation that this draft agreement be put before the native title parties. Given Pathfinder viewed these drafts as signature ready it would appear to be of the view they could have been entered into with no or minimal further discussion. I am of the view this shows a rigid non-negotiable approach and was unreasonable and unnecessary in the circumstances.
- [138] Further to this, the ability of the native title parties to agree or to even respond adequately to the draft agreements was severely hampered, if not completely negated, by a lack of information on the nature of the project and on any heritage information. Given the repeated requests over a significant amount of time and the indications from the native title parties these were important sets of information, I am of the view that making little to no apparent effort to provide this until such a late stage in the negotiation process, effectively the eve of the mediation, was not reasonable. As such the native title parties were not able to meaningfully engage with Pathfinder due to its failure to respond to key proposals or provide key information. Only after a very long period of non-engagement, aside from delivering a unilaterally drafted proposed agreement and some limited comments on negotiation funding, did Pathfinder provide this information, on the eve of mediation no less.
- [139] Considering these things overall, I have formed the view that Pathfinder did not discharge its duty fairly and conscientiously. I have further formed the view that it held an inflexible position and approach in relation to its unilaterally drafted agreement, failed to reasonably provide key sets of information despite multiple requests and went through the motions in the mediation after failing to engage meaningfully for an extended period of time.

Determination

[140] I am not satisfied that Pathfinder Pty Ltd negotiated in good faith as required by s 31(1)(b) of the Act. I therefore do not have the power to proceed to make a determination on the future act determination application brought in respect of M80/643. I dismiss Pathfinder Pty Ltd's future act determination application under s 148(a).

Glen Kelly
Member
28 July 2022

Annexure 1

Reference	Description	Date
Pathfinder document 1	Report of Sullivan, P (1988.09.20) Heritage Survey [SP03.570 (i)]	20/09/1988
Pathfinder document 2	Report Sullivan, P (1988.10.18) Heritage Survey	18/10/1988
Pathfinder document 3	Agreement between Malarngowem and Pathfinder	29/07/2011
Pathfinder document 4	Agreement between Ngarrawanji and Pathfinder	21/03/2016
Pathfinder document 5	Letter from DMIRS to Pathfinder (M80/643)	16/10/2019
Pathfinder document 6	Letter from HEMTS to native title parties	05/11/2019
Pathfinder document 7	Email from the State to Pathfinder M800643- Pathfinder Exploration Pty Ltd	12/11/2019
Pathfinder document 8	Email Pathfinder (Taylor Gillingham) to the State RE M800643- Pathfinder Exploration Pty Ltd Mala	12/11/2019
Pathfinder document 9	Email State (Jacobs) to PATHFINDER (Taylor Gillingham) RE M800643- Pathfinder Exploration Pty Ltd Mala	12/11/2019
Pathfinder document 10	Email State (Jacobs) to GP (Taylor Gillingham); NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	26/11/2019
Pathfinder document 11	Email GP (Taylor Gillingham) to State (Jacobs); NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	19/12/2019
Pathfinder document 12	Email State (Jacobs) to GP (Taylor Gillingham) RE M800643- Pathfinder Exploration Pty Ltd Mala	20/12/2019
Pathfinder document 13	Email NTP (Maszkowski) to GP (Taylor Gillingham) M80643 (Pathfinder Exploration Pty Ltd	16/01/2020
Pathfinder document 14	Email State (Jacobs) to GP (Taylor Gillingham); NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	22/01/2020
Pathfinder document 15	Email GP (Taylor Gillingham) to State (Jacobs); NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	22/01/2020
Pathfinder document 16	Email State (Jacobs) to GP (Taylor Gillingham); NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	23/01/2020

Reference	Description	Date
Pathfinder document 17	Email GP (Taylor Gillingham) to NTP (Maszkowski) RE M80643 (Pathfinder Exploration Pty Ltd	30/01/2020
Pathfinder document 18	Email NTP (Thomas) to GP (Taylor Gillingham) RE M80643 (Pathfinder Exploration Pty Ltd	05/02/2020
Pathfinder document 19	Email State (Jacobs) to NTP (Maszkowski) RE M800643- Pathfinder Exploration Pty Ltd Mala	10/02/2020
Pathfinder document 20	Email NTP (Maszkowski) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	11/02/2020
Pathfinder document 21	Email GP (Rugless) to NTP (Thomas) M80643 Negotiation Protocol - Your Ref 6001316	12/02/2020
Pathfinder document 22	Email 2020.02.17 163700 Email NTP (Thomas) to State (Jacobs)	17/02/2020
Pathfinder document 23	NTP (Thomas) to GP (Rugless) RE M80643 Negotiation Protocol - Your Ref 60013	17/02/2020
Pathfinder document 24	Email GP (Rugless) to NTP (Thomas) RE M80643 Negotiation Protocol - Your Ref 60013	28/02/2020
Pathfinder document 25	Email NTP (Thomas) to GP (Rugless) RE M80643 Negotiation Protocol - Your Ref 60013	10/03/2020
Pathfinder document 26	Email GP (Rugless) to NTP (Thomas) RE M80643 Negotiation Protocol - Your Ref 60013	11/03/2020
Pathfinder document 27	Email NTP (Thomas) to GP (Rugless) RE M80643 Negotiation Protocol - Your Ref 60013	11/03/2020
Pathfinder document 28	Email State (Jacobs) to NTP (Thomas); GP (Taylor Gillingham) RE M800643- Pathfinder Exploration Pty Ltd Mala	16/03/2020
Pathfinder document 29	Email GP (Taylor Gillingham) to State (Jacobs); NTP (Thomas) RE M800643- Pathfinder Exploration Pty Ltd Mala	17/03/2020
Pathfinder document 30	Email NTP (Thomas) to GP (Rugless) RE M80643 Negotiation Protocol - Your Ref 60013	17/03/2020
Pathfinder document 31	Email GP (Rugless) to NTP (Thomas) RE M80643 Negotiation Protocol - Your Ref 60013	17/03/2020
Pathfinder document 32	Email NTP (Thomas) to GP (Rugless) RE M80643 Negotiation Protocol - Your Ref 60013	17/03/2020
Pathfinder document 33	Email State (Jacobs) to GP (Taylor Gillingham) RE M800643- Pathfinder Exploration Pty Ltd Mala	17/03/2020

Reference	Description	Date
Pathfinder document 34	Email NTP (Thomas) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	17/03/2020
Pathfinder document 35	Email State (Jacobs) to NTP (Thomas) RE M800643- Pathfinder Exploration Pty Ltd Mala	08/05/2020
Pathfinder document 36	Email NTP (Thomas) to GP (Rugless) FW M800643- Pathfinder Exploration Pty Ltd Mala	08/05/2020
Pathfinder document 37	Email GP (Rugless) to NTP (Thomas) Re M80643 application	12/05/2020
Pathfinder document 38	Email NTP (Thomas) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	13/05/2020
Pathfinder document 39	Email NTP (Thomas) to GP (Rugless) RE M80643 application	15/05/2020
Pathfinder document 40	Email GP (Rugless) to NTP (Thomas) RE M80643 application	15/05/2020
Pathfinder document 41	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE M80643 application	15/05/2020
Pathfinder document 42	Email NTP (Thomas) to GP (Rugless) RE M80643 application	18/05/2020
Pathfinder document 43	Email GP (Rugless) to NTP (Thomas) RE M80643 application	18/05/2020
Pathfinder document 44	KLC Rule Book	10/06/2020
Pathfinder document 45	Email State (Jacobs) to NTP (Thomas); GP (Rugless) RE M800643- Pathfinder Exploration Pty Ltd Mala	15/06/2020
Pathfinder document 46	Email NTP (Thomas) to GP (Rugless) RE M80643 application	25/06/2020
Pathfinder document 47	Email NTP (Thomas) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	25/06/2020
Pathfinder document 48	Email State (Jacobs) to NTP (Thomas) RE M800643- Pathfinder Exploration Pty Ltd Mala	26/06/2020
Pathfinder document 49	Email GP (Rugless) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	02/07/2020
Pathfinder document 50	Email State (Jacobs) to GP (Rugless) RE M800643- Pathfinder Exploration Pty Ltd Mala	02/07/2020
Pathfinder document 51	Email GP (Rugless) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	02/07/2020
Pathfinder document 52	Email State (Jacobs) to GP (Rugless) RE M800643- Pathfinder Exploration Pty Ltd Mala	02/07/2020

Reference	Description	Date
Pathfinder document 53	Letter GP to NTP	25/07/2020
Pathfinder document 54	Email NTP (Thomas) to GP (Rugless) RE M80643 application	06/08/2020
Pathfinder document 55	Email State (Jacobs) to GP (Rugless); NTP (Thomas) M800643 - Pathfinder Exploration Pty Ltd Malarn	14/08/2020
Pathfinder document 56	Email NTP (Thomas) to GP (Rugless) RE M80643 application	17/08/2020
Pathfinder document 57	Email GP (Rugless) to NTP (Thomas) RE M80643 application	17/08/2020
Pathfinder document 58	Email NTP (Thomas) to GP (Rugless) FW Re M80643 application	17/08/2020
Pathfinder document 59	File Note of Chloe Thomas (KLC)	26/08/2020
Pathfinder document 60	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE M800643 - Pathfinder Exploration Pty Ltd Ma	31/08/2020
Pathfinder document 61	Email NTP (Thomas) to GP (Rugless) RE M80643 application	31/08/2020
Pathfinder document 62	Email GP (Rugless) to NTP (Thomas) RE M80643 application	31/08/2020
Pathfinder document 63	Email GP (Rugless) to State (Jacobs) RE M800643 - Pathfinder Exploration Pty Ltd Ma	31/08/2020
Pathfinder document 64	Email NTP (Thomas) to GP (Rugless) RE M80643 application	31/08/2020
Pathfinder document 65	File Note of Chloe Thomas (KLC).	31/08/2020
Pathfinder document 66	Email State (Jacobs) to NTP (Thomas) FW M800643- Pathfinder Exploration Pty Ltd Mala	01/09/2020
Pathfinder document 67	File Note of Chloe Thomas	01/09/2020
Pathfinder document 68	Email NTP (Thomas) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	01/09/2020
Pathfinder document 69	Email State (Jacobs) to NTP (Thomas) RE M800643- Pathfinder Exploration Pty Ltd Mala	01/09/2020
Pathfinder document 70	Email State (Jacobs) to NTP (Thomas); GP (Rugless) FW M800643 - Pathfinder Exploration Pty Ltd Ma	02/09/2020
Pathfinder document 71	Email NTP (Thomas) to GP (Rugless) RE M80643 application	08/09/2020
Pathfinder document 72	Email GP (Rugless) to NTP (Thomas) RE M80643 application	08/09/2020
Pathfinder document 73	Email State (Jacobs) to GP (Rugless) RE M800643- Pathfinder Exploration Pty Ltd Mala	16/09/2020

Reference	Description	Date
Pathfinder document 74	Email GP (Rugless) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	17/09/2020
Pathfinder document 75	Email State (Jacobs) to NTP (Thomas); GP (Rugless) RE M800643- Pathfinder Exploration Pty Ltd Mala	27/10/2020
Pathfinder document 76	Email GP (Rugless) to State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	27/10/2020
Pathfinder document 77	Email NTP (Thomas) to GP (Rugless); State (Jacobs) RE M800643- Pathfinder Exploration Pty Ltd Mala	02/11/2020
Pathfinder document 78	Email GP (Rugless) to NTP (Thomas) Agreements for Grant - M80643_001	11/11/2020
Pathfinder document 79	Email NTP (Thomas) to GP (Rugless) Automatic reply Agreements for Grant - M80643	11/11/2020
Pathfinder document 80	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE Agreements for Grant - M80643	11/11/2020
Pathfinder document 81	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	11/11/2020
Pathfinder document 82	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE Agreements for Grant - M80643	24/11/2020
Pathfinder document 83	Email NTP (Thomas) Negotiation Protocol to GP (Rugless) M80643	25/11/2020
Pathfinder document 84	Email GP (Rugless) to NTP (Thomas) RE M80643 Negotiation Protocol	02/12/2020
Pathfinder document 85	Email NTP (Thomas) to GP (Rugless) Automatic reply to Dispute Letter	07/12/2020
Pathfinder document 86	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE Agreements for Grant - M80643	09/12/2020
Pathfinder document 87	Email NTP (Topfer) to GP (Rugless) M80643 Negotiation Protocol - KLC & Pathfinder	18/12/2020
Pathfinder document 88	Email State (Jacobs) to GP (Rugless); NTP (Thomas) RE Agreements for Grant - M80643	12/01/2021
Pathfinder document 89	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	12/01/2021
Pathfinder document 90	Email State (Jacobs) to GP (Rugless) RE Agreements for Grant - M80643	13/01/2021

Reference	Description	Date
Pathfinder document 91	Email NTP (Topfer) to GP (Rugless) RE M80643 Negotiation Protocol - KLC & Pathfinder	13/01/2021
Pathfinder document 92	Email NTP (Thomas) to State (Jacobs) RE Agreements for Grant - M80643	05/02/2021
Pathfinder document 93	Email GP (Rugless) to NTP (Thomas) RE Agreements for Grant - M80643	05/02/2021
Pathfinder document 94	Email NTP (Thomas) to GP (Rugless) RE Agreements for Grant - M80643	10/02/2021
Pathfinder document 95	Email GP (Rugless) to NTP (Thomas) RE Agreements for Grant - M80643	10/02/2021
Pathfinder document 96	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	08/03/2021
Pathfinder document 97	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	23/03/2021
Pathfinder document 98	Email NTP (Thomas) to State (Jacobs) RE Agreements for Grant - M80643	23/03/2021
Pathfinder document 99	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	23/03/2021
Pathfinder document 100	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	08/04/2021
Pathfinder document 101	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	08/04/2021
Pathfinder document 102	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	22/04/2021
Pathfinder document 103	Email NTP (Thomas) to State (Jacobs) RE Agreements for Grant - M80643	22/04/2021
Pathfinder document 104	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	22/04/2021
Pathfinder document 105	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	22/04/2021
Pathfinder document 106	Email NTP (Thomas) to GP (Rugless) Negotiations re M80643	22/04/2021
Pathfinder document 107	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	06/05/2021
Pathfinder document 108	Email State (Jacobs) to GP (Rugless) RE Agreements for Grant	06/05/2021

Reference	Description	Date
	- M80643	
Pathfinder document 109	File Note of Chloe Thomas (KLC).pdf	10/05/2021
Pathfinder document 110	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	26/05/2021
Pathfinder document 111	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 112	Email State (Jacobs) to NTP (Thomas) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 113	Email NTP (Thomas) to State (Jacobs) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 114	Email State (Jacobs) to GP (Rugless) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 115	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 116	Email State (Jacobs) to GP (Rugless) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 117	Email GP (Rugless) to State (Jacobs) RE Agreements for Grant - M80643	27/05/2021
Pathfinder document 118	Email State (Jacobs) to GP (Rugless); NTP (Thomas) M800643 - Mediation Referral to the NNTT.	31/05/2021
Pathfinder document 119	Email State (Jacobs) to FA Mediation Requests	31/05/2021
Pathfinder document 120	Email State (Jacobs) to GP (Rugless) M80643 - NNTT Referral Letter	31/05/2021
Pathfinder document 121	Email GP (Rugless) to State (Jacobs) RE M80643 - NNTT Referral Letter	02/06/2021
Pathfinder document 122	Email NNTT (Leslie) to GP (Rugless) FW M80643 - NNTT mediation referral	04/06/2021
Pathfinder document 123	File Note of NTP (Mumford) (KLC)	01/07/2021
Pathfinder document 124	Email NNTT (Leslie) to NTP (Mumford); NTP (Thomas); State (Jacobs); GP (Rugless) WM20210012 & WM20210013 Malarngowem (WC1999044)	06/08/2021
Pathfinder document 125	Email GP (Rugless) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem (WC1999)	06/08/2021

Reference	Description	Date
Pathfinder document 126	Email NTP (Thomas) to GP (Rugless) RTN M80643 - NTP response to Pathfinder cost estimate	16/08/2021
Pathfinder document 127	Email NTP (Thomas) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem (WC1999	17/08/2021
Pathfinder document 128	Email GP (Rugless) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem (WC1999	17/08/2021
Pathfinder document 129	Email NNTT (Leslie) to NTP (Thomas) RE WM20210012 & WM20210013 Malarngowem (WC1999	17/08/2021
Pathfinder document 130	Email NTP (Thomas) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem (WC1999	27/08/2021
Pathfinder document 131	Email NTP (Thomas) to NNTT (Leslie); State (Jacobs); GP (Rugless) WM20210012 & WM20210013 Malarngowem (WC1999044)	01/09/2021
Pathfinder document 132	Email NTP (Mumford) to State (Jacobs) RE WM20210012 & WM20210013 Malarngowem (WC1999/044) and Ngarrawanji (WC1996/075)	10/09/2021
Pathfinder document 133	Teams Invitation for Single Party Mediation	21/09/2021
Pathfinder document 134	Email GP (Green) to NTP (Mumford); State (Jacobs) GREEN LEGAL (PATHFI001) RE WM20210012 & WM20210013	01/10/2021
Pathfinder document 135	Email NTP (Mumford) to GP (Green); State (Jacobs) RE GREEN LEGAL (PATHFI001) RE WM20210012 & WM20210013	11/10/2021
Pathfinder document 136	File Note of NTP (Mumford)	12/10/2021
Pathfinder document 137	Email NNTT (Leslie) to NTP (Mumford); GP (Green); State (Jacobs); GP (Rugless) WM20210012 & WM20210013	15/10/2021
Pathfinder document 138	Email NNTT (Leslie) to NTP (Mumford); GP (Green); State (Jacobs); GP (Rugless) WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	02/11/2021
Pathfinder document 139	Email NNTT (Leslie) to NTP (Mumford) FW WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	08/11/2021
Pathfinder document 140	Email NTP (Mumford) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	08/11/2021
Pathfinder document 141	Email NTP (Mumford) to GP (Green) WM20210012 & WM20210013 Malarngowem (WC1999044)	09/11/2021

Reference	Description	Date
Pathfinder document 142	Email GP (Green) to State (Jacobs) GREEN LEGAL (PATHFI001)FW WM20210012 & WM202100	10/11/2021
Pathfinder document 143	Email State (Jacobs) to NTP (Mumford); GP (Green) RE WM20210012 & WM20210013 Malarngowem (WC1999	11/11/2021
Pathfinder document 144	Email NNTT (Leslie) to NTP (Mumford); GP (Green); State (Jacobs); GP (Rugless) WM20210012 & WM20210013 Malarngowem Aboriginal C	12/11/2021
Pathfinder document 145	Email NTP (Mumford) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	18/11/2021
Pathfinder document 146	Email NNTT (Leslie) to NTP (Mumford); GP (Green); State (Jacobs); GP (Rugless) WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	19/11/2021
Pathfinder document 147	Email State (Jacobs) to NNTT (Leslie); NTP (Mumford); GP (Green); GP (Rugless) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	19/11/2021
Pathfinder document 148	Email NTP (Mumford) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	24/11/2021
Pathfinder document 149	Email GP (Green) to NNTT (Leslie) GREEN LEGAL (PATHFI001) RE WM20210012 & WM20210	25/11/2021
Pathfinder document 150	Email NNTT (Leslie) to GP (Green); State (Jacobs); GP (Rugless); NTP (Wonders); NTP (Mumford) WM20210012 & WM20210013 Malarngowem Aboriginal C	29/11/2021
Pathfinder document 151	Email NTP (Mumford) to NNTT (Leslie) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	NTP
Pathfinder document 152	Email State (Jacobs) to NNTT (Leslie); GP (Green); GP (Rugless); NTP (Wonders); NTP (Mumford) RE WM20210012 & WM20210013 Malarngowem Aboriginal Corporation	29/11/2021
Pathfinder document 153	Email State (Jacobs) to GP (Green); GP (Rugless) WM2021-12 & 13 M80-643 -State Deeds as requested	29/11/2021
Pathfinder document 154	Email GP (Green) to native title parties (Mumford); NNTT (Leslie); State (Jacobs) GREEN LEGAL (PATHFI001) WM20210012 & WM20210013	29/11/2021
Pathfinder document 155	155 Email NTP (Wonders) to GP (Green); State (Jacobs); GP (Rugless); NNTT (Leslie) RE GREEN LEGAL (PATHFI001) WM20210012 & WM2021	02/12/2021

Reference	Description	Date
Pathfinder document 156	File Note of NTP (Wonders) (KLC)	06/12/2021
Pathfinder document 157	Email NNTT (Leslie) to native title parties (Mumford); NTP (Wonders); GP (Green); GP (Rugless); State (Jacobs). Attaches NNTT synopsis and outcomes from mediation conference	06/12/2021
Pathfinder document 158	Email Green Legal (GP) to NNTT, with application under s 35 NT Act	07/12/2021
Pathfinder document 159	Orders of Federal Court (Mortimer J)	10/12/2021
Pathfinder document 160	Email NNTT (Hughes) to native title parties (Mumford); GP (Green); State (Jacobs) Notification WF20210010 - M80643 [SEC=OFFICIAL]	21/12/2021
Pathfinder document 161	Email State (Jacobs) to native title parties (Wonders); NTP (Mumford) RE GREEN LEGAL (PATHFI001) WM20210012 & WM2021	22/12/2021
Pathfinder document 162	Email native title parties WF20210010 Ngarrawanji (Wonders) - M80643 to – State (McCloskey) Malarngowem NTP	07/02/2022
Pathfinder document 163	Email David Reger to native title parties Fw WF 20210010 Pathfinder Exploration, Malarngowem AC and Ngarrawanji	16/02/2022
Pathfinder document 164	KLC Map titled “M80/643 and E80/4753”	21/02/2022
Pathfinder document 165	Current & Historical Company Extract - Pathfinder	04/03/2022
Pathfinder document 166	Current & Historical Company Extract – Kimberley Granite Holdings Pty Ltd	07/03/2022
Pathfinder document 167	Witness Statement of Craig Rugless	07/03/2022