NATIONAL NATIVE TITLE TRIBUNAL

Jonathan Downes v Gomeroi People and Another **[2022] NNTTA 26 (31 March 2022)**

Application No: **NF2021/0007**

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

- and -

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

Gomeroi People (NC2011/006)
(native title party)

- and -

Jonathan Downes
(grantee party)

- and -

State of New South Wales
(Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE

Tribunal:	Ms Nerida Cooley
Place:	Brisbane
Date:	31 March 2022

Catchwords: Native title – future act – s 35 application for determination – application for Ministerial consent – whether grantee party has negotiated in good faith – grantee party has negotiated in good faith – s 39 criteria considered – effect of act on native title rights and interests – effect of act on way of life, culture and traditions – effect of act on freedom of access – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public

interests in doing of act – determination that act may be done

Legislation:

Environmental Planning and Assessment Act 1979 (NSW)

Mining Act 1992 (NSW)

National Parks and Wildlife Act 1974 (NSW)

Native Title Act 1993 (Cth) ss 26, 29, 30, 31, 35, 36, 38, 39

Native Title Amendment Act 1998 (Cth)

Native Title (Right to Negotiate (Exclusion)—NSW Land) Determination No. 1 of 1996

Native Title (Right to Negotiate (Inclusion)—NSW Land) Approval No. 1 of 1996

Cases:

Albert Little & Others on behalf of Badimia/Western Australia/Lake Moore Gypsum Pty Ltd [2012] NNTTA 56 (*'Little v Lake Moore Gypsum'*)

Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC [2021] NNTTA 7 (*'Atlas Iron'*)

Australian Potash Limited and Another v Kalman Murphy & Ors on behalf of Waturta [2021] NNTTA 46 (*'Australian Potash v Murphy'*)

Cheedy and Others v Western Australia and Others [2011] FCAFC 100; (2011) 194 FCR 562 (*'Cheedy'*)

Drake Coal Pty Ltd and Another v Smallwood and Others [2012] NNTTA 9; (2012) 257 FLR 276 (*'Drake Coal v Smallwood'*)

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

Hale and Others v Western Australia and Another [2015] FCA 560; (2015) 233 FCR 96 (*'Hale'*)

Jax Coal Pty Ltd v Smallwood and Others [2011] NNTTA 46; (2011) 260 FLR 99 (*'Jax Coal v Smallwood'*)

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

Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC [2014] NNTTA 85 (*'Minister for Lands v Thalanyji'*)

Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga

People/Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families/Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga People) [1997] NNTTA 31 (‘*Strickland*’)

Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal [2018] NNTTA 24 (‘*Muccan Minerals*’)

Placer (Granny Smith) Pty Ltd and Another v Western Australia and Others [1999] NNTTA 521; (1999) 163 FLR 87 (‘*Placer v Western Australia*’)

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

Sheffield Resources Ltd and Another v Charles and Others on behalf of Mount Jowlaenga Polygon #2 [2018] NNTTA 48 (‘*Sheffield*’)

Stephen Christopher Purse v Guwa-Koa Aboriginal Corporation RNTBC and Another [2022] NNTTA 7 (‘*Purse v GKAC*’)

Strickland and Another v Minister for Lands for Western Australia and Others [1998] FCA 868; (1998) 85 FCR 303 (‘*Strickland v Minister for Lands*’)

Tritton Resources Pty Ltd and Another v Ngemba/Ngiyampaa, Wangaaypuwan and Wayilwan [2022] NNTTA 24 (‘*Tritton Resources*’)

Weld Range Metals Ltd v Western Australia and Others [2011] NNTTA 172; (2011) 258 FLR 9 (‘*Weld Range Metals*’)

Western Australia v Taylor and Another [1996] NNTTA 34; (1996) 134 FLR 211 (‘*Western Australia v Taylor*’)

Western Australia v Thomas and Others [1996] NNTTA 30; (1996) 133 FLR 124 (‘*Western Australia v Thomas*’)

Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49 (‘*Holocene*’)

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

Yellow Rock Resources Ltd and Others v Shay and Others on behalf of Yugunga-Nya People [2014] NNTTA 43 (‘*Yellow Rock Resources*’)

Representatives of the native title party:	James MacLeod and Maeve Parker, NTSCORP Limited
Representative of the grantee party:	William Oxby, Johnson Winter & Slattery
Representative of the Government party:	Caitlin Fegan, Crown Solicitor's Office

REASONS FOR DETERMINATION

INTRODUCTION

[1] Mr Jonathan Charles Downes is the holder of Exploration Licence 8492 (**licence**), located near Barraba in the State of New South Wales. The licence falls wholly within the external boundary of the Gomeroi People's native title determination application (**Gomeroi Claim**).

[2] The licence is subject to a condition prohibiting Mr Downes from prospecting on land or waters where native title has not been extinguished under the *Native Title Act 1993* (Cth) (**NTA**), without first obtaining the consent of the Minister administering the *Mining Act 1992* (NSW) (**Mining Act**).

[3] Mr Downes has applied for Ministerial consent, which is an act to which the right to negotiate process under the NTA applies. In February 2020, the State of New South Wales (**State**) (being the relevant Government party), gave notice of the Minister's proposed consent in accordance with s 29 of the NTA, specifying 12 March 2020 as the notification day.

[4] The negotiation parties, being the State, Mr Downes and the registered native title claimant for the Gomeroi Claim (**Gomeroi** or **Gomeroi Applicant**), were then required to negotiate in good faith with a view to obtaining Gomeroi's agreement to the giving of Ministerial consent (s 31(1)(b) NTA).

[5] The parties did not reach agreement and Mr Downes subsequently applied to the Tribunal for a determination that the Minister's consent may be given.

[6] I must not make a determination on the application in this matter if Gomeroi satisfies me that the State or Mr Downes did not negotiate in good faith (s 36(2) NTA). Gomeroi asserts that Mr Downes did not negotiate in good faith, but does not make any such assertion with respect to the State.

[7] I am not satisfied that Mr Downes failed to negotiate in good faith. Accordingly, I have the power to make a determination under s 38 of the NTA and I have determined that Ministerial consent may be given. My reasons follow.

THE TRIBUNAL PROCEEDINGS

[8] On 22 July 2021 (being, as required, at least six months after the notification day), Mr Downes lodged a future act determination application under s 35 of the NTA for a determination under s 38 of the NTA.

[9] The application was accepted by the Tribunal on 23 August 2021 and the President has directed me to constitute the Tribunal for the purpose of holding an inquiry into the application.

[10] A preliminary conference was held on 2 September 2021, following which I made directions for the conduct of the inquiry. The timetable for directions was subsequently varied on a number of occasions, primarily due to the impact of COVID-19 restrictions on the parties' ability to comply.

[11] During the preliminary conference, Mr Downes and Gomeroi indicated that their negotiations were ongoing, however they did not require any mediation assistance from the Tribunal.

[12] Each of the parties has provided contentions and evidence in accordance with the Tribunal's directions.

[13] On 20 September 2021, the State provided its initial material comprising:

(a) affidavit of Tracey Maria Godwin dated 20 September 2021, including annexure TG-1 containing documents related to the licence and licence activities, details of adjacent tenements and the notices given under s 29 of the NTA;

(b) affidavit of Caitlin Fegan dated 20 September 2021, with the following annexures:

i) CF-1 – a Basic Search for Aboriginal Sites through AHIMS;

ii) CF-2 – a map from the State Heritage Register which shows the general area of the licence; and

iii) CF-3 – a bundle of documents comprised of a tenure workbook, two charting maps, an email, Certificates of Title, current reserve and tenure profiles and notification of granting special leases.

[14] Ms Godwin is a Senior Analyst within the Mining, Exploration and Geosciences group of the Department of Regional NSW (**Department**), a role she has held since about 4 March 2019.

[15] Ms Fegan is a solicitor employed in the office of the Crown Solicitor for the State and she has carriage of this matter for the State under the direction and control of the Crown Solicitor. Ms Fegan's affidavit dated 20 September 2021 is signed by her electronically but not affirmed due to the COVID-19 restrictions then in force in New South Wales. It states that an affirmed version could be provided at a later time if required. No party took issue with that circumstance and I have had regard to the un-affirmed affidavit.

[16] On 5 October 2021, Gomeroi advised by email that it intended to contend that Mr Downes did not negotiate in good faith.

[17] On 17 November 2021, Gomeroi provided the following material:

(a) unsigned contentions;

(b) unsigned affidavit of Steven Frederick Talbott, a member of the Gomeroi claim group;

(c) unsigned affidavit of Gregory Thane Lex Livermore, a member of the Gomeroi claim group;

(d) unsigned affidavit of James William MacLeod, with annexure JWM-1 which contained a large bundle of documents comprised of correspondence and documents related to the COVID-19 pandemic; and

(e) an extract from the Register of Native Title Claims of the Gomeroi Claim.

[18] Gomeroi later provided signed copies of the unsigned documents on 22 November 2021.

[19] Mr MacLeod is a solicitor employed by NTSCORP and he has the day-to-day carriage of this matter.

[20] On 23 December 2021, the State provided the following further material:

(a) contentions; and

(b) affidavit of Caitlin Fegan dated 23 December 2021, with annexure CF-4 which contained correspondence, screenshots from the MinView spatial data mapping service, policy documents and codes relating to heritage and environmental protection in New South Wales and minerals industry publications by the New South Wales Government.

[21] Mr Downes provided the following material that same day:

(a) contentions;

(b) affidavit of Jonathan Charles Downes dated 22 December 2021; and

(c) affidavit of Matthew James Gerard O'Kane dated 22 December 2021.

[22] Mr O'Kane is the managing director of Comet Resources Limited (**Comet**). Both Mr Downes and Mr O'Kane depose to Comet's ownership of 80% of the Barraba Copper Project (**Project**) in New South Wales, which they say includes the licence. Mr Downes remains the holder of the licence and holds the remaining 20% share in the Project. Comet has an option to purchase Mr Downes' share within a specified period. Because of Comet's interest in the Project, Mr O'Kane took an active role in the negotiations as discussed below.

[23] On 17 January 2022, each of the parties advised it was content for this matter to be determined on the papers and Gomeroi provided contentions in reply.

[24] Despite having provided a reply and agreeing that the matter could be determined on the papers, Gomeroi wrote to the Tribunal and the other parties on 18 February 2022, foreshadowing that it would seek conditions be imposed in the event that I determined that the Minister's consent may be given. Gomeroi advised it would provide its proposed conditions (set out in Annexure A) by 21 February 2022, which it did late that day. Gomeroi made it clear that its primary position remained that it opposed the Minister's consent being given.

[25] The only reason provided for this late request by Gomeroi was that a meeting of the Gomeroi claim group was to be held on 21-25 March 2022 after the conclusion of the six -month period mentioned in s 36(3) of the NTA and Mr Downes had not agreed to ask me to delay my decision until after that meeting. Why Gomeroi did not put this alternative argument in its initial contentions as it should have done is not explained.

[26] In order to afford procedural fairness to the State and Mr Downes, I invited them to provide comments on Gomeroi's proposed conditions. The conditions are discussed further below from [260].

THE PROPOSED FUTURE ACT

[27] As noted, the licence has been granted but is subject to a condition in the following terms which prevents Mr Downes from prospecting on land or waters subject to native title (**Native Title Condition**):

> The licence holder must not prospect on any land or waters within the exploration area on which Native Title has not been extinguished under the *Native Title Act 1993* (Cth) without the prior written consent of the Minister.

[28] The State explains that the grant of the licence subject to the Native Title Condition was excluded from the right to negotiate process under the NTA by the *Native Title (Right to Negotiate (Exclusion)—NSW Land) Determination No. 1 of 1996* (**Exclusion Determination**) made under former s 26(3)(b) of the NTA, being the predecessor to s 26(1)(c)(iv). The Exclusion Determination relevantly applies to the grant or renewal of an exploration licence under the Mining Act which, "includes, or is subject to, a condition to the effect that the holder must not prospect on, or in relation to, any onshore place covered by that licence or authority in relation to which native title exists without the prior written consent of the New South Wales Minister for Mineral Resources".

[29] The licence was granted on 21 December 2016 and has been renewed on a number of occasions, most recently on 15 April 2021 with an expiry date of 23 December 2023.

[30] While the right to negotiate process was not applied to the grant of the licence, the giving of Ministerial consent in accordance with the Native Title Condition (**Minister's Consent**) is an act to which the right to negotiate applies by operation of the *Native Title (Right to Negotiate (Inclusion)—NSW Land) Approval No. 1 of 1996*

(**Inclusion Approval**). Both the Exclusion Determination and the Inclusion Approval were continued in force under the *Native Title Amendment Act 1998* (Cth) (sch 5 pt 5).

[31] The State's s 29 notice states that the entire area of the licence may be affected by the Minister's Consent. However, the State's position is that the Minister's Consent will not apply to the whole of the licence area. For convenience, I refer to the areas which may be subject to the Minister's Consent as the **Future Act Area**.

[32] Ms Fegan's affidavit dated 20 September 2021 sets out the process she followed to identify each of the land parcels within the licence area and the subject tenure. The culmination of that analysis is the summary table in the State's contentions which identifies those parcels where the State considers native title has been extinguished by previous exclusive possession acts under the NTA, predominately grants of freehold.

[33] The remaining parcels the State has identified as areas where native title may continue to exist are listed in the table below. These are the areas which the State says may be affected by the Minister's Consent, if granted, and therefore comprise the Future Act Area.

No.	Cadastral ID	Folio Number	Type of tenure
1	102385325	19/754821	PUBLIC HALL, PUBLIC RECREATION – R83140
2	102385281	27/754821	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R97049
3	108041016	52/754821	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
4	102385345	1/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
5	102385341	2/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
6	102385358	3/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
7	102385346	4/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
8	102385348	5/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
9	102385351	6/3/758481	FUTURE PUBLIC REQUIREMENTS, Grazing Licence – R96874
10	102385321	3/4/758481	PUBLIC BUILDINGS – R36062
11	102385328	4/4/758481	PUBLIC HALL, PUBLIC RECREATION – R83140
12	102385343	5/4/758481	FUTURE PUBLIC REQUIREMENTS – R754821
13	102385288	6/4/758481	FUTURE PUBLIC REQUIREMENTS – R754821
14	108056459	701/1024888	FUTURE PUBLIC REQUIREMENTS – R96874

No.	Cadastral ID	Folio Number	Type of tenure
15	158729658	702/1024888	FUTURE PUBLIC REQUIREMENTS – R96874
16	104366180	7004/1029183	PUBLIC HALL, PUBLIC RECREATION – R83140
17	104366179	7005/1029183	PRESERVATION OF GRAVES – R46279
18	103706694	7001/1029184	FUTURE PUBLIC REQUIREMENTS – R96874
19	163265634	7302/1145078	FUTURE PUBLIC REQUIREMENTS – R754857
20	163258250	7300/1145081	FUTURE PUBLIC REQUIREMENTS – R754821

[34] The State and Gomeroi agree that it is not for me to decide the question of extinguishment (State contentions at paragraph 26; Gomeroi contentions at paragraph 73). While Gomeroi does not make any contention about the correctness or otherwise of the State's extinguishment assessment, there does not appear to be any controversy between the parties about the operation of the Exclusion Determination and the Inclusion Approval and the fact that, despite the wording of the s 29 notice, the Minister's Consent may not affect the entire area of the licence.

PROPOSED EXPLORATION ACTIVITIES IN THE FUTURE ACT AREA

[35] The Minister's Consent would enable Mr Downes to prospect in the Future Act Area.

[36] Of the parcels listed above, Mr Downes says that he is primarily interested in three parcels, being Lot 7001 in DP1029184 (**Lot 7001**), Lot 7300 in DP1145081 (**Lot 7300**) and Lot 7302 in DP1145078 (**Lot 7302**) (Downes contentions at paragraph 10). Lot 7300 appears to be the location of the historic Gulf Creek Copper mine.

[37] While noting exploration is an iterative process, with the results in each phase informing the next phase, Mr Downes states that his planned activities are set out in the Proposed Exploration Program dated 14 October 2020 (commencing at TG-1 page 122).

[38] The summary in section 1.1 of that document states as follows:

> … Comet has delineated a number of exploration targets at the Gulf Creek Copper Mine located within EL 8492 which the Company believes are prospective for copper and gold mineralisation.
>
> In particular, historic mining data indicates the presence of an undeveloped copper ore body located under the old workings at a depth of approximately 120 metres below the main shaft. In addition, Induced Polarisation (IP) geophysical

> techniques have also identified a number of chargeability anomalies which are also of interest.
>
> It is the intention of the Company to drill test these features with a minimum of 4 Diamond and/or Reverse Circulation (RC) holes prior to the end of 2020 and subject to the results, a further 16 holes during the course of 2021.

[39] I note that Mr Downes' initial communication with Gomeroi on 20 February 2020 indicated a plan to drill six holes (JWM-1 page 53). Clearly Mr Downes' proposed timing did not eventuate and, as noted, the licence has since been renewed to 23 December 2023.

[40] Mr Downes contends that prospecting under the licence is heavily regulated to manage impacts on the land and environment. He says this regulation is achieved through a number of mechanisms which he refers to as **Environment Protection Conditions** including:

(a) the Mining Act and the *Environmental Planning and Assessment Act 1979* (NSW);

(b) conditions on the licence; and

(c) the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**).

[41] In his contentions at paragraphs 20–35, Mr Downes goes on to outline the relevant features of those mechanisms.

[42] The State similarly provides information about the operation of the regulatory regime with respect to prospecting activities in its contentions (at paragraphs 56–65).

PRELIMINARY QUESTION – HAS MR DOWNES NEGOTIATED IN GOOD FAITH?

[43] President Dowsett summarised the notion of good faith in the present context in *Rusa Resources v Gnulli* at [12]–[16] and I adopt that analysis for the purpose of this matter.

[44] Gomeroi must satisfy me that Mr Downes did not negotiate in good faith. In considering that question, I must view the negotiations as a whole. So much is accepted by Gomeroi which contends (at paragraphs 8–9), that the assessment is to be made weighing all of the relevant facts and "requires a contextual evaluation".

[45] It is worth remembering also that negotiation between a native title party and grantee party is a two way street. Both are under an obligation to negotiate in good faith (as is the State). While Gomeroi's good faith is not in issue, its conduct in the negotiations may be a factor in my consideration of whether Mr Downes has negotiated in good faith (see *Western Australia v Taylor* at 250; *Placer v Western Australia* at [30]; *Xstrata v Albury* at [65]).

[46] Gomeroi submits that, in all of the circumstances, Mr Downes' conduct in the negotiations was unreasonable and fell below the standard of negotiation in good faith. It goes on to list, at paragraph 12 of its contentions, conduct which it says demonstrates Mr Downes' failure to negotiate in good faith:

> (a) insisting upon or continuing to seek a draft land access agreement throughout 2020 despite the existence of the declared COVID-19 pandemic and the known risks posed by that pandemic;
>
> (b) proposing various meetings where there was no reasonable possibility or utility in meeting at the identified times, including in circumstances where it was known that the Native Title Party had not had an opportunity to provide instructions to its representatives and where the Grantee Party had not provided its response to the proposed agreement it had requested from the Native Title Party;
>
> (c) having persons who were ostensibly engaged as arms-length and independent experts undertake advocacy roles for the Grantee Party;
>
> (d) contacting members of the Native Title Party directly and seeking to meet with them in the absence of their legal representative, NTSCORP Limited (**NTSCORP**); and
>
> (e) altering negotiation positions, without explanation and on the bases of incorrect information.

[47] Mr Downes contends that he viewed this application as a last resort in circumstances where he had continuously attempted to negotiate for approximately 16 months without success, and NTSCORP for Gomeroi had indicated a necessary claim group meeting was unlikely to occur before the end of 2021.

[48] Mr Downes then proceeds to address each aspect of his conduct listed above about which Gomeroi complains. Gomeroi is critical of that approach, arguing that Mr Downes does not consider the "totality of the circumstances". It says the overall context may be "misconstrued or overlooked if an overly narrow or compartmentalised" approach is taken (Gomeroi reply at paragraphs 3–4).

[49] I expect Mr Downes was simply endeavouring to respond to the specific complaints made by Gomeroi. It might also be said that certain of Gomeroi's complaints about Mr Downes' behaviour are themselves taken out of context.

[50] In any event, there is no doubt that the totality of the negotiations must be considered and that the overall context is important. For that reason and, notwithstanding its length, I have outlined the course of the negotiations in stages below.

[51] Given only Mr Downes' good faith is in issue, references to the parties in the summary of the negotiations below should be taken as a reference to Mr Downes and Gomeroi, unless otherwise indicated.

[52] The evidence relevant to the good faith question is primarily from Mr MacLeod of NTSCORP and Mr Talbott for Gomeroi and from Mr Downes and Mr O'Kane of Comet for Mr Downes. Relevant documentary evidence is attached to the relevant affidavits.

February 2020 to May 2020

[53] On 18 February 2020, the State gave Gomeroi notice (by email) of the Minister's proposed consent in accordance with s 29(2) of the NTA. Notice was also given to Mr Downes, NTSCORP and the Tribunal that same day (TG-1 pages 239–250). In his affidavit (at paragraph 12), Mr MacLeod confirms that NTSCORP received the notice on 18 February 2020. Notice was also published in the Koori Mail on 26 February 2020.

[54] The next day, 19 February 2020, Mr Downes contacted NTSCORP by telephone with respect to progressing negotiations. He was referred to Mr Dylan Orsborn. Mr Downes says that he tried Mr Orsborn twice and on the second attempt had a high level discussion with Mr Orsborn about his plans and sought guidance on the native title process (Downes affidavit at paragraph 16).

[55] On 20 February 2020, Mr Downes sent Mr Orsborn an email (JWM-1 pages 51–54) thanking him for his time explaining the process required "for some low-level assessment work at Gulf Creek" and attaching an overview of the Gulf Creek copper mine and the proposed exploration program. In the email, Mr Downes invited

Mr Orsborn to let him know if he had any thoughts or questions. No mention was made of an agreement. The enclosed document explained that Mr Downes had entered into an agreement with Comet and stated that the current proposal was to drill six holes. The document also described the drilling process and concluded with the following paragraph:

> I will be seeking to enter into a reasonable and fair compensation agreement with the native title parties and hope that the process can be concluded utilising an existing access agreement. I recognise that this is unusual but would propose that the time saved, which is my primary concern, and by not engaging our own council would allow me to make an initial and early compensation payment.
>
> (As per original)

[56] Mr Downes says that, when he had not heard from Mr Orsborn by 11 March 2020, he telephoned NTSCORP. He was again advised to speak to Mr Orsborn and left a message for Mr Orsborn to return his call.

[57] On 21 April 2020, when Mr Downes had not heard from Mr Orsborn, he called again. On this occasion they spoke and Mr Downes has outlined his recollection of the discussion in his affidavit (at paragraph 21).

[58] Mr Downes says he advised Mr Orsborn he was calling to progress the negotiations, wanted to be reasonable and would likely agree to terms proposed by Gomeroi. Mr Downes also explained that he had been involved with another company that had negotiations with Gomeroi and understands there was a previous agreement for the relevant area. He asked if Mr Orsborn could send a pro-forma exploration agreement containing standard terms used by Gomeroi. Mr Orsborn advised that, due to a change in the Gomeroi Applicant, any previous agreement would no longer be relevant, to which Mr Downes responded that he was looking for a template document with standard terms to expedite the process. Mr Downes says he advised Mr Orsborn that he was not looking for an executable document but would like to get an idea of what Gomeroi would accept. Mr Downes says that Mr Orsborn advised that he thought that was reasonable and would send through a pro-forma agreement.

[59] Mr Downes says his recollection of this conversation is confirmed by his contemporaneous diary entry for that day (JD-1 page 4), which does include an entry relating to native title at Gulf Creek and, while not completely legible, appears to mention a template agreement and a pro-forma.

[60] Mr Downes explains in his affidavit (at paragraph 22) that he asked Mr Orsborn for a pro-forma agreement as he had taken that approach with native title groups in the past and found it to be a mutually beneficial way of reaching an agreement. Mr Downes says further that, assuming the pro-forma looked reasonable, he intended to agree to the terms in order to move the negotiations forward quickly.

[61] Later that same day, picking up his earlier email of 20 February 2020, Mr Downes sent an email to Mr Orsborn (JWM-1 page 84). This second email stated that Mr Downes was "looking to progress the exploration of the Gulf Creek copper mine" and wondered whether Mr Orsborn could provide the "contact details for the relevant claimant groups". Mr Downes says that his recollection of his reason for seeking those details at that time was to introduce himself and the Project to the native title party (being Gomeroi) as he understood members of Gomeroi had been involved in the previous agreement mentioned above. The email makes no mention of the telephone call earlier that day between Mr Downes and Mr Orsborn or the pro-forma agreement.

[62] Mr Orsborn responded at some length on 23 April 2020 (JWM-1 page 83). That response, which continues the email chain, does not ostensibly address Mr Downes' request for contact details for the "relevant claimant groups". Rather, Mr Orsborn's email appears to respond to Mr Downes' initial email of 20 February 2020. Mr Orsborn advises Mr Downes that, from reviewing the documents provided by Mr Downes and his own inquiries, the licence is within the Gomeroi Claim area and that NTSCORP acts as the legal representative of the Gomeroi native title claim group. Mr Orsborn then explains his understanding of the operation of the Native Title Condition and why Mr Downes now requires a native title agreement to undertake drilling in the areas where native title has not been extinguished. No mention is made of the right to negotiate process.

[63] Additionally, Mr Orsborn explained that Gomeroi, as applicant for the Gomeroi Claim, comprises 18 individuals, but that any agreement must be put to the claim group for authorisation before it could be signed by the Gomeroi Applicant. In concluding his email, Mr Orsborn states further that:

> **Once you've agreed to the Applicant's exploration agreement**, the agreement would need to be put to the wider claim group for their endorsement. After this, the agreement could be signed by the Applicant.

> The COVID-19 pandemic has affected our ability to convene meetings of the Applicant and claim group.
>
> **What we may be able to do to progress matters is to seek instructions from the Applicant remotely. We'll then send you our standard exploration agreement.**
>
> (Emphasis added)

[64] Mr Talbott, who says he was authorised as a member of the Applicant for the Gomeroi Claim at a meeting in July 2016, also deposes to his understanding that any agreements relating to native title rights and interests need to be brought back to the Gomeroi claim group for authorisation (Talbott affidavit at paragraphs 8–9).

[65] Mr Downes responded that same day in the following terms (JWM-1 page 85):

> Dear Dylan,
>
> Thank you very much for your email. My understanding regarding the Exploration Licence aligns with yours. As discussed, I am keen to progress this so that I can undertake some drilling to test the prospect and it would be fantastic if this process could continue despite the extraordinary circumstances we all find ourselves in. I would be very grateful if you could discuss this with the Applicant and, if they agree, send me a copy of a standard Exploration Agreement.
>
> Kind regards,
>
> Jonathan

[66] On 11 May 2020, Mr Downes emailed Mr Orsborn (JWM-1 page 86) to enquire whether Mr Orsborn had been able to "locate a Standard Exploration Agreement", noting "[w]e are keen to progress the project". Mr Downes says he followed up this email with a telephone call, in which he says Mr Orsborn indicated that he would send through a pro-forma agreement as soon as possible. JD-1 page 5 is Mr Downes' contemporaneous diary note of this call.

[67] Mr MacLeod deposes that, at around this same time, on 14 May 2020, the stay at home order which had been in place in New South Wales since 30 March 2020 was lifted but other restrictions remained (MacLeod affidavit at paragraph 24).

[68] On 19 May 2020, following consultation with NTSCORP, the Department published a policy on COVID-19 (MacLeod affidavit at paragraph 25; copy at JWM-1 pages 103–104). That policy recognised the need for face to face meetings for negotiations in good faith and the difficulties in meetings occurring. In light of those issues, the policy stated that it would not issue s 29 notices without the consent of the relevant native title party. It appears that policy remained in place until 1 September 2020.

[69] The State's policy had no direct bearing on the parties' obligations in this matter as the s 29 notice had already been issued in February 2020. With respect to existing processes, the policy stated "[w]here the Right to Negotiate process has already commenced, [Mining, Exploration and Geoscience] will consider each application in consultation with the affected parties".

[70] It is not apparent that any such consideration occurred in this case. Nothing in the material indicates any consultation between all negotiation parties about the impacts of COVID-19. Despite its obligation to negotiate in good faith, the State seems to have been largely uninvolved in the process save as discussed further below at [95]–[99].

May 2020 to October 2020 – Mr Rampe becomes involved

[71] Both Mr Downes and Mr O'Kane, each of whom is based in Western Australia, say that because Mr Downes was experiencing difficulties in progressing the negotiations, they thought it might be preferable to have someone on the ground in New South Wales (Downes affidavit at paragraph 35; O'Kane affidavit at paragraph 18). To that end, Comet sought the assistance of Mr Mart Rampe of Harvest Group Services (**Harvest**). Mr Rampe is a geologist and Comet's exploration manager in New South Wales.

[72] Mr O'Kane further says that he wanted Mr Rampe involved due to COVID-19 border closures which would make it difficult for him to travel from Western Australia to New South Wales (O'Kane affidavit at paragraph 18).

[73] Mr Rampe took over as the primary contact with NTSCORP and made contact with Mr Orsborn of NTSCORP by email on 27 May 2020. He advised that he had been appointed as "Technical Advisor" to Comet and was looking to visit the mine in the next week or two to get an appreciation of the environment and meet with any locals. Mr Rampe asked if Mr Orsborn had "any issues that [he] should be aware of for such a visit" and concluded by noting his understanding that Mr Orsborn was also dealing with the access agreement and offering his assistance in that regard, should any be required.

[74] On 2 June 2020, Mr Orsborn responded as follows:

> Dear Mart,
>
> Thank you for getting in touch. To clarify our role, we are the solicitors for the Gomeroi People's native title claim. It would be outside the scope of our role to provide advice to Comet Resources about engaging with the local community.
>
> The Authority Holder has been in touch with us separately in relation to this project, with a view to reaching agreement with the Gomeroi Applicant and allowing exploration (including drilling) on the land to proceed. Should we continue to liaise with the Authority Holder in relation to this agreement or should we liaise with you moving forward?
>
> In relation to your intention to visit the area around the Gulf Mine, we note that Comet Resources should not undertake exploration activities on the site. This would require that the aforementioned agreement is entered into by the Authority Holder and the Gomeroi Applicant.
>
> Kind regards.
>
> Dylan Orsborn | Senior Solicitor

[75] There is nothing in the material to indicate whether Mr Rampe answered NTSCORP's question regarding whether he was now the primary contact, but on 22 June 2020, Mr Rampe wrote again to Mr Orsborn to ask for an update on NTSCORP's meeting with Gomeroi, confirmation that he could visit the site immediately so long as no exploration work was undertaken, and to again request a template agreement.

[76] Mr Orsborn responded the next day, 23 June 2020, as follows:

> Dear Mart,
>
> Apologies for missing your calls. I was on leave yesterday and in meetings this morning.
>
> We are holding a teleconference this Thursday with the Gomeroi Applicant and we will seek instructions to commence negotiations. This would include **obtaining instructions on sending you our template agreement**. If we obtain these instructions, we will forward the template agreement.
>
> Accessing the site is permissible so long as no activities are undertaken which would constitute 'exploration activities' under the Mining Act.
>
> Kind regards,
>
> Dylan Orsborn | Senior Solicitor
>
> (Emphasis added)

[77] On 2 July 2020, Mr Rampe again emailed to follow up on the outcome of NTSCORP's meeting with the Gomeroi Applicant. Mr Orsborn responded to apologise (he had been unwell) and to advise the Gomeroi Applicant meeting planned for the previous week did not proceed due to lack of a quorum. He advised that NTSCORP would be in touch when it had instructions and that "[w]e appreciate your patience".

[78] Mr Rampe responded almost immediately as follows:

> Hi Dylan – I have been advised that the response time to the Notice under S29 of the Commonwealth Native Title Act 1993 - EL 8492 ran out at the end of June? Can you advise?
>
> Regards
>
> Mart Rampe

[79] Clearly the reference to the "response time" running out is a reference to the end of the notification period under the NTA which had concluded on 12 June 2020. It is not evident from the email what Mr Rampe understood to be the import of the end of the notification period. However, given the previous exchange it seems his intent was to prod NTSCORP to take some action to progress the matter.

[80] The correspondence includes an email response the same day from Mr MacLeod. He thanks Mr Rampe for his time on the telephone, although he does not depose to the content of that discussion. In his email, Mr MacLeod endeavours to explain the course of the negotiations to date from NTSCORP's perspective and the factors that have delayed progress. He refers to receipt of the s 29 notice on 18 February 2020, a March meeting of the Gomeroi Applicant which could not proceed due to COVID-19, NTSCORP's inability to meet with its clients in person since due to restrictions, the State's pause on the issuing of s 29 notices as discussed above, and NTSCORP's efforts to meet with its clients via teleconference. Mr MacLeod says, however, that with the lifting of restrictions, NTSCORP was considering a return to face to face meetings and would be in touch once it had a date for the next meeting of the Gomeroi Applicant. Mr MacLeod also stated that NTSCORP is working to progress the agreement as best it can in the meantime, although he does not say how. He concludes by acknowledging the less than ideal circumstances, the frustration arising from the delays and thanking Mr Rampe for his patience.

[81] The next day, 3 July 2020, Mr Rampe forwarded a copy of Mr MacLeod's email to Mr O'Kane. His covering email read:

> Matt/Jono
>
> Just got back into the office - please see below. I spoke to James at length last night and expressed our collective frustrations at the "process" and progress (or lack thereof!). This after receiving Dylans response earlier in the evening - unbelievable!
>
> Anyway, following my discussion with James and a review of his email, I think we are very many weeks (if not months) away from getting a resolution on this matter.
>
> Regards
>
> Mart Rampe

> (As per original)

[82] Mr Downes responds several minutes later as follows:

> Aaaargghh!!
>
> Thank you Mart.
>
> I can't believe that we were not told this earlier and also why they couldn't simply email or phone around the template agreement to the claimants?
>
> Jono

[83] Mr Downes' evidence is that he was "quite frustrated at this point" and could not understand why it was taking so long to receive a pro-forma agreement with standard terms or why it would take more months to do so (Downes affidavit at paragraph 41).

[84] There is no evidence as to any further contact between the parties until August 2020 when Mr O'Kane says that he asked Mr Downes to become involved again. He says he thought the fact that Comet was not the licence holder might have been a factor in Mr Rampe's lack of progress, although, there is nothing in the correspondence to suggest that was the case.

[85] Mr Downes says that in the week of 17 August 2020 he attempted to call Mr Orsborn several times but was unable to reach him. He says he started calling every day at that point. These efforts are again reflected in Mr Downes' diary notes (JD-1 pages 11–12). Those notes indicate calls were made on 17, 18 and 19 August 2020.

[86] On 19 August 2020, Mr Downes sent an email to Mr Orsborn which is at JWM-1 pages 166–167 and extracted in Mr Downes' affidavit at paragraph 43. In that email, Mr Downes refers to his initial contact with Mr Orsborn on 19 February 2020 and refers to Mr Orsborn's offers to provide a template agreement over the previous months. He also expresses frustration with the process, reiterates his availability to negotiate and states his view that, despite the unusual times, he considers there have been "extensive low-risk windows" to progress the matter. Mr Downes concludes by saying he is keen to speak with Mr Orsborn about how to move forward and again asks for the contact details of the claimants.

[87] Mr Downes and Mr Orsborn also spoke on 19 August 2020 when Mr Downes again expressed his frustrations regarding the lack of provision of a pro-forma agreement and the apparent inability to progress the matter. Mr Downes deposes that Mr Orsborn

again said he would "get a pro-forma agreement to you as soon as I can" (Downes affidavit at paragraph 45; JD-1 page 12). Mr Downes says by this time it had been almost four months since Mr Orsborn had first promised to send a pro-forma agreement.

[88] Mr Downes sent a follow up email to Mr Orsborn about a month later on 12 September 2020 asking if there "ha[s] been any progression with regards to the world of native title recently". He also noted that the State had recommenced issuing s 29 notices and said that he was "hoping that a cautious restart was underway on your side too", referring to NTSCORP. This follow up comes nearly a month after the previous exchange.

[89] Mr Orsborn replied on 15 September 2020 to confirm his understanding that the State had recommenced issuing notices. As to progress, Mr Orsborn advised that NTSCORP was continuing to seek instructions from the Gomeroi Applicant but had not been successful to date. He said that NTSCORP would inform Mr Downes when it had instructions.

[90] Mr Downes responded the next day to thank Mr Orsborn for all of his effort and to repeat his earlier request for a list of the members of the Gomeroi Applicant and their contact details. There is no evidence that NTSCORP responded to this request, asked Mr Downes why he wanted the list or told him that he should not make direct contact with the Gomeroi Applicant.

October 2020 to December 2020 – Kayandel becomes involved

[91] Mr O'Kane says that in or about October 2020, he and Mr Rampe had a further discussion in which Mr Rampe indicated that he was also having no success in progressing the negotiations and suggested that Mr O'Kane needed help from someone with experience in negotiating with traditional owners. He proposed Mr Lance Syme with whom he had dealt previously and who he said was "very familiar with native title matters and ha[d] experience dealing with NTSCORP before".

[92] This led to Harvest (on behalf of Comet) engaging Mr Lance Syme of Kayandel Archaeological Services (**Kayandel**) to assist with advice on heritage matters, communicating with the Gomeroi People about the Project and assisting Comet in

determining what compensation the Gomeroi People may require to reach agreement. It was thought that Mr Syme could assist on this aspect based on his prior experience, including in dealing with the Gomeroi People.

[93] Mr O'Kane says that he wanted to get the Project on the agenda for a Gomeroi meeting and Kayandel was engaged to communicate about the Project and heritage matters. He states that, while Kayandel was acting on Comet's behalf, they were not authorised to negotiate with Gomeroi in the sense that they were not authorised to make any offers. For a number of reasons, Kayandel's role is a source of complaint for Gomeroi as I will discuss further below.

[94] The evidence includes a document entitled Aboriginal Heritage Advice prepared by Kayandel and dated 9 October 2020 which relates to the existence of recorded Aboriginal sites within or in the vicinity of the licence. The report states that it was prepared in response to a letter dated 16 September 2020 from the State. That letter is not in evidence and no party has made reference to it.

[95] However, on 19 October 2020, more than eight months after the s 29 notice was issued, the State, acting through the Department, wrote to Gomeroi as it is required to do under s 31(1)(a) of the NTA, seeking submissions about the proposed giving of the Minister's Consent. The letter attached Mr Downes' proposed exploration program dated 14 October 2020 and sought submissions from Gomeroi by 11 January 2021. Kayandel's 9 October 2020 Aboriginal Heritage Advice is Appendix 1 to the proposed exploration program.

[96] The State's letter noted that Mr Downes would be given an opportunity to review any submissions. As to what the State would then do, the letter stated that after the submission review period (not defined) the State would contact NTSCORP to organise a first meeting with the negotiation parties, which it noted could be by telephone.

[97] The reason why it took the State so long to send this letter is not apparent and no explanation is given. It is not clear whether the delay was the result of an oversight or some other cause, perhaps associated with the unrelated pause on the issuing of new s 29 notices. I note that the Tribunal has commented previously on the need for the Government party to seek submissions early in the process (see *Strickland* at 24–26).

[98] The terms of the letter (which appears to be in a standard form) suggest it was intended to be sent at the beginning of the process, in that it refers to the "recent notice" under s 29 of the NTA. It also encourages the parties to have "preliminary negotiations" prior to the State organising the "first meeting", all of which seems ludicrous given when it was sent. No mention is made of the requirement for negotiation in good faith. It might have made more sense if the State had tailored this correspondence to the circumstances and taken account of the lengthy delay. Even so, there is nothing in the course of conduct between the parties to indicate this late request for submissions had any adverse impact on the negotiations. However, we will never know whether timely action by the State might have had a positive effect on the negotiations between Gomeroi and Mr Downes.

[99] The Department sent follow up emails to NTSCORP in January, July and August 2021 (CF-4 pages 3–5). Eventually, on 19 August 2021, Gomeroi provided a submission (CF-4 page 50). There is no indication as to whether Mr Downes was given the opportunity to respond to the submissions as foreshadowed or what, if any, steps the State then took.

[100] Meanwhile, following its engagement, Kayandel contacted members of the Gomeroi Applicant with a view to meeting them to discuss the Project. Mr O'Kane says that he was aware of this contact between October 2020 and December 2020 and was kept informed by Mr Rampe or Mr Syme.

[101] The initial contact by Kayandel seems to have occurred on 26 October 2020. Mr Syme emailed Mr Talbott inviting him for a coffee later in the week to discuss the Project (JWM-1 page 219).

[102] That same day, Ms Britt Andrews, Research Assistant at Kayandel, sent an email to Dr Marcus Waters (member of the Gomeroi Applicant) about a possible meeting with Mr Syme to discuss the Project later that same week (JWM-1 pages 216–218).

[103] Mr Talbott confirms that he received the email from Mr Syme. He says he first met Mr Syme in 2016 when Mr Syme was engaged by Whitehaven to undertake a cultural heritage assessment for the Vickery South Coal Mine near Gunnedah. Mr Talbott states that he did not reply to Mr Syme's email of 26 October 2020 or meet with Mr Syme at that time.

[104] On 3 November 2020, Mr Syme wrote to Mr Orsborn to advise that he would like to arrange for the conduct of a one day Aboriginal Due Diligence Inspection for the Project in the week of 16 November 2020. Mr Syme sought the participation of two members of the Gomeroi Applicant, preferably one male and one female to ensure any gender specific sites could be adequately considered, if identified. Mr MacLeod does not mention this request in the chronology of the negotiations in his affidavit and there is nothing to indicate NTSCORP responded. Mr Syme's email also indicates that he spoke to Mr Orsborn the week prior but there is no evidence of that discussion either.

[105] Just over a week later, on 11 November 2020, Ms Andrews forwarded Mr Syme's email to persons who I gather from the later correspondence are members of the Gomeroi Applicant, writing:

> Hi,
>
> My name is Britt, I'm a research assistant with Kayandel. You are likely to have spoken to/heard from Lance Syme, Principal, the week of the 27th of October about getting your input on Aboriginal cultural values for some mineral exploration works for the Barraba Copper Project out at Gulf Creek, NSW.
>
> Kayandel understands that the Barraba Copper Project is located within your Native Title Claim NC2011/006 – Gomeroi People area, and that NTS Corp are representing you in these proceedings.
>
> I'm not sure if Dylan Orsborn from NTS Corp has forwarded the below email onto everyone, and sought your input.
>
> Kayandel would like to arrange for the conduct of an Aboriginal Heritage Due Diligence Inspection for the above project. I've attached a map that indicates in yellow the two areas of initial interest.
>
> We are looking to undertake a 1 day inspection on Wednesday , 18th November 2020.
>
> We would like to invite two (2) of the Native Title Claim NC2011/006 claimants to assist with the inspection. It would be preferential if these representatives were 1x male and 1x female to ensure any gender specific sites can be adequately considered, should they be identified.
>
> Lance can be reached on … to discuss or if you could have the selected representatives contact me via return email it would be appreciated.
>
> Regards,
>
> Britt Andrews
>
> (As per original)

[106] A map showing the area of interest for the inspection was purportedly attached to both of these emails but is not included in the evidence.

[107] On 18 November 2020, Mr Syme and Mr Rampe met with Mr Talbott at Gulf Creek to conduct an inspection. The results of the inspection are recorded in a draft Aboriginal Heritage Due Diligence Report prepared by Kayandel dated 22 March 2021. The

report relates to Lot 7300 and Lot 7302. The report indicates that the field assessment with Mr Talbott "included the completion of visual inspections throughout all readily accessible portions of the Subject Area".

[108] Things seem to become a little disordered at this point. On 25 November 2020 and 30 November 2020, Ms Andrews of Kayandel sent emails to members of the Gomeroi Applicant to check their availability to attend a proposed meeting in Tamworth on 12 December 2020 to discuss the Project.

[109] On 7 December 2020, Ms Andrews emailed Mr Orsborn and Ms Maeve Parker of NTSCORP stating her understanding that a meeting of the "Gomeroi group" was occurring on the weekend of 12 and 13 December 2020, asking if the Project was on the agenda and stating that Comet would like to have a representative attend to "outline the project". Ms Andrews asked for confirmation as soon as possible because the Comet representative would be coming from interstate. It is not clear how Ms Andrews was aware of the proposed meeting.

[110] Mr Orsborn responded that same day to confirm that NTSCORP would be meeting with the Gomeroi Applicant on the coming weekend and would be seeking instructions in relation to exploration licence applications, including Gulf Creek. He advised that due to the impact of COVID-19, the agenda was very full and there would be no time for representatives of Comet to attend and present on the Project. Mr Orsborn said an update would be provided after the meeting when discussions could also occur about "the possibility of Comet Resources' representatives attending a meeting of the Gomeroi Applicant in person next year".

[111] Ms Andrews then emailed to ask if NTSCORP had all of the information it needed about the Project and reiterating her request for the agenda. She concluded by saying "[o]ur client is eager to bring this to a mutually beneficial arrangement as quickly as possible, especially in light of the delays". Mr Orsborn advised that he believed NTSCORP had all of the information it needed but would advise if any questions arose and further that agendas for client meetings are confidential, subject to legal professional privilege and are not provided to third parties.

[112] Also on 7 December 2020, Mr Syme forwarded Mr Orsborn's response to Mr O'Kane and asked if he still wanted Kayandel to try to arrange a meeting with the group.

Mr O'Kane says that he subsequently instructed Kayandel to try to meet with the Gomeroi People that weekend to give them as much information about the Project as possible. To that end he says that he wanted Kayandel to meet with the Gomeroi People before the NTSCORP meeting because of NTSCORP's advice that Comet would not be able to attend the meeting.

[113] As a result of those instructions, Ms Andrews forwarded her 30 November 2020 email to members of the Gomeroi Applicant advising that NTSCORP had confirmed the meeting for the weekend of 12 December 2020 and that the Project was on the agenda but there was no room for Comet to present. She went on to say "[a]s such, is there anything you need from us in advance to inform yourself about the project?" and further "[o]ur client is still keen to meet with any Gomeroi applicants on the 12th, and we are looking at a range of alternatives. This could be a meeting either in the morning, at lunch, or prior to dinner on the 12th" (O'Kane affidavit at paragraph 33; MacLeod affidavit at paragraph 51; copy at JWM-1 page 235).

[114] On 9 and 10 December 2020, members of the Gomeroi Applicant corresponded with Kayandel about matters relating to the NTSCORP meeting and it appears that at least one member was proposing to meet with Comet at 5.00pm on 12 December 2020.

[115] This meeting was later cancelled on 11 December 2020 following Comet's offer outlined below and Mr O'Kane's discussions with Mr Orsborn.

[116] Mr MacLeod says that NTSCORP was not copied into Kayandel's correspondence with members of the Gomeroi Applicant and, to the best of his knowledge, did not become aware of this contact until 12 December 2020 when provided with copies by a member of the Gomeroi Applicant. Mr MacLeod also states that, as far as he is aware, Kayandel did not consult with NTSCORP about its plans to engage directly with members of the Gomeroi Applicant (although Mr Downes did) and NTSCORP did not provide the contact details to Kayandel or any other representative of Mr Downes. Further, Mr MacLeod is not aware how Kayandel obtained those contact details. It seems likely that Kayandel may have had those details from its prior dealings with Gomeroi.

December 2020 onwards – Comet's offer and the draft agreement

[117] Mr O'Kane states that, not having received any satisfactory response or a pro-forma agreement from NTSCORP by 10 December 2020, he decided to try to progress the negotiations another way. Being aware of the proposed Gomeroi meeting on 12 December 2020, Comet sent a formal letter of offer to NTSCORP (JWM-1 pages 241–243). Key elements of this offer were an up-front payment of $15,000 paid in two tranches and a commitment to utilise Gomeroi People for future site inspections. In the letter, Mr O'Kane refers to the inspection done by Mr Talbott and says, while he was not able to attend, he understands it went well. Mr O'Kane concludes by saying Comet wants to have a "good, open and honest relationship with the Gomeroi People" and offers a site visit to review operations.

[118] On 16 December 2020, Mr MacLeod emailed Mr Syme and asked that he not contact Gomeroi directly, noting that approach was "highly inappropriate". Mr MacLeod says that he also spoke to Mr Syme that same day and Mr Syme agreed not to make further direct contact with members of the Gomeroi Applicant. Mr O'Kane, who was copied into that correspondence, says that, as far as he is aware, that was the first time such a request had been made. Kayandel does not seem to have any further role in engagement with Gomeroi or NTSCORP from that point forward. I have addressed Gomeroi's contentions about this issue below.

[119] In his email, Mr MacLeod also said that he "appreciate[s] you and your client are frustrated with the delays. As you are aware, the reason for those delays have been out of our hands". He concluded by noting that NTSCORP had received instructions to provide Comet with a draft Land Access Agreement and would endeavour to provide it at the first opportunity.

[120] Mr O'Kane responded to Mr MacLeod's email asking him to call, noting that from earlier discussions with Mr Orsborn he understood Comet's offer would be presented at the meeting and further noting "[i]t is a very generous offer". He asks for clarification of what action was taken with respect to the offer and whether it was presented at the meeting.

[121] On 18 December 2020, Mr MacLeod sent an email to Mr O'Kane attaching a draft Land Access Agreement. Neither the email nor the agreement responded to the offer

made by Mr Downes/Comet. Rather, Mr MacLeod advised that Gomeroi would prefer to meet with Comet to discuss the compensation. Consistent with that approach, the draft agreement did not include Comet's offer but stated "[w]e note your offer of compensation. The Applicant have requested to meet with Comet Resources in person to discuss compensation".

[122] The letter refers to a discussion between the two men the day before and addresses the following points:

(a) an acknowledgement of Comet's patience as NTSCORP sought instructions to provide the agreement;

(b) confirmation that the agreement cannot be signed by Gomeroi unless authorised to do so by the Gomeroi claim group and an indication that while NTSCORP is aiming to have a claim group meeting in the first quarter of 2021, the date remains subject to confirmation and any changes to COVID-19 restrictions;

(c) the requirement for a cultural heritage survey prior to any exploration works commencing but a willingness to conduct a survey over Lot 7300 early in the new year and prior to entering into the agreement;

(d) advice that future exploration activities outside Lot 7300 would require the usual process as per the agreement; and

(e) an explanation of the State's s 31 deed process and a suggestion that Comet progress that separately.

[123] Mr O'Kane says that when he received this email he was pleased that the matter had started to progress. His response on 18 January 2021 (copied to Mr Downes and Mr Syme) addressed the following:

(a) a request for confirmation of the date for the claim group meeting, noting that he understands from the Department that there are a number of other matters for Gomeroi to resolve;

(b) advice that he would be in New South Wales in February and would be happy to meet with Gomeroi at that time; and

(c) advice that the draft Land Access Agreement was still under review.

[124] In relation to the heritage survey, Mr O'Kane advised that a due diligence survey had already been conducted by Mr Talbott and a female representative over Lot 7300. Mr O'Kane now explains that at this time he was under the misapprehension that two Gomeroi representatives had participated in the inspection as that was the original proposal by Kayandel. Mr O'Kane advised that, as no Aboriginal Objects or areas of Aboriginal Significance were identified during that inspection, Comet did not feel another inspection was required, noting also that Comet's planned activities will be confined to the old workings and access tracks.

[125] Mr O'Kane also said he was unclear about the requirement for a heritage survey for other areas stating that:

> [a]part from Crown land that is within the boundaries of EL8492, of which there are two parcels, the balance of the land is freehold and we have executed agreements for access to conduct exploration activities on those areas. They are not subject to the agreement regarding native title. If you could please clarify that we are in agreement on that it would be appreciated.

[126] As can be seen from the State's list of parcels where native title may exist, Mr O'Kane's understanding in that respect was not correct. Further, Comet's interest appears to be in three parcels, namely Lot 7001, Lot 7300 and Lot 7302.

[127] Mr O'Kane followed up on a response to this email on 25 January 2021, noting particularly that he needed feedback to plan his trip to New South Wales.

[128] Mr MacLeod responded the same day apologising for the delay. He advised that he was making inquiries into dates for meetings of both the Gomeroi Applicant and the Gomeroi nation and hoped to be in touch about that shortly. Mr MacLeod said he would seek instructions about the heritage survey and asked Mr O'Kane for a copy of the report produced by Kayandel. He also explained that, while an access agreement with Gomeroi may not be required for areas where native title does not exist, those areas have significance to Gomeroi. He further said Gomeroi would seek Comet's cooperation in arranging heritage protection. Mr MacLeod offered to discuss this issue further and said he otherwise looked forward to receiving comments on the draft agreement.

[129] I note that the report was not provided to Gomeroi until after the commencement of this application, which according to correspondence from Mr Oxby to Mr MacLeod was because it was never finalised (JWM-1 page 640).

[130] On 15 February 2021, Mr O'Kane sent an email to Mr MacLeod to advise that he had arrived in New South Wales. He said that, although he had not heard from Mr MacLeod as to dates for a meeting with the Gomeroi Applicant, he could not delay his trip any longer. He advised that he would be available for about two weeks and hoped to meet with the Gomeroi Applicant during that time. Mr O'Kane said that he did not expect he would be able to return until the vaccine is rolled out and a more stable border arrangement is in place and "[f]or that reason I really do hope the applicants can meet with me while I am here". Mr O'Kane also asked for an update on the timing of the Gomeroi nation meeting and said he would like to meet with Mr MacLeod face to face during his visit to discuss the matter generally. There is nothing to indicate that Mr O'Kane did meet with Mr MacLeod whether in person or virtually.

[131] Mr O'Kane deposes that he was very keen to meet with Gomeroi before his return to Western Australia and, because he had not had any response to his email, he telephoned Mr MacLeod on or about 23 February 2021. Mr O'Kane's affidavit includes his recollection of this call, which is not mentioned by Mr MacLeod in the outline of events in his affidavit. Gomeroi does not dispute Mr O'Kane's recollection and I have no reason to doubt that the discussion transpired, at least broadly, as outlined by Mr O'Kane. As Mr Downes contends this discussion had a bearing on the course of the negotiations, I have set out Mr O'Kane's recollection of this telephone call in full:

Me:	Hi James, just wondering if you have been able to set up a time so I can meet with the Gomeroi People and also if there's a time set for the Nation meeting?
Mr MacLeod:	We are hoping to call a meeting in the next quarter
Me:	I'm confused. Everytime I talk to you, you always tell me that you are going to hold the meeting in the next quarter. Then in the next quarter nothing ever happens. When are you actually going to hold the meeting and why has it not been booked?
Mr MacLeod:	We are looking to hold it within the next 6 months but even then you may not get on the agenda. We have had issues around funding for the meeting and they only have a certain amount of funds, and the meeting cost a lot to hold, and we are only funded

to hold meetings about once a year. There are two big items which the Gomeroi People need to discuss at the next meeting and a meeting will not be called until those matters are ready to be addressed. They are the major issues in front of the Gomeroi Applicant at the moment and therefore no meeting can be held until we get those matters on the agenda. Those issues will take up all the time so it is unlikely that your matter will be heard at the next meeting even if you get onto the agenda, as I believe the whole time will be used addressing these major matters.

Me: So what you are saying is that meetings are about once a year, and that the next meeting will be in about 6 months, even if I get on the agenda for that meeting my matter won't be heard in all likelihood, and then it is going to be about another 6-12 months until the next meeting. Mate, can you please try to help me here. Am I misunderstanding this? Every time I try to do something you tell me not to do it and I am trying to work within what you're telling me to do, but if I am understanding this right, because this has to go to a full nation meeting, I have to get it to a meeting, but you tell me even if I do it won't get addressed, so this process is broken and I can't wait another year. I have shareholders that I need to report to and I have pressure to try to get this resolved. I am asking you for assistance in how to navigate this. You are literally telling me that I have no pathway to reaching an agreement with the Gomeroi People under this process.

Mr MacLeod: You have other legal options as well.

Me: I would rather you just talk to your clients and make them the offer which is a generous offer so that we can just get this done.

Mr MacLeod: Everything needs to go to a Nation meeting to get decided.

Me: This seems to be a Catch 22 because even if we get it on the agenda for the meeting you are telling me it won't be discussed. The TOs don't seem to be getting any benefit out of this process. I just don't see how this is generating any benefit for them and I don't want to take this down a legal pathway as I don't know what will happen there and I don't want to waste the time and money. I think the Native title act is not generating the outcomes that were intended when it was introduced.

Mr MacLeod: All I can tell you, is that you have legal options.

Me: Ok, I don't really know what to do now. I thought I just needed to get to the meeting, but what you have told me today is that is not actually going to get me a result either, so I am really not sure what to do. I'll have to think and will be in touch.

(As per original)

[132] Mr O'Kane says that he was disheartened after this call and did not wish to pursue a legal avenue to secure the Minister's Consent but he understood Mr MacLeod was telling him that was his only option.

[133] Mr O'Kane also says that his understanding was that the only way to reach agreement with Gomeroi was to meet with the Gomeroi People. He says he had this understanding because of the terms of the draft Land Access Agreement, which is why he continued to seek a meeting.

[134] Mr Downes contends that this conversation had a material impact on the negotiations because he understood it to mean that reaching an agreement would likely not be possible in 2021, which was inconsistent with previous advice from NTSCORP that the Gomeroi People wanted to meet in the new year. Mr Downes contends that this was difficult news particularly in the context of the limited progress since the s 29 notice.

[135] Gomeroi argues that contention should not be accepted because it was the Gomeroi Applicant, not the Gomeroi People, which NTSCORP had advised wanted to meet with Mr Downes in the new year.

[136] However, Mr O'Kane does not appear to be under a misapprehension about who he was looking to meet with because he asks on 15 February 2021 to meet with the Gomeroi Applicant and his evidence about the call indicates that he drew a distinction between his meeting with the Gomeroi People and a time for the nation meeting.

[137] I do agree with Gomeroi that there is nothing in the material to suggest that NTSCORP had advised that the Gomeroi claim group wanted to meet with Mr O'Kane or Mr Downes in the new year. However, while qualified, NTSCORP's email of 18 December 2020 did express an intention to hold a claim group meeting in the first quarter of 2021.

[138] It may be that Mr O'Kane was confused about this call and thought that Mr MacLeod was advising that he could not meet with the Gomeroi Applicant until the next quarter. However, I doubt that was the case because of what Mr O'Kane does next with respect to both seeking a meeting with the Gomeroi Applicant in the short term and sharing the costs of a nation meeting.

[139] In any event, NTSCORP had made it clear that authorisation by a claim group meeting was required before any agreement could be executed. I have no doubt that to hear, not only that such a meeting would be further delayed, but even then may not deal with any agreement for this matter, would have been cause for concern for Mr O'Kane and Mr Downes. The key point made by Mr Downes in his contentions is that this advice meant agreement in 2021 was unlikely. Gomeroi does not address that aspect of the discussion.

[140] On 11 March 2021, Mr O'Kane provided Mr MacLeod with feedback on the draft Land Access Agreement by way of marked up changes. The document also includes what appear to be internal comments on the terms between Mr Downes, Mr O'Kane and Mr Syme. In his covering email, Mr O'Kane notes Gomeroi's wish to meet Comet in person to discuss the agreement (as stated in the draft) and says he is happy to meet but asks that it be sooner rather than later.

[141] On 17 March 2021, Mr O'Kane emailed Mr MacLeod to ask for the names of the other companies seeking access agreements in order to explore the collective funding of a claim group meeting. Mr O'Kane sent a further email to follow up on this information on 24 March 2021.

[142] Also on 24 March 2021, Mr O'Kane sent an email to Mr MacLeod to follow up on any feedback to the revised agreement and again asked about the timing for a meeting as requested. Mr O'Kane says that he will come to meet with the Gomeroi Applicant at any time but will be in New South Wales at the end of April/beginning of May for work. He notes his frustration that, despite the Gomeroi Applicant's request to meet, and despite many attempts, he has had no feedback on a suitable time since December.

[143] Mr MacLeod responds to this email on 30 March 2021 to apologise for the delay and advise that he will seek instructions. He also says that he is seeking to confirm meeting dates, hopefully for late April, but will advise as soon as possible.

[144] On 3 May 2021, Mr O'Kane replies to the 30 March 2021 email from Mr MacLeod noting that he has not heard anything since then about meeting dates, he is now in Sydney and will be available to meet on Friday of that week or can extend his trip until the middle of the following week. Mr O'Kane says that if neither of these dates work, it will be the second time in three months he has been in New South Wales on significant advance notice, in order to meet, as requested by Gomeroi, and received no feedback. Mr O'Kane also asks for feedback on the revised agreement sent on 11 March 2021.

[145] Mr O'Kane deposes that by May 2021, he felt he had made every reasonable effort to secure an agreement and the only option left was to engage lawyers. On or about 10 May 2021, Mr O'Kane engaged Mr William Oxby of Johnson Winter & Slattery to act in a future act determination application.

[146] A month later, on 3 June 2021, Mr MacLeod responded to the 3 May 2021 email from Mr O'Kane enclosing an amended copy of the agreement which Mr O'Kane says he forwarded to Mr Oxby. From then on, communication on the part of Mr Downes was via Mr Oxby. The marked up amendments show that the notation which stated that the Gomeroi Applicant wanted to meet with Comet in person had been deleted and replaced with the words "[t]o be discussed".

[147] On 5 July 2021, Mr Oxby wrote to Mr MacLeod to advise that he had been instructed to act in this matter. He attached a further marked up copy of the agreement and asked to make a time to talk as he is instructed the matter is urgent. Mr Oxby advised that his client would like to trigger a survey while drafting is being concluded so the outcomes can be incorporated in the drafting and Comet could commence activities, subject to mitigation measures, once the agreement is signed. Additionally, Mr Oxby asked to speak about the process for authorisation and signing.

[148] The next day, 6 July 2021, Mr MacLeod responded to indicate that he and Ms Parker were free any time that day to talk, if that worked. Mr MacLeod then sent a further email advising that, in relation to authorisation, a meeting had been planned for July but had to be cancelled due to COVID-19. He includes a link to the advertisement for that meeting and says it can be discussed further on the telephone.

[149] On 21 July 2021, Mr Oxby writes again to thank Mr MacLeod for his time on the telephone, although it is not clear when that discussion occurred. Mr Oxby addresses Comet's wish for a survey to commence as soon as possible, attaching a map showing the initial exploration area and asks what else is required for a survey to proceed. He notes that Mr MacLeod is seeking instructions on the draft agreement and notes Comet's preference to reach agreement. However, he advises that Comet is proposing to refer the matter to the Tribunal to ensure the matter is resolved in 2021, but says Comet is open to exploring other options such as a "consent" determination.

[150] Mr O'Kane says that, on 22 July 2021, he instructed Mr Oxby to lodge the application in this matter, which occurred that same day. On 10 August 2021, Mr Oxby writes to Mr MacLeod to confirm this application had been lodged and asked for any feedback about the draft agreement and the proposed survey.

[151] As I have already noted, the parties appear to have continued to negotiate since the lodgement of the future act determination application. However, there is little in the way of evidence of the negotiations since that time and Gomeroi has not made any specific assertions with respect to Mr Downes' conduct after the lodgement of the application.

Consideration of Mr Downes' good faith

[152] As contended by Gomeroi and discussed above, the negotiations must be considered as a whole and in context. Having reviewed the conduct of Mr Downes and his representatives as a whole, I could not say that his efforts were directed to any end other than reaching agreement with Gomeroi.

[153] In my view, certain actions taken on Mr Downes' behalf were, as I will explain, ill advised. However, there is nothing in the material to disclose anything other than an intention on the part of Mr Downes to reach agreement with Gomeroi and repeated efforts towards that objective. There is also nothing in Mr Downes' actions that is so unreasonable to amount to a lack of good faith and the negotiations did progress towards an agreement.

[154] In fact, the evidence indicates that, even in the face of setbacks, such as Mr MacLeod's advice that a nation meeting was unlikely in 2021, Mr Downes (through Mr O'Kane) investigated alternatives such as shared funding arrangements in an effort to progress an agreement.

[155] Further, it seems clear that the actions taken by Mr Downes and his representatives were, rightly or wrongly, influenced by Gomeroi's attitude and approach, which is also part of the overall context.

[156] While conscious that I am reviewing these events after the fact, it does not appear to me that either Mr Downes or Gomeroi handled the negotiations in a particularly adept way. It might also have assisted Mr Downes and Comet to engage the services of someone experienced in negotiating agreements under the right to negotiate process. However, as President Dowsett has observed, it is not the Tribunal's role to critique the negotiation techniques or strategies of the parties (see *Rusa Resources v Gnulli* at [16]). The question is whether Mr Downes negotiated in good faith with a view to

obtaining Gomeroi's agreement to the giving of the Minister's Consent. I am satisfied that he did.

[157] Taken together, the crux of Gomeroi's argument seems to be that Mr Downes should have waited until whenever Gomeroi may have been able to hold the necessary meetings to agree and authorise an agreement, rather than make this application. There are a number of difficulties with that approach, which takes a rather one sided view of the negotiation. As Member Kelly recently noted, NTSCORP might have been able to explore alternative ways to meet with its clients (see *Tritton Resources* at [73]). There is no evidence on that point. Ultimately, while the negotiations did progress, Mr Downes decided to lodge this application. That of itself does not evidence a lack of good faith (see *Strickland v Minister for Lands* at 322; *Cox* at [19]) and given Mr MacLeod's advice about the likelihood of any agreement being authorised in 2021, is also unsurprising.

[158] Although I have formed my conclusion based on the whole of the evidence and the overall context, Gomeroi has particularised a number of specific complaints and it is convenient to discuss the particulars by reference to those points.

Insisting upon or continuing to seek a draft land access agreement throughout 2020 despite the known risks posed by the COVID-19 pandemic

[159] Gomeroi contends that Mr Downes' insistence on the provision of a pro-forma agreement in the face of the COVID-19 pandemic is conduct illustrative of his lack of good faith (Gomeroi contentions at paragraphs 12, 33–35).

[160] The s 29 notice in this matter was issued just prior to the declaration of COVID-19 as a pandemic by the World Health Organisation. Mr MacLeod's evidence outlines in detail the history of the pandemic in Australia and, in particular, the various restrictions in place from time to time in New South Wales. These include stay at home orders, limits on gatherings and restrictions on movement. Mr MacLeod also deposes to the significant risks identified for Aboriginal peoples and Torres Strait Islanders as a vulnerable group.

[161] All of those matters no doubt had a very real impact on how NTSCORP and Gomeroi might usually go about their business. For example, Mr MacLeod states that

NTSCORP's office in Redfern, Sydney was closed between 16 March 2020 and 4 January 2021, with staff directed to work from home.

[162] It is also apparent that COVID-19 restrictions affected all parties to varying degrees from time to time, including limiting the extent to which Mr Downes and Mr O'Kane could travel from Western Australia to Sydney to progress the negotiations.

[163] However, to the extent possible, the parties also adapted as best they could. For example, Mr Orsborn indicated in his email of 23 April 2020 that NTSCORP would explore a remote meeting of the Gomeroi Applicant. It is not clear whether such a meeting ever occurred. The draft agreement was provided after Gomeroi's December 2020 meeting.

[164] The point of Gomeroi's argument here is not entirely clear. The way it is framed suggests that Mr Downes pressured Gomeroi to ignore the very real health and regulatory impacts of the pandemic in his quest for a pro-forma agreement. However, it is apparent from the evidence that is not what occurred. To the contrary, Mr Downes' efforts were largely futile. There were frequent periods of delay when Mr Downes waited to hear from NTSCORP.

[165] Further, at no point did NTSCORP disagree with Mr Downes' view that the provision of a Gomeroi preferred pro-forma agreement was a good starting point. To the contrary, Mr Orsborn, in his correspondence of 23 April 2020 and 23 June 2020 and telephone calls of 11 May 2020 and 19 August 2020, seems to be in agreement with that approach and repeatedly promised a pro-forma agreement was forthcoming. Having not just gone along with the pro-forma agreement suggestion but seemingly agreed with it, Gomeroi's argument now that Mr Downes lacked good faith in pursuing that course lacks any merit.

[166] Moreover, while Mr Downes and his associates repeatedly followed up on a pro-forma agreement, Mr Downes did not seek to terminate the negotiations on the basis that it had not been provided. To the contrary, despite expressing frustration and concern at the delay, Mr Downes and Comet remained engaged in the process and a draft agreement was eventually provided in December 2020.

[167] To the extent that Gomeroi's circumstances or its position on the pro-forma agreement changed, whether due to the impact of pandemic restrictions or otherwise, it could have advised Mr Downes and perhaps discussed an alternative approach. However, that did not occur. Mr Downes clearly became frustrated at the lack of progress and the lack of information forthcoming from NTSCORP, but he did not waiver from the approach he had agreed to with NTSCORP.

[168] I expect that part of Mr Downes' frustration arose from the distinct lack of engagement by NTSCORP on behalf of Gomeroi. NTSCORP's communications with Mr Downes and his representatives, while apologetic, appear to take something of a "don't call us, we'll call you" approach. It is not clear whether this is because Gomeroi had other priorities, but the material reveals a distinct lack of meaningful communication between the parties.

[169] Gomeroi also complains that once the agreement was received, Mr Downes then took until March to respond. Given the time of year and Mr O'Kane's travel to New South Wales, that is not entirely surprising. Gomeroi then took a similar period to respond so I do not read too much into that delay. There were delays on all sides from time to time.

Unreasonably proposing meetings with Gomeroi

[170] Gomeroi says that it takes issue with the manner in which Mr Downes and his representatives sought meetings with Gomeroi at various times, when he knew Gomeroi had not yet given instructions to NTSCORP and at a time when Mr Downes had not yet responded to the draft agreement.

[171] In his contentions (at paragraph 62), Mr Downes has set out all of his meeting requests to Gomeroi. This starts from the time Kayandel sought to meet with Gomeroi for the site inspection, the efforts to meet in December 2020 (which Mr Downes contends occurred after eight months of trying to obtain a draft agreement without success) and Mr O'Kane's requests in early 2021 when he says he was trying to meet with the Gomeroi Applicant at their request.

[172] As the evidence indicates, Mr Downes says that the parties have not met either in person or electronically other than for the 18 November 2020 site inspection. He

contends that it was reasonable to seek a meeting, particularly where Gomeroi had suggested a meeting occur in early 2021.

[173] Mr Downes says that he accepts COVID-19 affected Gomeroi's ability to convene meetings but submits it was not unreasonable for him to seek a meeting in the 14 month period between the notification day and the lodgement of this application, particularly at those times when Mr O'Kane was able to travel to New South Wales.

[174] In its reply, Gomeroi disagrees and says it does not contend every proposal or request to meet was unreasonable. It argues the unreasonableness contended for is that, when considered as a whole, Mr Downes consistently proposed meetings with Gomeroi when it was unreasonable or inefficient to do so. This includes:

(a) throughout 2020, including when Mr Syme and Mr Rampe met with Mr Talbott without NTSCORP (this is discussed further below);

(b) in January and February 2021, when Mr Downes had not yet responded on the draft agreement; and

(c) changing his position to agree to a heritage survey and then requesting the survey be undertaken as soon as possible, despite the reinstatement of travel restrictions as a result of the COVID-19 Delta variant. As to this last point, which refers to Mr Oxby's email of 5 July 2021, I note that Mr Oxby states that Comet wishes to trigger a survey while the agreement was being drafted. There is no suggestion that Mr Downes was demanding this occur at a time when restrictions would prevent it.

[175] From my review of the evidence, I do not accept that Mr Downes' requests to meet with Gomeroi indicate a lack of good faith. If anything they reflect his intention and efforts to reach agreement. As Mr O'Kane repeatedly points out in his correspondence, the Gomeroi Applicant wished to meet in person to discuss compensation.

[176] Also, the material does not support Gomeroi's claims. For example, when Mr MacLeod did respond in January 2021 to Mr O'Kane's request for a meeting it was to apologise for the delay and to say he was making inquiries into the timing of both the Gomeroi Applicant and nation meetings. He said he otherwise looked forward to receiving comments on the draft agreement. At no time did Gomeroi say it would

not meet or that it was unreasonable to meet until those comments had been provided. Mr O'Kane's subsequent emails went unanswered.

[177] I must say it beggars belief that at no time did the parties' representatives meet electronically or on those occasions when Mr O'Kane was in New South Wales. Mr O'Kane's request to meet with Mr MacLeod during his visit in February 2021 also went unanswered.

[178] Gomeroi's argument now appears to be that Mr Downes should have done nothing but wait until it was ready to engage on this matter. That is not how negotiation works. The fact that Mr Downes had business imperatives and sought to progress the negotiation does not amount to a lack of good faith. If Gomeroi felt that any of the requests made by Mr Downes or his representatives were unreasonable or inappropriate because of COVID-19 or any other reason it could have said so at the time, as it did on occasion. To now suggest those actions evidenced a lack of good faith is spurious.

Having persons who were ostensibly engaged as arms-length and independent experts undertake advocacy roles for Mr Downes

[179] In its contentions (at paragraph 59), Gomeroi complains that Kayandel (and Mr Syme), which identified itself as having expertise in archaeology, was not an arm's length independent expert. Gomeroi notes that Kayandel sought to advocate on behalf of Mr Downes and provide advice on the terms of the agreement. This is evident from the internal comments contained in the draft agreement returned to Gomeroi on 11 March 2021 (Gomeroi contentions at paragraphs 12, 59).

[180] In his contentions, Mr Downes says he does not completely understand this argument. He confirms that the engagement of Mr Syme and Kayandel was not at arm's length, says that it did not need to be and that for Gomeroi to suggest that Mr Downes could not use experts would seem unreasonable. Mr Downes argues that it is common for negotiation parties to retain one or more experts to assist and undertake advocacy, using lawyers as an example. Mr Downes confirms that Mr Syme and Kayandel acted on his behalf and their actions should be viewed in the context of considering

Mr Downes' good faith (Downes contentions at paragraphs 72–76). That is certainly what I have done.

[181] In its reply (at paragraphs 32–41), Gomeroi expands upon its argument stating that:

(a) it had not previously known that Kayandel or Mr Syme was engaged to provide advice on what Gomeroi may require for an agreement based on previous experience;

(b) engaging Kayandel in such circumstances is unreasonable;

(c) Mr Downes' example of a lawyer is not apt as a lawyer is not an expert in the same way as an archaeologist (or some other person who possesses specialist knowledge) and is not commonly understood to be independent;

(d) a lawyer has ethical duties and could not be engaged to advocate or advise a party where they had confidential information concerning an opposing party;

(e) the terms of Mr Syme's engagement places a "different complexion" on his comments in the agreement and there is no evidence of what other advice he may have given;

(f) Mr Syme's advocacy or advisory role was not known to Gomeroi and the fact that he provided advice on what might be suitable to Gomeroi in the agreement is entirely unreasonable and demonstrative of a failure to negotiate in good faith; and

(g) while Mr O'Kane says Mr Syme was not authorised to communicate any offers to Gomeroi and to his knowledge did not do so, there is no evidence from Mr Syme about what may have occurred.

[182] Gomeroi contends that whatever else occurred in the time between the commencement of the notification period and the lodgement of the future act determination application, Mr Downes' conduct in engaging Kayandel to advise on what may be acceptable to Gomeroi is inexcusable.

[183] I find this argument to be something of a red herring because there does not appear to be anything in the material to suggest that Kayandel was engaged as an independent expert or perceived by Gomeroi or NTSCORP to be independent. The fact that Kayandel had expertise in archaeology does not mean it must act independently. As

contended by Mr Downes, negotiation parties often engage expert advisors in a range of fields but that does not mean that they are independent. For example, native title parties have been known to consider the engagement of expert financial advisors or other consultants to advise on the adequacy of a grantee party's offer (see, for example, *Drake Coal v Smallwood*; *Yellow Rock Resources*; *Muccan Minerals*; *Rusa Resources v Gnulli*).

[184] As to what NTSCORP was advised here, Kayandel refers to Comet as its "client" and Mr MacLeod in his email to Mr Syme of 16 December 2020, refers to "you and your client". On the material, I do not see that anyone could have reasonably viewed Kayandel as anything other than a representative of Comet and therefore Mr Downes, nor does the evidence indicate anyone did.

[185] With respect to Gomeroi's assertion that Mr Syme possessed confidential information and should not have been advising Mr Downes, this also seems to be a misrepresentation of the position. I do not understand Gomeroi to contend that Kayandel had a conflict of interest because it had acted previously for Gomeroi. The issue is that Kayandel had previously acted for another company and so had familiarity with Gomeroi and its expectations and approach to various issues. There is no merit in that contention. Mr Downes and Comet were entitled to engage experienced advisors.

Contacting members of the Gomeroi Applicant directly and seeking to meet with them in the absence of their legal representative, NTSCORP

[186] Gomeroi asserts that Mr Downes' actions in contacting members of the Gomeroi Applicant and seeking to meet with them in the absence of NTSCORP as their legal representative is evidence of his lack of good faith. It says Mr Downes sought to meet and negotiate directly with Gomeroi despite the fact that it was legally represented and in circumstances where Mr Downes had sought to impliedly express concern about NTSCORP to Gomeroi (Gomeroi contentions at paragraph 36; Gomeroi reply at paragraphs 45–46).

[187] Mr Downes contends that Kayandel first wrote to members of Gomeroi in October 2020 and that direct contact ceased as soon as NTSCORP made that request in

December 2020. Mr Downes asserts that NTSCORP was aware of this contact prior to its request in December, however, as pointed out by Gomeroi, that appears to be an error as the email from Dr Waters to Mr MacLeod providing a copy of Ms Andrews' email of 26 October 2020 is dated 2 November 2021 not 2020.

[188] Mr Downes argues further that there is no rule of negotiations where one party may not speak to the other party. That rule exists for legal representatives but not principals and their agents. Mr Downes says he was not advised he could not speak to the Gomeroi Applicant directly and says Kayandel was engaged as experts in Aboriginal cultural heritage and native title. He says that as soon as NTSCORP made its request, any direct communication ceased.

[189] In its reply, Gomeroi says that the absence of a prohibition on such conduct does not render it reasonable or appropriate. It notes Mr Downes requested contact details for the Gomeroi Applicant on various occasions. Those details were not provided and Mr Downes was advised at the outset that Gomeroi was legally represented. Gomeroi contends that "[a] reasonable person in that context would not understand that they were at liberty to engage with that party in the absence of their lawyers. Further still, a reasonable party who was acting under a mistaken belief as to the appropriateness of engaging directly with a represented party would not exclude the representatives from such communication".

[190] Gomeroi also points to the occasions on which Kayandel's communications cast doubt on NTSCORP's effectiveness, which it says is significant, inexcusable and goes to the heart of negotiation in good faith. While Gomeroi accepts Mr Downes was not expressly advised not to speak directly to Gomeroi, it says that is not "persuasive as a matter of substance".

[191] There is no professional conduct rule preventing Mr Downes or his representatives contacting the Gomeroi People directly. However, that is not to say such direct contact is always appropriate, particularly in circumstances where there may be a power imbalance between the negotiating parties. The Tribunal has been critical of this type of conduct in the past (see *Marine Produce v Mayala* at [141]; *Sheffield* at [69], [84], [99]).

[192] In my view, aspects of Mr Downes' (and Comet's) approach to the negotiations, particularly with respect to its efforts to engage with Gomeroi other than through NTSCORP, were ill advised. I also do not accept that there was a clear delineation between Kayandel's role with respect to cultural heritage and the negotiations.

[193] However, NTSCORP's communication did not assist. On at least two occasions, Mr Downes made written requests for the contact details of members of the Gomeroi Applicant. NTSCORP did not respond to say that it would be inappropriate for such contact to be made. On the first occasion it advised it was the legal representative for Gomeroi. As it suggests now, that may have been NTSCORP's way of addressing that point but it was not explicit and evidently not clear enough.

[194] Further, it must be noted that as far back as 27 May 2020, Mr Rampe wrote to Mr Orsborn to say he was looking to visit the mine in the next week or two to get an appreciation of the environment and meet with any locals. He asked if Mr Orsborn had "any issues that [he] should be aware of for such a visit". Mr Orsborn's reply on 2 June 2020 was to indicate such visits were outside NTSCORP's remit as the lawyers for the Gomeroi Claim but noted no exploration activities should occur. That advice was repeated on 23 June 2020 after Mr Rampe again asked about any issues with a site visit.

[195] Further, about a week before Kayandel made direct contact with the Gomeroi Applicant about the site inspection, it made the same request to NTSCORP but there is no evidence that it received a reply (JWM-1 pages 222–223).

[196] The site inspection aside, I do not think it was appropriate for Mr Downes, through Kayandel, to pursue a meeting with the members of the Gomeroi Applicant at a meeting it knew was being conducted by NTSCORP when it had been advised it could not meet that day and without advising NTSCORP. My sense though is that this was borne from frustration with the delay and lack of meaningful communication with NTSCORP.

[197] Ultimately, Mr Downes (through Mr O'Kane) did not pursue that request and sought to progress the negotiations by making an offer to NTSCORP. Direct communication ceased as soon as the request was made for it to cease and the negotiations progressed further from that time.

[198] Accordingly, while unfortunate, the engagement with Gomeroi around the December 2020 meeting was a small part of the overall negotiations and does not, of itself, amount to a failure to negotiate in good faith.

Altering negotiation positions, without explanation and on the basis of incorrect information

[199] Gomeroi complains that Mr Downes changed his negotiation position over time without explanation, including in relation to quantum and the offer to survey (Gomeroi contentions at 12, 60).

[200] Mr Downes says changing a negotiation position over time is characteristic of negotiations and to suggest that could not occur would leave open the possibility that agreement could not be reached. Mr Downes says the amendments reflected an agreement to increase the survey costs and a decrease in the monetary compensation (this was by $5,000), in circumstances where Gomeroi had deleted the previous offer and changed its request to meet. In relation to the offer to survey, Mr Downes contends he does not understand how accepting Gomeroi's position with respect to the survey could be anything other than acting in good faith.

[201] In reply, Gomeroi again points to the need to view the negotiations as a whole and links Mr Downes' change in position and his request for a cultural heritage survey in advance of execution of the agreement to the lodgement of this application. It contends that conduct was unreasonable.

[202] I do think it might have been preferable if the basis for the changes to the agreement had been explained when it was provided to Gomeroi, but the correspondence shows Mr Downes was upfront about intending to make this application and his desire to continue negotiating. As I have said, his making the application was unsurprising given the history of the matter to that point. Further, the parties did continue to negotiate. Nothing in Mr Downes' conduct indicates that he was trying to scuttle the negotiations in order to bring this application.

[203] It follows that I am satisfied I have the power to make a determination in relation to this application and will now turn to the matters in s 39 of the NTA.

SECTION 39 INQUIRY

Issues for determination

[204] Under s 38 of the NTA, I am required to make one of the following determinations:

(a) that the grant of the licence must not be done;

(b) that the grant of the licence may be done; or

(c) that the grant of the licence may be done, subject to conditions to be complied with by any of the parties.

[205] The matters that I must take into account in making a determination are those set out in s 39(1) of the NTA. The NTA does not specify the weight to be afforded to each matter listed in s 39 – that will depend on the evidence (see *Western Australia v Thomas* at 166). In considering the effect of the Minister's Consent on the matters listed in s 39(1)(a), I must also take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned and existing use by persons other than Gomeroi (s 39(2) NTA).

[206] Under s 39(4), I must also take into account any relevant issues upon which the parties agree. Further, if all parties consent, I need not take into account the matters mentioned in s 39 to the extent that they relate to agreed issues. In this case there are no matters in that category and I have considered each of the matters in s 39 as set out below.

[207] Gomeroi contends that because Mr Downes is entitled to undertake exploration activities over the majority of the licence area, i.e. in areas where native title is said to have been extinguished, the State or Mr Downes must identify some special, unique or extraordinary feature of the Future Act Area, or otherwise some particular impact or prejudice that would arise from withholding the Minister's Consent.

[208] I do not accept that contention. The Tribunal's task is clear. Each future act must be considered on its merits weighing the criteria in s 39. This future act may affect a relatively small area but the analysis required is the same. The fact that Mr Downes

may hold rights in surrounding areas is not a factor in my analysis of the effect of this future act in accordance with the NTA.

Consideration of section 39 criteria

Effect on the enjoyment of registered native title rights and interests: s 39(1)(a)(i)

[209] Section 39(1)(a)(i) relates to the effect of the Minister's Consent on Gomeroi's enjoyment of its registered native title rights and interests. In this case, the registered native title rights and interests are those described in the entry for the Gomeroi Claim on the Register of Native Title Claims under the NTA (s 30(3) NTA). The registered native title rights and interests include both non-exclusive native title rights and interests and, to the extent capable of recognition, exclusive rights.

[210] Gomeroi argues that the Minister's Consent will affect its registered native title rights and interests and contends that I should assume exclusive native title may be determined over much of the Future Act Area. It approaches this criterion on a theoretical footing advocating an analysis of how the Minster's Consent *may* affect the registered native title rights and interests (see especially Gomeroi reply at paragraphs 98–105).

[211] Gomeroi suggests also that because the evidence suggests there has been no activities under the licence to date the Gomeroi People have not needed to protect and care for the Future Act Area but now they do (Gomeroi reply at paragraph 103). However, the relevant registered native title rights and interests with respect to that point would appear to be the right to "maintain and protect places of importance under traditional laws, customs and practices". There is no evidence with respect to how Gomeroi presently enjoys that right in the Future Act Area or how the Minister's Consent will affect its right do so.

[212] Further, s 39(1)(a)(i) is not a strictly rights based analysis. For the purposes of weighing the matters in s 39, the issue is the extent to which Gomeroi's registered native title rights are *enjoyed* by Gomeroi in the Future Act Area and the effect the future act would have on that enjoyment (see *Weld Range Metals* at [248]; *Australian Potash v Murphy* at [49]–[50]. That approach, which is advocated for by the State, has

been consistently adopted by the Tribunal and that is the approach taken by the Tribunal since the inclusion of the word "enjoyment" in s 39(1)(a)(i).

[213] Gomeroi contends instead that there is nothing express in s 39(1)(a)(i) to support that approach, although the requirement to consider the effect on the *enjoyment* of the registered native title rights counts against that view.

[214] None of the evidence provided by Gomeroi goes to the enjoyment by the Gomeroi People of the registered native title rights and interests in the Future Act Area.

[215] At paragraph 77 of its contentions, Gomeroi contends that each of the registered native title rights is currently exercised and enjoyed by the Gomeroi People in the Future Act Area. Again, there is no evidence provided by Gomeroi to support that contention.

[216] On the basis of the evidence provided, there is nothing before me to indicate the grant of the Minister's Consent will have any effect on Gomeroi's enjoyment of its registered native title rights and interests in the Future Act Area.

Effect on way of life, culture and traditions: s 39(1)(a)(ii)

[217] Gomeroi contends that the way of life, culture and traditions of Gomeroi as they relate to the Future Act Area are described in the affidavits of Mr Talbott and Mr Livermore.

[218] It says the Gomeroi People's way of life primarily consists of physical use of the land and its resources and its obligations to care for, maintain and pass on connection to the land. It says further that its cultural, physical and spiritual way of life will be disrupted and detrimentally affected by Mr Downes' exploration activities but it does not say how.

[219] Mr Livermore outlines (at paragraphs 12, 21–26) traditional practices, particularly his experience in making spears, *nulla nullas*, shields and *coolamons* but this evidence does not relate to the Future Act Area. He also speaks of the importance of caring for country and intergenerational teaching (at paragraph 25). Mr Talbott also outlines Gomeroi's obligations to country in his affidavit (at paragraphs 28–32).

[220] Mr Downes says the Minister's Consent will have limited effect because there is limited evidence from Gomeroi of what that effect might be, Environment Protection

Conditions would minimise impact and access would only be restricted to small areas at any given time such that any effect will be short term and isolated.

[221] The State contends similarly that, as there is no evidence of contemporary use of the licence area generally or the Future Act Area specifically, there is no evidence that establishes any effect on the matters in this criterion.

[222] Other than the general concerns expressed by Mr Livermore and Mr Talbott about the potential impact of any proposed prospecting activities on cultural heritage protection and the importance of Gomeroi's involvement in that protection, there is no evidence that the Minister's Consent will have any effect on the matters in this criterion.

Effect on development of social, cultural and economic structures: s 39(1)(a)(iii)
Effect on freedom of access to the land or waters and freedom to carry out rites, ceremonies or other activities of cultural significance in accordance with traditions: s 39(1)(a)(iv)

[223] Gomeroi contends that the historic and ongoing effects of colonisation and dispossession of land have had a profound effect on the Gomeroi People's social, cultural and economic structures. It says, therefore, that the protection of culture and heritage and the intergenerational transmission of knowledge is of key importance to the Gomeroi People.

[224] It contends that the continuity of intergenerational communication of culture is disrupted by the impacts of exploration activity and restriction of access to country and this disruption would be further compounded by the Minister's Consent. There is no evidence to support these contentions.

[225] Mr Downes contends that the Minister's Consent will have a limited effect on the matters in s 39(1)(a)(iii) and (iv) because there is limited evidence with respect to any such access, the Environment Protection Conditions would minimise any impact and the nature of the prospecting activities means that any restriction of access would be to relatively small areas for relatively short periods. He also says that he would not object to any requests from Gomeroi to access drill sites for the purposes of carrying out rites and ceremonies, subject to compliance with any health and safety requirements.

[226] The State contends that Gomeroi has not provided any evidence of any social, cultural or economic structures or access to the Future Act Area that would be affected by the Minister's Consent.

[227] Gomeroi does not address any of these matters in its reply.

[228] While I can accept the importance of the protection of culture and heritage and the intergenerational transmission of knowledge to Gomeroi, there is no evidence of any such activities in the Future Act Area and no basis to conclude those structures or access will be affected by the Minister's Consent.

Effect on any area or site of particular significance to Gomeroi on the land or waters concerned: s 39(1)(a)(v)

[229] The material provided by both the State and Mr Downes indicates that there are no recorded Aboriginal sites or areas either in the licence area or in the Future Act Area. However, an absence of recorded sites is not determinative of whether there are any areas or sites of particular significance to Gomeroi in the area (see *Little v Lake Moore Gypsum* at [67]).

[230] A site or area of *particular* significance is a site or area of more than ordinary significance to Gomeroi. The site or area must be able to be located in the relevant area and the significance in accordance with Gomeroi tradition explained (see *Jax Coal v Smallwood* at [69]).

[231] Gomeroi contends that Mr Livermore deposes to his familiarity with the area around the licence, including through conducting cultural heritage assessments, although he says he has not visited the licence area itself (Livermore affidavit at paragraph 8).

[232] In relation to stories and sites in the vicinity of the licence Mr Livermore says:

> 13. I have heard stories about the area around EL 8492 including one about Red Chief who was a Gomeroi warrior from Gunnedah. He had a fight with the Anaiwan mob because they were coming on to Gomeroi country and taking the Gomeroi women. The fight between Red Chief and the Anaiwan mob would have taken place in that area around Bingara, Barraba and Kingstown according to the story that's told in that neck of the woods.
>
> 14. There is also the Turkey Dreaming Songline which runs northwest from Bulagaranda (Mt Yarrowyck) near Armidale to the Nandewar Ranges near Narrabri. Rock art in Bulagaranda depicts brush turkeys and those same stories about turkeys are in the Nandewar Ranges and Mount Kaputar near

> Narrabri. The area in between these mountains is connected. The old fellas would have been up on those mountaintops when they were travelling, because they travelled along the ridgelines. When you're on the top of the hills, you can see the Nandewar Ranges and they seem close and you can understand how the country connects. Gulf Creek in particular is on a hill in between those spots and from up high you can see how the landscape connects between sites.
>
> 15. My Mother and Aunty used to tell a story about a Yowie near Stoney Creek Mission, which is just outside Tingha. The mission was revoked in 1914. My grandparents used to trap rabbits out there. They would set all the traps and then the kids (my Mother and Aunties mainly) would have to check them either at night or early in the morning with my Grandfather. They told me that there was a big old mulberry tree near where they were checking the traps, and one time when they were checking the traps the mulberries were ripe and they wanted a feed. They told me that when they approached the tree this big thing was climbing down out of it and ran off into the hills and they reckoned it was a Yowie.
>
> 16. My cousin owned a property on Bassendean Rd at Tingha which is approximately 5 kms from where my Mother and Aunties saw the Yowie – she told me what happened a few years ago. She had people staying in the shed. My cousin and her daughter went out there for a yarn with the guests in the night. As my cousin was nearing the gate she saw something she thought was a horse – but as she got closer it ran off into the dark. She said it was a Yowie.
>
> 17. A lot of the stories I was told as a kid were about staying safe around water. For example, I was told to keep away from the river and creek in case the Ti Tree Woman came and ate you all up. All that she leaves behind are people's bones.

[233] While I accept Mr Livermore's evidence, it is general in nature and speculative with respect to any sites or areas in the licence area. The evidence is insufficient for me to conclude that there are any areas or sites of particular significance to Gomeroi within the Future Act Area.

[234] Mr Talbott's evidence also does not refer to any sites or areas of particular significance. He does speak of the importance of ensuring that cultural heritage is properly assessed and managed by Gomeroi as a group and of the need for a survey of the entire licence area (Talbott affidavit at paragraphs 28–33).

[235] Mr Downes' relies on the 18 November 2020 inspection of Lot 7300 undertaken by Mr Talbott. The draft due diligence report arising from that inspection notes that no sites were recorded.

[236] Mr Talbott's evidence is at odds with this report. He says:

> 13. In or around early November 2020, I went to the Barraba Copper Project with Lance and another man whose name I forget.

14. We surveyed a small area within exploration licence 8492. The area we went to was on someone else's private property. I knew that because we had to travel through gates and Lance told me it was private property. You could see the old footings and left-over infrastructure from the previous drill sites of the copper works. In total the area I surveyed was about 200m by 300m at a maximum. It was the area where the tailings from the old mine were and there was a lot of disturbance. Overall, the survey was brief and took approximately one and a half to two hours. I did not find any artefacts or Aboriginal cultural heritage during the survey.

15. A complete Aboriginal cultural heritage assessment would involve site officers walking over the whole foot print of an exploration licence so that all Aboriginal cultural heritage can be identified, assessed and managed. I told this to Lance while we were undertaking the assessment. I can't recall the exact words, but I said words to the effect of:

    a proper cultural heritage assessment of the whole exploration licences needs to be done.

16. I did not identify any Aboriginal sites or objects in the area that we surveyed. We spent maybe an hour or two out there. It wasn't a long time.

17. While we were doing the survey, Lance pointed out the areas of the exploration licence which were the native title lots but we did not survey those areas. We didn't go out to the native title lots because for that survey we were only doing the three drill sites which they wanted to test.

18. While on the survey Lance gave me a map showing the exploration licence and which parcels were native title land and which were private property. The survey was limited to the areas where they wanted to put in those first drills holes. Based off my experience doing cultural heritage work in the past where the entire footprint of an exploration licence or mine is surveyed, I was under the impression we would come back and survey the remaining areas later.

19. The corner of the native title area I could see was really bushy and hilly but we didn't go onto those parcels.

20. After the survey, I wrote a small report for the area we surveyed for the three drill pads sites. I have moved house recently. I have not been able to find a copy of that report.

21. As I remember it, the report, more or less said, that from a cultural heritage perspective I didn't have a problem with the explorer's drilling in that site, and that the assessment had identified no issues in that smaller area but the whole area needs to be assessed.

[237] The copy of the map provided to Mr Talbott has not been provided.

[238] Mr O'Kane's affidavit attaches an email to him from Mr Rampe dated 20 December 2021 which advises that the site inspection occurred within Lot 7300 at the planned location of the proposed drill holes identified as GCDH1, GCDH2, GCDH3 and 3A and GCDH 4 and 4A. Mr Rampe says these locations are shown on a map attached to his email but, again, that map does not appear to have been provided. However, those locations are identified on Figure 2 of the draft Due Diligence Report entitled "Proposed Drilling Area".

[239] It seems likely that the inspection was conducted over Lot 7300 as evidenced in the draft report. Firstly, it is unlikely Mr Downes would be interested in conducting a site inspection over other areas, when Lot 7300 is the area he wishes to explore initially. Secondly, Mr Talbott's evidence is that the previous drill sites were visible which is consistent with it being the site of the old Gulf Creek Copper Mine on Lot 7300.

[240] In any event, there is no evidence of any sites or areas of particular significance in the Future Act Area, so the site inspection does not alter my conclusion for this criterion.

Interests, proposals, opinions or wishes of Gomeroi in relation to the management, use or control of land or waters affected by the licence: s 39(1)(b)

[241] Gomeroi's view is that the Minister's Consent should not be given, relevantly due to the cultural heritage and environmental impacts of the act (of which there is no evidence). In that respect, Mr MacLeod deposes that he attended a meeting of the Gomeroi Applicant on 4 November 2021 at which the following resolution was passed:

> *The Gomeroi Applicant resolves that:*
>
> 1. *under Gomeroi lore and customs, Gomeroi People have the authority to make decisions about the management, use and control of Gomeroi land;*
> 2. *the exploration under EL8492 should not go ahead as it will negatively impact the native title rights and interests of the Gomeroi People including:*
>   a. *the Aboriginal cultural heritage in that area;*
>   b. *The impacts on biodiversity of flora and fauna; and*
>   c. *Other environmental concerns including soil erosion.*
> 3. *if the exploration under EL8492 does proceed despite the Gomeroi Applicant's wishes, it must be in accordance with an agreement with the Gomeroi People, which has been authorised at an in-person meeting of the Gomeroi People native title claim group*
> 4. *any Agreement must only be made with the full free, prior and informed consent of the Gomeroi People native title claim group.*

[242] Mr Downes does not address this resolution in his contentions but refers to paragraph 21 of Mr Talbott's affidavit where he states:

> 21. As I remember it, the report, more or less said, that from a cultural heritage perspective I didn't have a problem with the explorer's drilling in that site, and that the assessment had identified no issues in that smaller area but the whole area needs to be assessed.

[243] Of course that evidence is given in the context that Mr Talbott deposes the inspection did not relate to the Future Act Area.

[244] The State similarly points to evidence from Mr Talbott and Mr Livermore which it says suggests the Minister's Consent could be given if cultural heritage assessments are done.

[245] Gomeroi has not identified any particular proposals or wishes for the Future Act Area, other than that prospecting should not occur unless it is by agreement with Gomeroi. It remains open to the parties to reach agreement and I understand they have continued negotiating, at least until recently.

Economic or other significance of the licence: s 39(1)(c)

[246] Under s 39(1)(c) I am required to take into account the economic or other significance of the licence to Australia, the State, the area in which the licence is located and to the Aboriginal peoples and Torres Strait Islanders who live in that area. This requires an evaluation of the economic or other significance of the licence, rather than consideration of the significance of exploration or mining generally (*Western Australia v Thomas* at 175–176).

[247] Mr Downes contends that the Minister's Consent will provide economic benefits to the region around the licence and the broader State of New South Wales in the form of current and future employment opportunities and direct expenditure.

[248] Mr O'Kane deposes that between December 2019 and December 2020 Comet spent $160,479.00 in respect of its exploration activities on the licence. It is not clear what this amount relates to. Further, there is no evidence of estimated expenditure or employment opportunities arising from the grant of the Minister's Consent.

[249] Mr O'Kane also says that Comet currently pays $2,730 per annum to the State in rent and has paid a $10,000 environmental security bond. Again, the relevance of these amounts to the Minister's Consent and the Future Act Area is not explained.

[250] The State's contentions add little but note that CF-4 includes information about the economic significance of mining generally in New South Wales. That is a matter which can be considered in the context of the public interest. As contended by

Gomeroi, the State's material does not establish any economic significance of the relevant future act.

[251] I can infer from the proposed prospecting activities that there will be at least some expenditure associated with prospecting activities on the Future Act Area but that amount is not quantified by Mr Downes. On the extent of the evidence provided, with respect to Mr Downes' proposed activities and area of interest, I conclude that the economic significance of the Minister's Consent is minimal.

Public interest in the grant of the licence: s 39(1)(e)

[252] Section 39(1)(e) requires the Tribunal to consider whether there is any public interest in the grant of the licence. This expression has been described as importing a discretionary value judgment made by reference to undefined factual matters, and only confined by the subject matter, scope and purpose of the legislation (see discussion in *Minister for Lands v Thalanyji* at [266]). There can be a public interest in the act proceeding or not proceeding, and the public interest is not limited to economic considerations (*Western Australia v Thomas* at 176).

[253] Mr Downes points to the public interest in maintaining a viable mining industry, including exploration.

[254] The State contends that because the Minister's Consent relates to exploration, rather than the creation of a mine, the principal interest to the public is that Mr Downes' prospecting will provide a better understanding of the mineralisation in the exploration area. It says this will result in data being added to the public domain for further exploration and research and, if the exploration program is successful, may enable further economic development in the region.

[255] Further, the State contends, citing *Cheedy*, that Gomeroi has not established that there will be anything more than a nominal effect on Gomeroi's rights and interests. In *Cheedy* at [138], the Full Court of the Federal Court, stated:

> Whilst it may be accepted that mining developments generally are in the public interest, it may be necessary in other circumstances for the Tribunal to consider the public interest in the particular project rather than by reference to the mining industry in general. For instance, if a project is insignificant in scope, or marginal in profit terms, the public interest in the particular mine may not outweigh the impact on the cultural and religious interests of the particular indigenous people. If the consideration

> of the public interest is limited to the benefit of mining in Western Australia in general, an argument may lie in other circumstances that the Tribunal has had regard to an irrelevant consideration. What is relevant is the effect of the particular mining project on the particular rights and interests asserted in that area.

[256] Gomeroi contends that the Minister's Consent will only serve Mr Downes' private interests. It seeks to distinguish the Western Australian mining industry as considered in *Western Australia v Thomas* and the mining industry in New South Wales in 2022. It also relies on *Holocene* which recognised the public interest in protecting places of public interest to Aboriginal peoples. No doubt that is correct, however, in *Holocene* the Tribunal had found there were sites or areas of particular significance in the relevant area, which is not the case here.

[257] The State has provided some general information about the value of the mining industry to New South Wales in CF-4, including the Minerals Industry Action Plan dated 6 November 2015 and a report on the Future of Minerals in NSW dated March 2020 which includes information about the contribution of the mineral industry to the State's economy. I accept that there is public interest in the Minister's Consent in the context of its contribution to that industry.

Any other matter the Tribunal considers relevant: s 39(1)(f)

[258] There are no other matters that I consider relevant to my determination in this matter and none proposed by any party.

Should the Minster's consent be given and, if so, should conditions be applied?

[259] Having weighed the matters under s 39 of the NTA, as outlined above, I am satisfied that the Minister's Consent may be given.

[260] As already mentioned, on 18 February 2022, Gomeroi sought conditions be imposed on the grant, in the event that I concluded (as I have done) that the Minister's Consent may be given. This occurred after the parties had submitted all of their material for the inquiry and after each had confirmed they were content for the matter to be decided on the papers. The conditions proposed by Gomeroi are included at Annexure A.

[261] The Tribunal sought comments from the other parties. The State advised it did not have any comments given Gomeroi's conditions did not seek to impose obligations on the State.

[262] Mr Downes provided extensive submissions outlining why it is inappropriate to "re-open" the proceeding and why the conditions proposed by Gomeroi are not appropriate. Mr Downes also proposed alternative conditions as set out in Annexure B, modelled on those imposed relatively recently by Member Shurven in *Atlas Iron*, in the event that I did "re-open" the inquiry.

[263] Gomeroi sent a reply on 1 March 2022 stating that the circumstances leading to its request to the Tribunal to consider imposing conditions could not properly be considered a "re-opening" of the case. It says that it was only recently able to confirm the date for the Gomeroi claim group meeting and, once the possibility of resolving the matter by agreement was ruled out, it made its request to the Tribunal. It says that in those circumstances, Gomeroi's request that the Tribunal consider imposing conditions on any determination, and the timing of that request, was appropriate and reasonable.

[264] Further, Gomeroi argues that Mr Downes has not identified any basis on which it could be said that the request has or would cause it prejudice. On the contrary, it says, Mr Downes was provided a reasonable opportunity to respond and availed itself of that opportunity by providing 13 pages of further contentions. Given that the Tribunal is not bound by procedural technicalities, and where Mr Downes has been provided procedural fairness and there is an absence of any evidence of prejudice, the interests of justice weigh in favour of the Tribunal considering Gomeroi's request for it to impose conditions.

[265] I do not find the reason for the late request at all persuasive. For as long as the inquiry remained on foot, there remained a risk that a decision would be made before such time as the parties could conclude an agreement. Gomeroi could have easily argued for conditions in the alternative, as it has now. There is no excuse for such a request to be made so late.

[266] However, this proceeding is an inquiry and not necessarily limited to the information provided by the parties (see generally *Hale* at [98], [100]). To the extent that I

determined that the Minister's Consent may be given and that it should be given on conditions to be imposed on the parties, then it is relevant for me to have the parties' views as to what those conditions should be. In the ordinary course, if I determined that the Minister's Consent may be given subject to conditions, then I would have sought comments from the parties on any proposed conditions.

[267] However, based on the evidence provided, I have not concluded that it is necessary to impose any conditions on the Minister's Consent and am not persuaded by Gomeroi's contentions to the contrary. There is no evidence of any sites or areas of particular significance to Gomeroi. I accept that Gomeroi would like a survey to be undertaken before any works occur and that is a matter which is open to them to agree with Mr Downes. However, a need for conditions is not supported by the evidence and not agreed. In that respect, I also refer to my recent comments in *Purse v GKAC* at [71].

[268] I can say, however, that had I determined that the Minister's Consent should be given subject to conditions, I would not have imposed the conditions proposed by Gomeroi. While the Tribunal has a broad discretion in relation to conditions, they should be generally matters in connection with the matters relevant to the inquiry (see *Muccan Minerals* at [157]). Gomeroi's proposed conditions reach far beyond the Future Act Area and the matters in s 39 of the NTA.

Determination

[269] I determine that the Minister's Consent in relation to EL8492 may be given.

Nerida Cooley
Member
31 March 2022

Annexure A

Conditions sought by Native Title Party on determination that the future act may be done

Defined Terms

Aboriginal Cultural Heritage means any object, remains, place, practise or tradition that holds important spiritual, emotional, cultural or physical significance (whether it be material or intangible) to the Gomeroi native title claim group.

Avoidance Principle means to avoid harm to Aboriginal Cultural Heritage and, to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal Cultural Heritage

Clearance means the process of inspecting the land to identify anything that may be Aboriginal Cultural Heritage including any archaeological or historical site or object ('clear', 'cleared', 'clearing' and ‘clearances’ have corresponding meanings).

Clearance Report means a written report concerning the nature and extent of any Aboriginal Cultural Heritage in relation to an area the subject of a Clearance and the recommendations for implementing the Avoidance Principle in relation to any Clearance provided by the Specialist

Environmental Legislation means any means any statute, regulation, by-law, proclamation or other regulation of Australia or New South Wales which has as one of its principal objects, purposes or effects, any one or more of:

(a) the protection of the environment;

(a) the prevention, control, abatement remediation, mitigation or investigation of pollution or contamination or their effect; or

(b) the regulation of waste, waste generation, waste disposal and discharges to the environment.

Exploration Activities means activities done pursuant to, or giving effect to, the Exploration Licence.

Exploration Area means the area covered by the Exploration Licence.

Exploration Licence means Exploration Licence 8492.

Explorer mean Jonathon Downes, or any subsequent holders of the Exploration Licence.

Force Majeure means acts of God, flood, fire or damage caused by lightening, storm, tempest, unseasonable rains, strikes, lockouts or other industrial disturbance, riots, blowouts, laws, rules, regulations, or directions of a governing body having jurisdiction over the Exploration Licence Area, religious or other ceremonial activities of members of the Native Title Party, inability to obtain equipment or material or any other causes which by the exercise that party is unable to prevent or overcome.

Gomeroi Claim means the Gomeroi People native title determination application (NSD 37/2019)

Gomeroi native title claim group means the native title claim group as defined by sections 253 and 61(1) of the Native Title Act 1993 (Cth) in relation to the Gomeroi Claim from time to time

Native Title Party means the registered native title claimant in relation to land the subject of the Exploration Area, being the person or group of persons whose name or names appear from time to time in an entry on the Register of Native Title Claims as the applicant in relation to the Gomeroi Claim.

Party/Parties means the Native Title Party and/or the Explorer.

Operations Area means the area in relation to which the Explorer proposes to do Exploration Activities.

Specialist means a suitably qualified archaeologist, ethnographer, anthropologist or other heritage professional.

Access

1 Any right of the members of the Gomeroi native title claim group to access or use the Exploration Area is not to be restricted except in relation to those parts of the Exploration Area which are actively used for exploration activities or for safety or security reasons relating to those activities. **Safety or security** reasons means any belief held by the Explorer on reasonable grounds that there is a hazard to the health or safety of any person, or a reasonable risk of destruction to property or damage to property or unauthorised use of facilities or equipment in the Exploration Area.

Site visit

2 Prior to commencing Exploration Activities, the Explorer must facilitate and pay the reasonable costs of the members of the Native Title Party undertaking a site visit of the proposed Exploration Activities.

Clearance

3 The Explorer must not conduct Exploration Activities over any part of the Exploration Area unless it has first caused a Clearance to be conducted over the whole of the area in relation to which the Exploration Activities are proposed to be done.

4 If the Explorer proceeds with Exploration Activities, the Explorer will at the first available opportunity, involve the Native Title Party in the Clearance as follows:

(a) The Explorer will notify the Native Title Party of the name of the representative of the Explorer responsible for Exploration Activities from time to time on the Exploration Licence, such notice to be given 14 days in advance in writing where practicable.

(b) The Explorer will inform all of its contractors, employees, agents and visitors of the obligation upon them to contain Exploration Activities within Operation Areas which have been the subject of a Clearance.

5 At least 90 days in advance of Exploration Activities being commenced on the Exploration Licence, the Explorer must give a written request for a Clearance accompanied by particulars in writing of the following parts of the Explorer's proposed work program, namely:

(a) the proposed location of access roads;

(b) the proposed approximate location of Operation Areas;

(c) the major items of equipment proposed to be used;

(d) the location of any proposed earthworks for the stockpiling of soil and disposal of any waste material arising out of the proposed Exploration Activities;

(e) the location of any proposed earthworks for minimising environmental disturbance or pollution, including oil or water spills and blowouts;

(f) any other aspect of the Exploration Activities which is likely to have an adverse impact upon or cause substantial disturbance to Aboriginal Cultural Heritage in any part of the Exploration Licence.

Conduct of the Clearance

6 The Clearance must be conducted by:

(a) a suitably qualified Specialist, nominated by the Native Title Party, engaged and paid for by the Explorer, and

(b) up to a maximum of four members of the Gomeroi native title claim group nominated by the Native Title Party (**nominated persons**). Nomination by the Native Title Party must be in writing and include full contact particulars of the nominated persons who shall be physically capable of safely walking the distances required of the Clearance. The Explorer will nominate a representative to assist the nominated persons for the duration of the Clearance. The Native Title Party will ensure the nominated persons are ready to commence Clearance work within 40 days after the provision of particulars of the proposed work program, or such shorter time as may be agreed between the Parties from time to time;

(c) Subject to any law, the Clearance must be completed within 50 days of the Native Title Party's nomination, with the Parties cooperating in good faith on the conduct of the Clearance.

7 If during the conduct of the Clearance, the Native Title Party or their Specialist identify any Aboriginal Cultural Heritage that might be a basis for the denial of a Clearance or the imposition of conditions in respect to that Operations Area, the Native Title Party or its Specialist, will as soon as possible inform the Explorer to enable it to nominate an alternate Operations Area or some other method of applying the Avoidance Principle.

Clearance Report

8 The Native Title Party must either themselves or through the Specialist promptly notify the Explorer upon completion of a Clearance and, as soon as practicable, but no later than 28 days after the completion of the Clearance, the Native Title Party either itself or through the Specialist must provide a Clearance Report to the Explorer. The Report must:

(a) identify those parts of the Operational Area which are given Clearance by the Native Title Party or denied Clearance by the Native Title Party;

(b) identify any alternative Operational Areas for which Clearance is given in accordance with the requirements and describe any conditions on which the Native Title Party has provided in the Clearance so as to implement the Avoidance Principle.

Payment for Clearance

9 The Explorer must pay all reasonable costs, fees, disbursements and expenses incurred by the Native Title Party in carrying out a Clearance and provision of the Clearance Report, subject to any agreement in writing between the Parties. The carrying out of a Clearance shall include all reasonable costs associated with the coordination of the personnel, travel, meals, fees for service of the Specialist and nominated persons, accommodation and other allowances, and the drafting, review and approval of any Clearance Report. This is not intended to include the costs of other members of the Native Title Party who may attend as observers to the Clearance.

Confidential cultural information

10 Nothing in these conditions compels or requires the Native Title Party or any other person to disclose to the Explorer or to the Explorer's representative the location of Aboriginal Cultural Heritage, or any cultural information deemed to be confidential by the Native Title Party whatsoever with respect to the Exploration Area.

Cultural Heritage monitoring

11 During any Ground Disturbing Exploration Activities, the Explorer must engage a person nominated by the Native Title Party to monitor those works for compliance with these conditions, and to assist with any unexpected finds of Aboriginal Cultural Heritage.

Cultural Awareness

12 The Explorer must ensure all employees, contractors and sub-contractors who may be involved in Exploration Activities conducted on the Exploration Licence, have undertaken Gomeroi cultural awareness training such that those persons have an awareness and an understanding of:

(a) native title and the relationship between the Native Title Party and the Exploration Area, and in particular the relationship between the Native Title Party and its cultural heritage; and

(b) its obligations under the National Parks and Wildlife Act 1974 (NSW), the Aboriginal and Torres Strait Islander Heritage Protection Act (1984) (Cth), the Native Title Act, and these Conditions in relation to abiding by and implementing the Avoidance Principle.

13 The Gomeroi cultural awareness training must be delivered by a business or entity nominated by the Native Title Party, and engaged by the Explorer.

14 If, at any time in the course of carrying out Exploration Activities the Explorer or any person acting on behalf of the Explorer (despite a Cultural Report or Clearance Report) identifies anything that may be Aboriginal Cultural Heritage including any archaeological or historical site or object, or any site or object which the Explorer or any person acting on behalf of the Explorer suspects to be Aboriginal Cultural Heritage, then in addition to obligations under the National Parks and Wildlife Act 1974 (NSW), the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), and these Conditions, the Explorer will promptly report the location of such site or object to the Native Title Party and will stop work until the Native Title Party has agreed the mitigation measures to be undertaken.

Environmental

15 The Explorer must:

(a) consult with the Native Title Party about any ecological/environmental surveys it proposes to be conducted;

(b) ensure the early involvement of the Native Title Party in environmental planning;

(c) involve the Native Title Party and engage Gomeroi businesses in any rehabilitation work of the areas affected by the Exploration Activities.

16 The Explorer shall comply with Environmental Legislation and use best endeavours to ensure that all Exploration Activity undertaken in relation to the Exploration Area is conducted so as to:

(a) minimise any adverse environmental impact;

(b) disturb the least amount of soil and vegetation;

(c) ensure the protection of animal corridors;

(d) prevent erosion to the extent reasonably practicable;

(e) prevent the introduction of non-native flora and fauna.

(f) ensure the use of bush tucker in regeneration;

(g) ensure the protection of culturally significant flora and fauna;

(h) ensure the protection of water on the Exploration Area (both surface and ground water);

(i) present air pollution.

17 Without limiting the generality of this clause, the Explorer shall:

(a) where it is the recommended best practice for any particular location, replace topsoil removed from disturbed areas to assist reseeding and regeneration of local native flora;

(b) remedy any erosion of disturbed areas caused by the Exploration Activity;

(c) seal all drill holes and backfill trenches;

(d) leave the surface in a safe condition and in a reasonable contour having regard to the state of the surface area and its contour prior to the Exploration Activity; and

(e) rehabilitate areas as soon as practicable after the conclusion of the Exploration Activities.

18 In the event that the Explorer intends to seek a variation to obligations imposed upon it under Environmental Legislation, the Explorer shall

(a) notify the Native Title Party in writing detailing the nature and the reasons of the variation and requesting that the Native Title Party provide any comments on the variation sought within 10 business days of receipt of the advice; and

(b) submit any comments received from the Native Title Party together with the application for variation to the relevant agency or authority.

19 The Explorer will notify the Native Title Party in the event that the variation is granted as a result of the application.

Employment and training

20 The Explorer will use best endeavours to provide employment, contracting and other economic opportunities for the Gomeroi native title claim group in relation to the Exploration Activities within the Native Title Claim area, and will notify the Native Title Party of employment and contracting opportunities as they arise in relation to the Exploration Activities.

Notice of further approvals

21 The Explorer must give the Native Title Party notice of any further approvals it has applied for (or modifications thereto) in order to undertake the Exploration Activities.

Assignment

22 Upon assignment of the Exploration Licence, the Explorer must ensure the assignee is bound by these conditions.

Trust condition

23 The Explorer must pay $50,000 into trust until it is dealt with in accordance with section 52A of the *Native Title Act 1993* (Cth).

Resolution of Disputes

Notice of Dispute

24 If:

(a) any Party considers that the other Party has breached any condition; or

(b) in the event of any dispute between the Parties in respect of these conditions,

(each a dispute) a Party may serve a written notice of the dispute containing full particulars of the dispute on the other Party. The Parties must attempt to meet, discuss and resolve the dispute within 14 days of a Party receiving a notice of dispute.

Mediation

25 If the dispute cannot be resolved within 14 days of one Party giving the other Party notification of the dispute, if all Parties agree, the dispute may be referred to mediation.

(a) Where a matter is referred to mediation the Parties will attempt to agree to the appointment of a mediator. Failing agreement, the mediator must be a suitably qualified person nominated by the President (or President's delegate) of the New South Wales Law Society.

(b) In a mediation session, each Party may be represented by a qualified legal practitioner.

Determination by Court or Tribunal

26 If:

(a) the Parties fail to refer a dispute to mediation pursuant to condition 25; or

(b) the Parties fail to reach agreement on a dispute within 14 days of the commencement of a mediation pursuant to condition 25,

either Party may refer the dispute to a court or tribunal of competent jurisdiction.

No Premature Legal Action

27 No Party will commence any legal action in a court or tribunal until the dispute resolution procedures outlined in condition 24 and 25 have been exhausted.

Urgent Injunctive Relief

28 Nothing prevents a Party from seeking any urgent injunctive relief in relation to a dispute.

The Explorer may continue Exploration Activities

29 Notwithstanding the existence of any dispute, the Explorer may continue with its Exploration Activities until the dispute is determined or agreed provided that the Explorer complies with any order or direction made by a tribunal or court which determines the dispute or any agreement made in relation to the dispute.

General

The Explorer must take all reasonable action to ensure compliance with these conditions by its employees, agents and contractors.

Annexure B

Conditions

1. If the Grantee Party wishes to conduct prospecting involving ground disturbance over an area of EL8492 where native title has not been extinguished and which has not previously been subject to a survey, then a survey must be undertaken before such prospecting commences. Prospecting has the meaning in the *Mining Act 1992* (NSW).

2. A survey for condition 1 must be conducted by a suitably qualified archaeologist, ethnographer, anthropologist or other heritage professional, paid for by the Grantee Party and up to three members of the Native Title Party (nominated persons). Nomination by the Native Title Party must be in writing and include full contact particulars of the nominated persons.

3. The Grantee Party must pay the reasonable costs of the nominated persons' attendance and participation in the survey. This is not intended to include the professional costs of legal or other representation or advice.

4. The Grantee Party must give written notice to the Native Title Party of its intention to conduct the survey and when giving notice must include a suitable topographical map showing the areas proposed to be surveyed. If, within 30 days of receipt of the notice, the Native Title Party fails to nominate any persons for the survey, then the Grantee Party need not conduct such survey.

5. Subject to any law, a survey required under condition 1 must be completed within 30 days of the Native Title Party's nomination with the parties cooperating in good faith on the conduct of the survey. If the survey is not carried out in this time due to the failure of the Native Title Party to cooperate in good faith with the Grantee Party, then the Grantee Party need not conduct such survey.

6. The Grantee Party must not disclose to any person any confidential information given to it by the Native Title Party regarding Aboriginal cultural heritage or cultural information, during or as a result of the survey, except (and only then on a confidential basis):

    a. with the written consent of the Native Title Party; or
    b. to a bona fide prospective assignee of the lease; or
    c. to an actual assignee of the lease; or
    d. to its employees, agents, contractors and consultants for the sole purpose of
    e. ensuring that no Aboriginal sites or cultural heritage are interfered with and as
    f. far as the information relates only to the location of those areas; or
    g. as required by law; or
    h. for a purpose under the *National Parks and Wildlife Act 1974* (NSW).