NATIONAL NATIVE TITLE TRIBUNAL

***Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2);Brendan Wyman & Ors (Bidjara People)/Queensland*, [2012] NNTTA 93 (23 August 2012)**

Application No: **QF12/2**

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

and

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

Xstrata Coal Queensland Pty Ltd, Sumisho Coal Australia Pty Limited,
ICRA Rolleston Pty Ltd
(Grantee party)

- and -

Mark Albury, Charles Stapleton, Sharleen Leisha, Marlene Leisha, Carol McLeod & Anor on behalf of Karingbal #2 **(First native title party)**

Brendan Wyman, Patricia Fraser, Helen Coulahan, Sheryl Lawton, Keelen Mailman, Robert Raymond Robinson, Floyd Robinson, Randall Johnson and Robert Ernest Mailman on behalf of the Bidjara People **(Second native title party)**

- and -

State of Queensland **(Government party)**

DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN INQUIRY

Tribunal: **Graeme Neate**
Place: **Brisbane**
Date: **23 August 2012**

Hearing Dates: 19 March, 17 April, 27 April, 30 April, 9 May 2012

Representatives:

First Native title party: Redmond & Redmond, Solicitors

Second native title party: Mr Trevor Hauff, Trevor Hauff Lawyers

Grantee parties: Mr Ben Zillmann and Ms Caitlin Wilson, Allens

Government party: Ms Sara Newrick, Lawyer, on behalf of the Department of Natural Resources and Mines

Catchwords: Native title – future act – proposed grant of Mining Lease – future act determination application – two native title parties – separate negotiations about grant of proposed tenement – whether Grantee party and Government party negotiated in good faith with each native title party – directions restricting disclosure of some evidence – legal principles on good faith negotiations

Native title – future act – First native title party – whether Grantee party and Government party negotiated in good faith – apparent split in native title party – failure of Government party to make an offer – whether Government party failed to negotiate – transfer of the Government party's obligation to pay compensation to the Grantee party – 'dual deed' system – Grantee party's offer of compensation – basis for calculation of offer – whether taking a rigid or non-negotiable position – whether a 'sham' or unrealistic offer – whether failure of Grantee party to consider issues raised by ss. 33 and 39 of Native Title Act – quality of the parties' conduct.

Native Title – future act – Second native title party – whether Grantee party and Government party negotiated in good faith – delay in assertion that the Government party did not act in good faith - failure of the Government party to meet with or contact the native title party – 'dual deed' system – transfer of the Government party's obligation to pay compensation to the Grantee party – failure to agree to payments of costs associated with negotiation meetings – Grantee party's offer of compensation – basis for calculation of offer – whether taking a rigid or non-negotiable position – whether a 'sham' or unrealistic offer - failure by Second native title party to make counter proposals – failure of Grantee party to consider issues raised by s.33(1) of Native Title Act – quality of the parties' conduct.

Legislation: *Aboriginal Cultural Heritage Act 2003* (Qld)

Mineral Resources Act 1989 (Qld)

Mining Act 1978 (WA)

Native Title Act 1993 (Cth) – ss. 24MB, 24MD, 26, 29, 30, 30A, 31, 33, 35, 36, 38, 39, 48, 51, 51A, 53, 75, 123, 154, 155, 162, 164, 190B, 238, 240

Cases: *Austmin Platinum Mines Pty Ltd v Western Australia* (2010) 258 FLR 216

Brownley v Western Australia (1999) 95 FCR 152

Cox v Western Australia (2008) 219 FLR 72

Crowe v Western Australia (2008) 218 FLR 429

Drake Coal Pty Ltd v Smallwood (2012) 257 FLR 276

FMG Pilbara Pty Ltd v Cox (2009) 175 FCR 141

FMG Pilbara Pty Ltd/Cheedy/Western Australia [2009] NNTTA 38

FMG Pilbara Pty Ltd v Wintawari Guruma Aboriginal Corporation (2009) 258 FLR 418

The Griffin Coal Mining Co Pty Ltd v Nyungar People (2005) 196 FLR 319

Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation (2005) 196 FLR 52

Jabiru Metals Ltd v Victoria (2010) 257 FLR 443

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia [2010] NNTTA 211 (19 December 2010) Deputy President Sumner

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon [2006] NNTTA 65 (2 June 2006) Deputy President Sumner

Mt Gingee Munjie Resources Pty Ltd v Victoria (2003) 182 FLR 375

North Ganalanja Aboriginal Corporation & Waanyi People v Queensland (1996) 185 CLR 595

Parker on behalf of the Martu Idja Banyjima People v Western Australia [2007] FCA 1027

Parker v Western Australia (2008) 167 FCR 340, 245 ALR 436

Placer (Granny Smith) v Western Australia (1999) 163 FLR 87

Raymond Dann & Ors (Amangu People)/Western Australia/Empire Oil Company (WA) Limited [2006] NNTTA 153 (24 November 2006) Deputy President Sosso

South Blackwater Coal Ltd v Queensland (2001) 165 FLR 232

Strickland v Minister for Lands for Western Australia (1998) 85 FCR 303

Thomas v Western Australia (1996) 133 FLR 124

Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia, [2003] NNTTA 82 (9 July 2003) Deputy President Sumner

Walley v Western Australia (1999) 87 FCR 565

Western Australia v Daniel (2002) 172 FLR 168

Western Australia v Dimer (2000) 163 FLR 426

Western Australia v Taylor (1996) 134 FLR 211

Western Australia/West Australian Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/ Leslie Hayes, Glenys Hayes, Judy Hayes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the Thalanyji People [2001] NNTTA 18 (9 March 2001) Deputy President Sumner

White Mining (NSW) Pty Ltd v Franks (2011) 257 FLR 205

WMC Resources Limited/Western Australia/Richard Guy Evans (Koara) [2000] NNTTA 259 (7 July 2000) Deputy President Sumner

REASONS FOR DECISION

Introduction

[1] On 8 February 2011, the State of Queensland ('the Government party') gave notice under s. 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant Mining Lease (ML) 70415 ('the proposed tenement') to Xstrata Coal Queensland Pty Ltd (75%), Sumisho Coal Australia Pty Limited (12.5%) and ICRA Rolleston Pty Ltd (12.5%) ('the Grantee party') pursuant to the *Mineral Resources Act 1989* (Qld). In accordance with s. 29(5) of the Act, 30 March 2011 was specified as the notification day.

[2] The notice stated that the grant of the proposed tenement would authorise 'the holder to mine and carry out associated activities subject to the *Mineral Resources Act 1989* (Qld), for a term not exceeding twenty five (25) years, with the possibility of renewals for a term not exceeding twenty five (25) years'. The notice published in the *Koori Mail* on 9 March 2011 stated that the grant would be for a term not exceeding 'thirty (30) years' with the possibility of renewals for a term not exceeding 'thirty (30) years'. No party took issue with the discrepancy between the original notice and the notice published in the *Koori Mail*. No party put in issue whether the notice was provided by the Government party in accordance with s. 29 of the Act. I am satisfied that the notice was validly given and hence have proceeded on the basis that the Tribunal can exercise its power to consider the present application.

[3] *The proposed tenement:* The proposed tenement is described as being located approximately 20 kilometres north-west of Rolleston in Central Queensland, within the local government area of Central Highlands Regional Council. It is approximately 270 kilometres west of Gladstone and 120 kilometres south-west of Emerald. The approximate area of the proposed tenement is 6,271 hectares. If granted, the proposed tenement would form part of the expansion of the existing Rolleston Coal Mine located on ML 70307 and Mineral Development Licence MDL227.

[4] The proposed tenement is one of four mining lease applications made by the Grantee party as part of the Rolleston Coal Expansion Project which, if granted, might extend the life of the Rolleston Coal mine by approximately 20 years to 2045 and increase production from 10 million tonnes per annum up to a total of 20 million tonnes per annum. The other mining lease applications are MLA 70416, MLA 70418 and MLA 70458. The mining lease application area (of which the proposed tenement is a part) covers some 12,500 hectares.

[5] An unusual feature of these proceedings is that the proposed tenement is wholly within the external boundaries of two registered native title claims:

(a) the Karingbal #2 native title determination application (QUD23/06) ('the Karingbal #2 claim') which was entered on the Register of Native Title Claims on 24 March 2006, and

(b) the Bidjara People native title determination application (QUD 216/08) ('the Bidjara claim') which was entered on the Register of Native Title Claims on 12 September 2008**.**

[6] For the purpose of these proceedings, the registered native title claimant for the Karingbal #2 claim is referred to as the 'First native title party' and the registered native title claimant for the Bidjara claim is referred to as the 'Second native title party'. Those native title claims are the subject of proceedings in the Federal Court of Australia. I understand that a hearing in relation to those claims is scheduled to commence not earlier than March 2013.

[7] Although the proposed tenement has an area of 6,271 hectares, the Grantee party contends that native title rights have been extinguished over the majority of the area by previous grants of tenures. A table, 'MLA 70415 Native Title Extinguishment Assessment,' lists nine lots and two roads that together cover the area of the proposed tenement. The tenures include five fee simple parcels, one Grazing Homestead Perpetual Lease, one Grazing Homestead Freeholding lease, one Perpetual Lease and one Lease of Preferential Pastoral Holding. According to the table, the grant of tenures between 1892 and 1986 extinguished native title over all but one parcel.

[8] The only area where native title has not been extinguished is Lot 5055 on PH977, Lease of Preferential Pastoral Holding PPH 37/5055, known as the Mt Kelman pastoral holding. According to the table, the Preferential Pastoral Holding is not a previous exclusive possession act under the Act. It has an area of approximately 1,449 hectares, some 23 per cent of the area of the proposed tenement.

[9] On 4 October 2011, the legal representative of the Grantee party provided the table to the legal representative of the First native title party (and to Daniel Lavery of counsel who was, at that time, representing Charles Stapleton, one of the people who together constitute the First native title party). According to the Grantee party's legal representative, neither of those lawyers nor the First native title party have ever contested the correctness of the

Grantee party's view of the extent of the extinguishment of native title rights and interests in relation to the area of the proposed tenement.

[10] No party has taken issue with the Grantee party's analysis of the effect of tenures on the extent to which native title might or would not be recognised in relation to parcels of land covered by the proposed tenement.

[11] *The negotiations:* The First native title party and the Second native title party is each a negotiation party (s. 30A). In effect, two sets of negotiations were conducted (or attempted) involving the Grantee party and, to a lesser extent, the Government party: negotiations with the First native title party and negotiations with the Second native title party. The bifurcation of negotiations occurred because:

(a) the native title parties were, and are, in dispute as to which group has native title rights and interests in relation to the area of the proposed tenement

(b) the Grantee party needed to reach agreement with each native title party but considered it unlikely that the two native title parties would meet together or that a joint meeting would be conducive to reaching agreement with either

(c) although the Grantee party advised each native title party that it was also negotiating with the other, neither native title party requested a meeting with the other present, and

(d) although the First native title party met with the Grantee party for negotiations, the Second native title party did not do so, as they could not agree with the Grantee party about the funding arrangements for negotiation meetings.

[12] No agreement was reached in accordance with s. 31(1)(b) of the Act with the native title parties about the grant of the proposed tenement.

[13] On 8 March 2012, Allens Arthur Robinson (now Allens), the legal representative of the Grantee party, lodged with the National Native Title Tribunal ('the Tribunal') pursuant to ss. 35 and 75 of the Act, a future act determination application. The application was made more than six months after the notification day (see s. 35(1)(a)).

[14] On 9 March 2012, I was appointed as the Member to constitute the Tribunal for the purpose of conducting the future act determination application inquiry (see s. 123(1)(c)).

[15] A preliminary conference was convened on 19 March 2012. Directions hearings were held on 17, 27 and 30 April 2012 and a listing hearing was held on 9 May 2012. Representatives of parties attended in person or participated by telephone.

Legal representation of the Karingbal #2 people – a preliminary issue

[16] The solicitors on the record for the applicant in relation to the Karingbal #2 claim are Redmond & Redmond. That firm also appears for the First native title party in relation to this future act determination application.

[17] At the time of the preliminary conference on 19 March 2012 there was a possibility that Charles Stapleton, one of the people who together comprise the applicant in the Karingbal #2 claim, might seek to be represented separately in these proceedings by Daniel Lavery of counsel. Mr Lavery was given notice of the preliminary conference but did not appear. Given that Redmond & Redmond are the legal representatives of the First native title party, directions were made to the effect that:

(a) on or before 26 March 2012, Mr Lavery was at liberty to provide to the Tribunal and each of the other parties a submission in relation to whether the Tribunal should permit individual persons who comprise the applicant in the Karingbal #2 claim to be separately represented and to make submissions in relation to this future act determination application

(b) if such a submission was made then, on or before 2 April 2012, the legal representatives of the parties were to provide to the Tribunal and each of the other parties with their submissions in reply.

[18] Mr Lavery did not provide such a submission and took no part in these proceedings.

[19] However, Mr Lavery did take an active role in some of the negotiations between the Grantee party, the Government party and the Karingbal #2 people (or at least the Karingbal person on whose behalf he was acting in a ‘support role in an unpaid capacity’). The practical implications of Mr Lavery’s involvement in the negotiations for one of the issues in these proceedings will become apparent later in these reasons (see the summary at [193] to [196]).

The 'good faith' issue – ss. 31(1)(b), 36(2), 151(2)

[20] Paragraph 31(1)(b) of the Act states that the negotiation parties 'must negotiate in good faith' with a view to obtaining the agreement of 'each of the native title parties' to the doing of the future act or the doing of the future act subject to conditions to be complied with by any of the parties. The term 'negotiation parties' is defined in s. 30A to include the Government party, any native title party and the grantee party. Any negotiation party may, pursuant to ss. 35 and 75, apply to the Tribunal for a determination pursuant to s. 38 if at least six months have passed since the notification day and no agreement of the kind mentioned in s. 31(1)(b) has been made in relation to the future act.

[21] If any negotiation party satisfies the Tribunal that any other negotiation party (other than a native title party) did not negotiate in good faith, the Tribunal must not make a determination pursuant to s. 38 (see s. 36(2)). The implications of s. 36(2) were explained by the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 ('*Cox*') (at [11]) as follows:

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

[22] During the preliminary conference on 19 March 2012, the First native title party and the Second native title party each advised that it would contend that the Grantee party had not negotiated in good faith.

[23] Directions were made on 19 March 2012 requiring any native title party that did not agree or took issue whether the Government party and the Grantee party had negotiated in good faith to provide to the Tribunal and to each of the other parties a statement of contentions and supporting documentary evidence in relation to the good faith issue. Such statements were to be provided by 11 April 2012. That date was varied subsequently to 13 April 2012.

[24] The Government and Grantee parties were required to provide their own statements of contentions and supporting documentary evidence on the good faith challenge by 26 April 2012. That date was varied subsequently to 1 May 2012. The Grantee party and the

Government party each lodged their statement of contentions and supporting documentary evidence with the Tribunal on 1 May 2012.

[25] Each native title party was to reply by 3 May 2012. That date was varied subsequently to noon on 8 May 2012. Those replies were lodged on 8 May 2012 by the First native title party and, without further variation of the Directions, on 10 May 2012 by the Second native title party. By the end of the process it was clear that each native title party also contended that the Government party did not negotiate in good faith with it.

[26] Extensive written statements of contentions and evidence were provided to the Tribunal and the parties in response to Directions made by the Tribunal. I was satisfied that I could make a decision in relation to the good faith issue by considering the documents provided to the Tribunal. In accordance with s. 151(2) of the Act, and with the agreement of the negotiation parties, I decided that a hearing in relation to the good faith issue was not necessary, and have proceeded to deal with the issue 'on the papers'.

Directions restricting disclosure of some documents – s. 155

[27] Some of the dates in the Directions made on 19 March 2012 were varied because subsequently two issues arose in relation to whether restrictions should be imposed on the disclosure of some of the information to be provided to the Tribunal and the negotiation parties in accordance with those Directions.

[28] The first issue arose initially in relation to some paragraphs in the statement of contentions of the First native title party and Attachments 3 and 4 to that statement of contentions. Some of the concerns were resolved in a directions hearing on 17 April 2012. The only remaining issue was whether the information in Attachment 3 (the minutes of the meeting between most members of the First native title party and representatives of the Grantee party, the Government party, and the First native title party on 4 and 5 October 2011, including some material relating to cultural heritage matters) should not be disclosed to the Second native title party.

[29] As noted earlier, the proposed tenement is wholly within the outer boundaries of the Karingbal #2 claim area and the Bidjara claim area. These claims overlap each other and are the subject of proceedings in the Federal Court.

[30] The negotiations between the Grantee party, the Government party and each native title party have proceeded separately. In other words, the negotiations with the First native title party have progressed independently of the negotiations with the Second native title party. Each native title party contended separately from the other that the Grantee party and the Government party did not negotiate in good faith with it.

[31] The First native title party was concerned not to disclose to the Second native title party information, including culturally sensitive information, that was disclosed to the Grantee party and Government party in the course of negotiations on 4 and 5 October 2011. Those negotiations apparently did not involve or refer to the separate negotiations between the Second native title party, the Grantee party and the Government party.

[32] Section 155 of the Act states:

> **Tribunal may prohibit disclosure of evidence**
>
> The Tribunal may direct that:
> (a) any evidence given before it; or
> (b) the contents of any document produced to it;
> must not be disclosed, or must not be disclosed except in such manner, and to such persons, as the Tribunal specifies. This section does not limit the Tribunal's powers under sections 154 and 154A.

Section 154A applies to native title application inquiries, and so does not apply to these proceedings. Section 154 provides that hearings in relation into right to negotiate applications covered by s.75 are to be held in public except in special circumstances. Subsection 154(4) provides that, in determining if part of a hearing is to be held in private, the Tribunal must have due regard to the cultural and customary concerns of Aboriginal peoples.

[33] Section 155 confers a broad discretion on the Tribunal. It does not prescribe the ground or grounds on which directions may be made. By inference from the reference to s. 154, directions may be made to deal with the cultural and customary concerns of a native title party. Having heard from the representatives of each negotiation party on 27 April 2012, and from representatives other than Trevor Hauff (the legal representative of the Second native title party) on 30 April 2012, I was satisfied that directions of this type should be made.

[34] Accordingly, on 27 April 2012, directions were made under s. 155 of the Act to the effect that:

(a) while the Karingbal People #2 continue to assert confidentiality in relation to Attachment 3 to their statement of contentions, the contents of Attachment 3 must

not be disclosed to any person but the Grantee party and the Government party and must only be used for the purposes of these proceedings and any related proceedings, and

(b) any copy of any written submissions or contentions that a party intends to provide to the Second native title party must be edited to ensure that it does not disclose the contents of Attachment 3.

In short, the contents of Attachment 3 are not to be disclosed by any party to the Second native title party.

[35] The second issue arose in relation to certain documents that the Government party intended to provide as some of the annexures to the Affidavit of Julianne Maree Butteriss dated 26 April 2012, which Affidavit is Annexure 7 to the statement of contentions of the Government party. Ms Butteriss is the Principal Project Officer, Senior State Negotiator with the Department of Natural Resources and Mines.

[36] The application for appropriate directions was made by the Government party (rather than the First native title party) because the Government party had in its possession material relating to the First native title party that might be of a culturally sensitive nature. The material had been provided to the Government party in the course of negotiations by or in relation to members of the Karingbal native title claim group rather than by the First native title party. The Government party wanted to include that material as part of its contentions in relation to the good faith issue. In light of the restricted evidence directions made on 27 April 2012 on the ground of cultural concerns advanced by the First native title party, the Government party requested an opportunity to make submissions to the Tribunal in relation to the material.

[37] At the directions hearing on 30 April 2012, the representative of the First native title party supported the application for directions made by the Government party. Directions were made on 1 May 2012 to the effect that:

(a) the contents of specified annexures to Ms Butteriss's Affidavit (which contain information relating to connection material, or sites of significance, or persons with knowledge of Aboriginal traditions, or cultural heritage agreements, or any combination of those topics) must not be disclosed to any person but the Grantee

party and the First native title party and must only be used for the purpose of these proceedings and any related proceedings, and

(b) any copy of any written submissions or contentions that the First native title party intends to provide to the Second native title party must be edited to ensure that it does not disclose the contents of the documents listed in Direction 3.

[38] In the course of the directions hearings on 27 and 30 April 2012, when considering the applications to make directions under s. 155, and the parties' submissions, I made it clear that such Directions would not limit my capacity to rely on, refer to and quote from the restricted material in giving my reasons for decision in this matter.

[39] Such an approach is appropriate, if not necessary, having regard to the sections of the Act pertaining to the conduct of future act determination inquiries, particularly ss. 154, 162 and 164. In addition to the provision that hearings must be held in public except in special circumstances (s. 154), the Act provides that:

(a) after holding an inquiry in relation to a right to negotiate application, the Tribunal must make a determination about the matters covered by the inquiry (s. 162(1))
(b) the Tribunal must state in the determination any findings of fact upon which it is based (s. 162(2)), and
(c) determinations must be in writing and be given to each of the parties (s. 164(1)).

The clear import of those provisions is that, if it is necessary to rely on evidence to make findings of fact, the Tribunal should set out the facts on which those findings are made, even when directions have been made under s. 155. I note, for completeness, that s. 178 provides that, if an appeal is made to the Federal Court from a determination of the Tribunal relating to a right to negotiate application, the Tribunal must send to the Court all documents that were before the Tribunal in relation to the inquiry.

[40] The effect of s. 162(2) was considered by a Full Court of the Federal Court of Australia in *Parker v Western Australia* (2008) 167 FCR 340, 245 ALR 436. The Full Court heard an appeal in relation to a determination made by the Tribunal about an objection to the expedited procedure. The Tribunal had made directions under s. 155 in relation to certain affidavits sworn by members of the native title party claimant group and other evidence. In the reasons for determination, the Tribunal referred to those documents only to the extent necessary to explain its decision and did not include material that should 'according to customary law and

traditions remain confidential' (*Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon,* [2006] NNTTA 65 (2 June 2006) at [24]). An appeal against the Tribunal's determination was dismissed by a single judge of the Federal Court (*Parker on behalf of the Martu Idja Banyjima People v Western Australia* [2007] FCA 1027). That decision was appealed to a Full Court (Moore, Branson and Tamberlin JJ).

[41] In their reasons for judgment that, in effect, upheld the determination of the Tribunal, each member of the Full Court expressed views about the statutory obligations on the Tribunal, and the way in which the Tribunal could satisfy those obligations in circumstances where directions are given under s. 155 in relation to evidence on which the Tribunal makes finding of fact.

[42] Justice Moore referred to two features contained in s. 162(2):

(a) the language in the expression 'any findings' is of 'wide import', and
(b) that the findings be those upon which the determination was based.

In his Honour's opinion, the Tribunal is 'obliged to set out the findings of fact it makes which lead to the determination of the matters covered by the enquiry'. The statutory obligation to 'reveal fully the found facts upon which a decision is based' is understandable given the significance of the decision (at [7]). Where there are sensitivities about the publication of a found fact, that obligation might be discharged if the Tribunal incorporates by reference the relevant evidence without repeating it (at [17]).

[43] Although Justice Branson considered that this was not an appropriate case for careful analysis of the 'extent of the obligation imposed' on the Tribunal by s. 162(2), she observed that two 'principal purposes' may be assumed to be intended to be served by s. 162(2), namely:

(a) a party dissatisfied with the determination can understand how the Tribunal arrived at its determination and, in particular, can form a view on whether the determination was lawfully made, and
(b) to facilitate review by the Court of the Tribunal's determination should any party exercise its right to appeal pursuant to s. 169.

Having regard to those purposes, her Honour stated that the likely intention of the legislature was to require the Tribunal to set out 'such of its findings of fact as were critical to the making of its determination' (at [50]). In her view, it was unlikely to have been the intention of the legislature in enacting s. 162(2) that the Tribunal be obliged to record in its reasons for determination 'every aspect of the evidence and other material before it, whether controversial or not, upon which it placed reliance in making its determination' (at [49]).

[44] Justice Branson noted that, in the case on appeal, the Tribunal was concerned not to publish information confidential to the native title party (at [43]). Her Honour considered that the Tribunal's reluctance to refer in its determination to the details of evidence which was of a confidential nature was 'entirely understandable'. In that case it was unnecessary to do so as the Tribunal was able to identify the 'uncontested evidence' upon which it made the relevant finding and so enabled the parties (and the Court on appeal) to know the factual basis of its finding (at [53]).

[45] Writing in general terms, Justice Tamberlin stated:

> In giving reasons, it may be appropriate for the tribunal to refrain from reciting or even referring specifically to detailed evidence disclosed in confidence. It is a question of striking a reasonable balance between the sensitivity of certain evidence and the appropriate extent to which that evidence needs to or should be recited when setting out findings. (at [76])

[46] Justice Tamberlin noted that, in the matter before the Court, the Tribunal had made confidentiality directions in respect of 'sensitive material' in detailed affidavits and referred to them in so far as it was 'necessary to explain the reasons for its determination'. The Tribunal's reasons reflected 'a concern to respect this need for confidentiality' (at [61]). Although the relevant evidence was not spelt out in the Tribunal's reasons due to its highly confidential nature, his Honour considered that the reasons sufficiently demonstrated that it was taken into account. Consequently, he was satisfied that 'the essential findings of fact' were 'sufficiently stated' by the Tribunal as required by s. 162(2) (at [75]). His Honour observed that, in that case, the specific detailed evidence was accepted without contradiction and the factual basis for the Tribunal's finding was made known to the parties who had access to the relevant evidentiary material, albeit on a confidential basis (at [76]).

[47] As Deputy President Sosso observed in his reasons for determination in *Crowe v Western Australia* (2008) 218 FLR 429 (*'Crowe'*) at [33]:

> ... while each of the Judges dismissed the appeal there was a marked variety of approaches to how s 162(2) should be applied by the Tribunal when setting out its reasons for its

> determination. What is clear however is that the Tribunal is under an obligation to set out clearly the factual basis of its determination. The obligation imposed by s 162(2) cannot be avoided because of issues relating to cultural or customary concerns. Wherever possible, especially when directions have been made pursuant to s 155 to restrict the disclosure of documents produced, the material which has cultural or customary sensitivity should only be disclosed to the extent required by the law and, where possible, direct quotation from affidavits should be avoided. Unnecessary details of such culturally sensitive material should not be set out in the reasons.

He continued:

> This obligation ... does require that the Tribunal use its discretion to identify and set out in an appropriate form, the key material from which it has drawn inferences. How this is best effected is a matter that can only be resolved in each inquiry having regard to the nature of the material produced, the attitude of the parties and whether it is contested or uncontested. (at [35])

[48] In light of the Full Court's reasons for judgment and the Tribunal's determination in *Crowe*, I intend to refer to the aspects of the restricted material that are relevant to my decision as to whether the parties have negotiated in good faith and, where appropriate, will quote or closely paraphrase passages from the restricted material. To that extent, if it is necessary to do so, the directions made under s. 155 are hereby varied accordingly.

Material before the Tribunal

[49] The statement of contentions and supporting documentary evidence of the First native title party were lodged with the Tribunal on 13 April 2012. The statement of contentions and supporting documentary evidence of the Second native title party were lodged with the Tribunal on 13 April 2012, and provided to the Government party and the Grantee party on 16 April 2012.

[50] In accordance with Directions 3, 4 and 5 made on 19 March 2012 as varied on 11, 17, 27 and 30 April 2012, the negotiation parties lodged the following documents with the Tribunal in relation to the 'negotiate in good faith' issue:

(a) Statement of contentions on behalf of the First native title party, and Attachments 1, 2, 3 and 4
(b) Statement of contentions on behalf of the Second native title party and witness statement by Trevor George Hauff and Annexures TGH1 to TGH7
(c) Statement of contentions on behalf of the Government party and covering letter, Annexure 7 (entire and redacted versions), document list, Annexures 1 to 6 and 8
(d) Statement of contentions on behalf of the Grantee party and covering email, statement of contentions (redacted version), Affidavit Ben Zillmann Re Bidjara

People, Affidavit of Ben Zillmann Re Karingbal People #2, Affidavit of Ben Zillmann Re Karingbal People #2 (redacted version) and Affidavit of Ben Zillmann Re Meeting Minutes (this Affidavit was not provided to the Second native title party)

(e) Reply on behalf of the Second native title party to the Grantee party contentions

(f) Submissions on oral hearing on behalf of the Second native title party

(g) Submissions on behalf of the Second native title party in support of the statement of contentions

(h) Statement in reply on behalf of the First native title party (entire and redacted versions)

(i) Statement of contentions in reply on behalf of the Government party (entire and redacted versions), Affidavit of Sara Newrick in support, covering letter, statement of contentions regarding oral hearing

(j) Response on discrepancies on behalf of the Grantee party (entire and redacted versions)

(k) Reply by First native title party to Grantee party's response on discrepancies (entire and redacted versions), and

(l) Submissions on requirement for oral hearing on behalf of the Grantee party.

[51] The Directions made under s. 155 restricting disclosure of specified information apply in relation to:

(a) Attachment 3 to the statement of contentions on behalf of the First native title party, and

(b) Part of Annexure JMB1; and all of Annexures JMB12; JMB13; JMB14; JMB15; JMB16; JMB17; JMB18; JMB19; JMB21; JMB22; JMB24; JMB26; JMB27; JMB28; JMB31; JMB32; JMB33; JMB34; JMB35; and JMB36 to the Affidavit of Julieanne Maree Butteriss dated 26 April 2012, which Affidavit is Annexure 7 to the statement of contentions by the Government party provided in accordance to Direction 4 in relation to these proceeding 19 March 2012 (as amended).

The 'good faith' issue – four components

[52] As noted earlier, two separate sets of negotiations were conducted or attempted: negotiations involving the First native title party and negotiations involving the Second native

title party. Given the contentions by the native title parties, it is appropriate to consider separately whether:

(a) the Government party negotiated in good faith with the First native title party
(b) the Grantee party negotiated in good faith with the First native title party
(c) the Government party negotiated in good faith with the Second native title party, and
(d) the Grantee party negotiated in good faith with the Second native title party.

[53] Similar submissions were made in relation to some of those issues, and portions of the evidence are relevant to the resolution of more than one issue. Dealing with the four main issues separately and in that order requires some repetition of references to parts of the evidence and legal principles. Where appropriate, and to reduce the amount of replication, cross-references are made to passages in these reasons where an issue is dealt with in greater detail.

[54] Before turning to the evidence and contentions provided by each party, it is useful to outline the legal context within which the 'good faith' issue is to be decided.

Legal principles in relation to future act negotiations in 'good faith' – an overview

[55] Subsection 31(1) provides that unless a s. 29 notice includes a statement that the Government party considers that the future act attracts the expedited procedure:

(a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
(b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act (with or without conditions to be complied with by any of the parties).

[56] The obligation is to negotiate in good faith with a view to obtaining each native title party's agreement to the doing of the future act. A minimum six month period after notification is prescribed before arbitration can be sought. As Member O'Dea pointed out in *FMG Pilbara Pty Ltd/Cheedy/Western Australia* ([2009] NNTTA 38 at [67]):

> the Act does not require any party to negotiate in any physical sense for a period of six months. What is required is that the parties negotiate in good faith with a view to obtaining an agreement with the native title party to the doing of the [a]ct ... . The actual period of negotiation which would need to take place in order to establish that the parties had negotiated in good faith, is not necessarily related to the length of time spent negotiating. Rather it is the quality of the process

> that will be determinative of the question of whether the parties have engaged in the process in good faith.

[57] Once the six month period has elapsed it is open to any negotiation party to exercise its statutory right to seek a future act determination. It is not necessary that the negotiations have reached any particular 'stage' before a party seeks arbitration. This was explained by the Full Federal Court in *Cox* (at [19]) as follows:

> The expression "negotiate in good faith" is to be construed in its natural and ordinary meaning and in the context of the Act as a whole: *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 319. Accordingly, the act of lodging an application under s 35, taken alone, cannot be relied upon in order to establish bad faith in the negotiating process (*Strickland* 85 FCR at 322). If negotiations reach a standoff, notwithstanding attempts in good faith to negotiate within the relevant six-month period, there are no further obligations after the completion of the six-month period on a party which wishes to lodge a notice under s 35 of the Act. There is no need, for example, to give further warning of the intention to do so.

[58] Although negotiations are not required to have reached any particular stage before a future act determination is sought, 'it is not sufficient for good faith negotiations to merely "go through the motions" with a closed mind or a rigid or predetermined position' (at [24]). The Full Court highlighted that the requirement for good faith in negotiations is directed towards 'the quality of a party's conduct'. Drawing on previous Federal Court and Tribunal decisions, the Full Court stated:

> It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in negotiations. (at [20])

[59] Accordingly, it is important to ascertain whether negotiations have not advanced due to one of the parties engaging in misleading conduct or a stalling process so that by the time the six month period has elapsed there was never any real intention to reach agreement. In *White Mining (NSW) Pty Ltd v Franks* ((2011) 257 FLR 205 at [33]) Deputy President Sosso observed:

> ... it is central to a good faith assessment to have regard to a negotiation party's state of mind as manifested by its conduct. A party will fail to negotiate in good faith if it proposes a course of action which could be characterised as stalling, and then seeking arbitration after six months when the other party or parties reasonably would have expected that negotiations be on-going. In short, while good faith is not evaluated on the basis of the "status", "stage" or "substance" of negotiations, it is evaluated on how negotiations are conducted. Consequently, if a party has deliberately taken advantage of another party's understandable misapprehension that the negotiations would lead to an accord and delays in putting offers on the table or engaging in substantive negotiations to "buy time" so that the six months would elapse and arbitration could be sought, then the Tribunal will find that there have not been good faith negotiations.

[60] The Full Federal Court also held in *Cox* (at [38]):

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

[61] A useful and succinct statement of what constitutes negotiating in good faith was provided by Member (later Deputy President) Sumner in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 (*'Placer (Granny Smith)'*) at [30]:

> Negotiation involves 'communicating, having discussions or conferring with a view to reaching an agreement': *Western Australia v Taylor* (1996) 134 FLR 211 at 219. Good faith requires the Government party to act with subjective honesty of intention and sincerity but this, on its own, is not sufficient. An objective standard also applies. The Government and grantee parties' negotiating conduct may be so unreasonable that they could not be said to be sincere or genuine in their desire to reach agreement. The Tribunal must look at the conduct of the Government party as a whole but may have regard to certain indicia which were outlined in *Western Australia v Taylor* as a guide to whether the obligation has been fulfilled. One of these indicia is whether the negotiation party has done what a reasonable person would do in the circumstances. There is no requirement that the Tribunal be satisfied that the Government party has made reasonable offers or concessions to reach agreement but is permitted to have regard to the reasonableness or otherwise of them if it assists in the overall assessment of a party's negotiating behaviour. Lack of good faith in the negotiations by the native title party will be relevant to whether the parties have fulfilled their obligation and may impose a lesser standard on them.

It should be noted that the references to the Government party in that passage should be read (following the commencement of the 1998 amendments to the Act, including to s. 31(1)(b)), as applying to all negotiation parties.

[62] Subsection 36(2) of the Act is also significant to these proceedings. As noted earlier, it provides that the Tribunal must not make a determination on the application if any negotiation party satisfies the Tribunal that any other negotiation party (other than the native title party) did not negotiate in good faith as mentioned in s. 31(1)(b). The Tribunal has held that the practical effect of s. 36(2) is to place an evidential burden on the party alleging that another party did not negotiate in good faith which would normally require it to produce evidence to support its contentions (see e.g. *Placer (Granny Smith)* at [28]; *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 196 FLR 52 *('Gulliver Productions')* at [10]).

[63] The passage from *Placer (Granny Smith)* just quoted referred to the good faith negotiating indicia which were outlined in *Western Australia v Taylor* (1996) 134 FLR 211 at 224-5, often referred to as the *Njamal* indicia. These indicia were set out in full in the judgment of RD Nicholson J in *Strickland v Minister for Lands for Western Australia* (1998)

85 FCR 303 (*'Strickland'*) at 312–313 with apparent approval. The indicia of failing to negotiate in good faith are as follows:

(i) unreasonable delay in initiating communications in the first instance

(ii) failure to make proposals in the first place

(iii) the unexplained failure to communicate with the other parties within a reasonable time

(iv) failure to contact one or more of the other parties

(v) failure to follow up a lack of response from the other parties

(vi) failure to attempt to organise a meeting between the native title and grantee parties

(vii) failure to take reasonable steps to facilitate and engage in discussions between the parties

(viii) failing to respond to reasonable requests for relevant information within a reasonable time

(ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls

(x) unnecessary postponement of meetings

(xi) sending negotiators without authority to do more than argue or listen

(xii) refusing to agree on trivial matters, for example a refusal to incorporate statutory provisions into an agreement

(xiii) shifting position just as agreement seems in sight

(xiv) adopting a rigid non-negotiable position

(xv) failure to make counter-proposals

(xvi) unilateral conduct which harms the negotiating process, for example, using inappropriate press releases

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

(xviii) failure to do what a reasonable person would do in the circumstances.

[64] It is important to note that these are indicia only. They provide a guide to assist the Tribunal when evaluating evidence about the negotiations. When assessing whether a party has negotiated in good faith, the Tribunal will consider all of the material before it and not make a decision mechanistically on the basis that a party has not met all of the indicia or even most of them. The correct approach was summed up by Member Lane in *Western Australia v Dimer* (2000) 163 FLR 426 (at [85]) as follows:

> In determining whether parties have negotiated in good faith, the criteria developed in *Njamal* will be relevant. But these criteria do not constitute a checklist or series of conditions. It is not necessary that parties engage in all of the activities described there in order to negotiate in good faith. Likewise, the failure to do one or more of the things described in the criteria will not require the Tribunal to find that the parties have not negotiated in good faith.

[65] When determining whether the parties have negotiated in good faith, a contextual evaluation is required. The approach taken by one party is normally influenced by the approach taken by, or the conduct and actions of, another. The obligation to negotiate in good faith applies to all parties, so the Tribunal will not ignore the relevant actions of others when assessing the negotiation conduct of the party being challenged. For example, as the passage in *Placer (Granny Smith)* quoted above indicates, lack of good faith in the negotiations by a native title party will be relevant to whether other parties have fulfilled their obligation and may impose a lesser standard on them. Similarly, if a grantee party is a small miner with few resources and limited capacity to make offers or give concessions in relation to a small project, what would be regarded as negotiating in good faith could be different from that of a large mining company with the capacity to make substantial offers and concessions in relation to a large project (see *Drake Coal Pty Ltd v Smallwood* (2012) 257 FLR 276 *('Drake Coal')* at [85]).

[66] Importantly for dealing with some of the contentions made in these proceedings, s. 31(2) provides that if any of the negotiation parties refuses or fails to negotiate about matters unrelated to the effect of the future act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of s. 31(1)(b). The operation of s. 31(2) is discussed later in these reasons (see [209] to [219] and [329] to [332].

[67] In summary, when considering the contentions of the native title parties in respect of the Government party and the Grantee party the Tribunal needs to bear in mind:

(a) the obligation on the negotiation parties to negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the grant of the proposed tenement or the grant subject to conditions to be complied with by any of the parties (s. 31(1)(b))

(b) that if any of the negotiation parties refuses or fails to negotiate as mentioned in s. 31(1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of s. 31(1)(b) (s. 31(2))

(c) the need to consider the behaviour of each party as a whole and in context (e.g. by reference to the approach taken by, and the conduct and actions of, one or more of the other parties), to assess the party's state of mind as manifested by its conduct in negotiations, and to assess the quality of the party's conduct by reference to what it has done or failed to do

(d) that the Act does not require the Tribunal to evaluate the reasonableness of each proposal or counter-proposal or that negotiations have reached any particular stage

(e) that it is for the negotiation party that asserts that another negotiation party did not negotiate in good faith as mentioned in s. 31(1)(b) to satisfy the Tribunal of that.

Summary of contentions of the First native title party

[68] The statement of contentions by the First native title party quotes the *Njamal* indicia for negotiating in good faith; yet it does not provide or analyse the evidence in relation to each or all of those indicia. Rather, the First native title party takes a broader approach to the good faith issue, focussing on the conduct of the Government party and the Grantee party in negotiation meetings and on the perceived inadequacy and unreasonableness of the Grantee party's offer of compensation. In summary, the First native title party contends that:

(a) the Karingbal People deserve open and transparent negotiations

(b) the social impacts of changes in land use, the alienation of property and the loss of connection with the land (including the impacts and stresses associated with relocations) will have significant impact upon the Karingbal People as the traditional owners of the country

(c) the Government party has not fulfilled its obligation under s. 31(1) to negotiate in good faith as it failed to negotiate at all with the Karingbal People

(d) the Grantee party has not fulfilled its obligation under s. 31(1) to negotiate in good faith as its offer of compensation was 'reprehensible in that it does not respond prudently to any of the impacts that the mining lease will cause', and the negotiations 'failed to opine the effects upon Native Title with the value of the country in relation to the significance and profitability of the project'.

[69] As indicated earlier, it is appropriate to deal separately with the good faith issue in relation to the Government party and the First native title party, and with the good faith issue in relation to the Grantee party and the First native title party.

The Government party and the First native title party

[70] In its statement of contentions lodged on 13 April 2012, the First native title party contended that Government party did not negotiate in good faith, indeed that it 'failed to negotiate at all with the Karingbal People'. In essence, the First native title party contends that the Government party attended only one meeting with the First native title party (on 4 and 5 October 2011) and that the Government party was asked by the Karingbal people if 'it would be making an offer, and responded that it would not be making an offer and was merely there to assist and facilitate'. The submissions of the parties and the evidence will be considered by reference to:

(a) the alleged failure of the Government party to make an offer

(b) the alleged failure of the Government party to negotiate with the First native title party

(c) the implications of the Government party's dealings with persons other than the First native title party.

[71] Before considering those contentions it is appropriate to say something about the minutes of the negotiation meetings on 4 and 5 October 2011 and about the role of a Government party in right to negotiate negotiations such as these.

[72] *Minutes of negotiation meetings:* In support of its contentions, the First native title party relies on minutes of the meeting held on 4 and 5 October 2011. The following observations about the minutes are based on two versions of the minutes, separate affidavits of Camille Kirby and Julieanne Butteriss annexed to the Government party's statement of

contentions, and submissions from the Grantee party together with an affidavit of Ben Zillmann, a lawyer representing the Grantee party.

[73] In summary:

(a) the minutes were prepared by Ms Kirby, who is employed by the Government party as a Principal Project Officer with the Department of Natural Resources and Mines

(b) they were prepared in response to a motion at the meeting on 4 October 2011 for formal minutes to be kept

(c) they are based on notes taken by Ms Kirby, and are not a verbatim record of the meeting

(d) Ms Kirby stated at the meeting on 4 October 2011 that, rather than be the 'go between person' regarding changes and objections to the minutes, she would send them to Xstrata and Karingbal who would liaise between themselves about changes, which would then be sent to the State as a final version; and all parties concurred

(e) on 20 October 2011 the minutes were sent to all parties to the meeting for comment

(f) the minutes state that they were taken by the relevant Government department for its use and that department 'does not warrant, guarantee or make any representations regarding the correctness, accuracy or completeness of this information'

(g) on 2 November 2011 Simon Cobb, a lawyer for the Grantee party who was present at the meeting, forwarded amendments to the minutes to representatives of the Government party (Ms Kirby and Ms Butteriss) as well as to the representative of the First native title party (Bill Redmond) and to Mr Lavery, all of whom were present at the meeting

(h) no response to these amendments was received by Mr Zillmann, Mr Cobb or the Grantee party

(i) in Ms Kirby's opinion, all those changes to the minutes remain an accurate record of what occurred

(j) to Ms Kirby's knowledge, the Karingbal People made no changes to the minutes

(k) Ms Butteriss considered that Ms Kirby's original minutes appeared to be an accurate version of the meeting as it occurred, and Mr Cobb's amendments also appeared to be an accurate version of the meeting as it occurred

(l) the First native title party has used the original minutes as part of its submission

(m) the First native title party did not take issue with the minutes as amended, and

(n) the Government party and the Grantee party relied on the minutes as amended in support of their contentions.

[74] Two practical issues arise in relation to the minutes. First, the original version is Attachment 3 to the statement of contentions by the First native title party and so is subject to directions under s. 155 of the Act (referred to at [34] above) that, in short, the contents of Attachment 3 are not to be disclosed by any party to the Second native title party. The amended version, which is Annexure BJZM-1 to the 'Minutes' affidavit of Mr Zillmann dated 1 May 2012, was not provided to the Second native title party in any form. As noted earlier in these reasons, I intend to refer to the aspects of the restricted material that are relevant to my decision as to whether the parties have negotiated in good faith, and, where appropriate, will quote or closely paraphrase passages from the restricted material.

[75] Second, there are two versions of the minutes in evidence before the Tribunal: the original version prepared by Ms Kirby and provided and relied on by the First native title party, and the amended version provided and relied on by the Grantee party. The First native title party has not disputed the amended and expanded version of the minutes provided by the Grantee party. Both Ms Butteriss and Ms Kirby deposed that, in their respective opinions, the amendments provided by Mr Cobb appeared to be an accurate record of what occurred.

[76] Accordingly, I have had regard to both versions of the minutes. For the most part, the original version is sufficient evidence for the purpose of these proceedings. However, to the extent that the expanded version contains material which is different (e.g. by way of correcting an error) or additional but relevant to the resolution of the good faith issue, I have relied on it.

[77] Because the minutes are more directly relevant to the Tribunal's consideration of whether the Grantee party negotiated in good faith with the First native title party, they are considered in more detail when dealing with that issue later in these reasons.

[78] *Role of a government party:* The contentions of the First native title party require that attention be given to the practical operation of the statutory obligation on the Government party to negotiate in good faith.

[79] As originally enacted, s. 31(1)(b) provided that only the Government party must 'negotiate in good faith with the native title parties and the grantee parties with a view to obtaining the agreement of the native title parties' to the doing of the act, with or without conditions to be complied with by any of the parties.

[80] In 1998, s. 31(1)(b) was amended to provide that 'the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to' the doing of the act, with or without conditions to be complied with by any of the parties. The Explanatory Memorandum to the Native Title Amendment Bill 1997 throws no light on the reasons for the amendment. It simply states that 'the requirement to negotiate in good faith is clarified to make it clear that it applies to all parties' (at paragraph 18.16) and that the Bill 'extends this requirement to all parties' (paragraph 20.31).

[81] In the absence of any express language in the Act and any guidance from the Explanatory Memorandum to the contrary, it appears that the nature of the obligation on the Government party did not change in 1998. Rather, the obligation remained *vis-a-vis* the Government party, and the other negotiation parties became subject to the same obligation. Accordingly, Tribunal and judicial statements about the Government party's obligation before the amendment in 1998 remain relevant to the application of the current obligation.

[82] However, what can be expected of each party can be influenced by the nature of the future act and the procedures followed in relation to that act. So, for example, how and when a Government party will be involved in negotiations and what it will contribute to the substantive negotiations might vary depending on whether the future act is the grant of a mining lease for a large scale project which will benefit the grantee party, or it is the compulsory acquisition by a State of native title rights and interests to confer rights and interests in relation to the area on a third party. The stages of negotiations in which a Government party is involved and its role in those negotiations will be different in those jurisdictions where a 'dual deed' system is followed (as discussed later in these reasons) from jurisdictions where there is no such system. Also, as noted earlier, the approach taken by one

party is normally influenced by the approach taken by, or the conduct and actions of, another party.

Alleged failure of Government party to make an offer

[83] The First native title party contends that the Government party attended the negotiation meeting on 4 and 5 October 2011 and, when asked by the Karingbal People 'if it would be making an offer', the Government party 'responded that it would not be making an offer and was merely there to assist and facilitate'. In the First native title party's submission, this is 'not negotiating in good faith'.

[84] The Governments party's statement of contentions provides two responses to this submission:

(a) the Government party complied with its obligation under s. 31(1)(a) of the Act by writing to the First native title party inviting it to make submissions to the Government party in relation to the proposed future act, and

(b) it is not the State's practice to make offers of compensation because the applicant for a mining tenement is liable to pay any compensation.

[85] *Compliance with s. 31(1)(a) of the Act:* The Government party wrote to the First native title party on 9 February 2011. The letter was addressed to the Karingbal People c/- Queensland South Native Title Services ('QSNTS') and was headed 'NOTICE OF PROPOSED GRANT OF MINING LEASE ML70415'. It stated that, in accordance with s. 29 of the Act, 'notice of the proposed grant of Mining Lease ML70415 is hereby given to the registered native title claimants of the Karingbal People'. Enclosed was the Notice of Proposed Grant of Mining Lease which, the letter advised, would be advertised in the *Koori Mail* and the *Central Queensland News* on 9 March 2011. The notification day was 30 March 2011. The letter continued:

> Under section 31 of the *Native Title Act 1993* (Cth) native title parties are entitled to the opportunity to make submissions to the State of Queensland, in writing or orally, regarding the proposed grant of the Mining Lease. Further information may be obtained from the Principal Project Officer Senior State Negotiator, Native Title, Central Region, Level 5, 34 East Street, Rockhampton Qld 4700, Telephone (07) ....
>
> Should you have any queries regarding this letter or the right to negotiate, do not hesitate to contact Ms Julieanne Butteriss.

The letter was signed by Ms Butteriss, who held the position described in the first quoted paragraph.

[86] At the time the letter was sent to QSNTS the State understood that, as well as being the representative Aboriginal body for the region, QSNTS was the solicitor on the record for the First native title party. In order to comply with its obligations under the Act, the letter was sent to QSNTS. In connection with these proceedings, the Government party obtained advice from QSNTS that:

(a) around the time of the letter, QSNTS was still representing the First native title party in future act matters, but only in expedited procedure matters

(b) the letter was received by QSNTS on 11 February 2011, and

(c) copies of the letter were forwarded to Mark Albury, Marlene Leisha, Sharleen Leisha, Carol McLeod and Charles Stapleton (i.e., the persons who comprise the First native title party) on 18 February 2011.

[87] No submissions were received in response to that letter, either orally or in writing, from the First native title party or any representative of it.

[88] On 30 June 2011, the Government party wrote again to the First native title party c/- QSNTS in relation to Mining Lease 70415. The letter stated that the Notice of Proposed Grant of Mining Lease was advertised in the *Koori Mail* and the *Central Queensland News* on 9 March 2011. The notification day was 30 March 2011. The letter described the three month notification process and noted that only those native title claims which are registered at the end of the notification period are entitled to negotiate an agreement. The letter continued:

> The National Native Title Tribunal (NNTT) identifies that Mining Lease 70415 falls within the Karingbal People Registered Native Title Claim.
>
> The NTA also outlines that **all parties** involved in the negotiation process are required to consult and negotiate in good faith with a view to obtaining a successful agreement. **This includes** not only the applicant for the mining lease, but also the registered native title parties and **the State**. **The State cannot grant a mining lease until this agreement has been finalised by all parties.**
>
> The NNTT identifies 'negotiate in good faith' as 'something that should be approached in a responsible and serious manner and that negotiation parties should enter into negotiations with an open mind and genuine desire to reach agreement'.
>
> If the negotiation parties cannot reach an agreement through negotiation, an application may be made to the NNTT seeking a Future Act Determination. This process provides for a determined outcome with possible conditions which contractually bind the negotiation parties.
>
> As this application is now out of the notification period, the parties are now required to negotiate in good faith with a view to reaching an agreement. **In order for negotiations to commence, if you could please consider your availability over the next four weeks and make contact with Ms Julieanne Butteriss** on [telephone number provided]. (emphasis added)

[89] At the time the letter was sent to QSNTS the State understood that, as well as being the representative Aboriginal body for the region QSNTS was the solicitor on the record for the First native title party. In connection with these proceedings, the Government party obtained advice from QSNTS that:

(a) QSNTS ceased to act for the Karingbal on 16 June 2011
(b) the letter was received by QSNTS on 5 July 2011
(c) copies of the letter were forwarded to Mark Albury, Marlene Leisha, Sharleen Leisha, Carol McLeod and Charles Stapleton (i.e., the persons who comprise the First native title party) as well as Steven Freeman, Bill Redmond (representative) and Robert Powrie (representative) on 19 July 2011

[90] Although the letter of 9 February 2011 apparently did not go to the legal representatives of the First native title party (because there was no legal representative for these purposes), the later letter was sent to their lawyers. Thus there was a direct invitation soon after the end of the notification period for the First native title party to engage with the Government party in negotiations about the grant of the proposed tenement. Had it done so, the First native title party could have asked whether the Government party would be making an offer in order to secure the First native title party's agreement to the grant of the proposed tenement, or could have put a proposal to the Government party.

[91] According to the Government party and the Grantee party, the First native title party did not propose at any stage during the negotiations that the Government party pay compensation. Indeed, not only did the Government party not receive a submission from the First native title party in response to its invitation to make one in relation to the grant of the proposed tenement, the Government party received no communication from the legal representative of the First native title party other than at the meeting on 4 and 5 October 2011, the mediation in the Tribunal, and the contentions in this matter. Nor was it asked by those lawyers to take a greater role in the negotiations.

[92] In *Gulliver Productions*, the Tribunal considered a case where the native title party did not make a request for compensation from the Government party, and compensation was at all times a matter negotiated between the native title party and the grantee party. As Deputy President Sumner stated:

> Negotiations do not occur in a vacuum, they must be about proposals. An opportunity is provided for a native title party to make submissions about the doing of the act (s 31(1)(a))

> which is an opportunity for it to put forward proposals for negotiation. If a native title party makes no proposals on an issue to the Government or grantee parties it is difficult to see how after the event the other parties can be accused of not negotiating in good faith in relation to them. (at [49])

I agree with those observations and adopt them insofar as they apply to the Government party in this case.

[93] *State not liable to pay compensation:* The Government party's position is that the applicant for a mining tenement is liable to pay compensation, if any, to native title parties in respect of the grant of the tenement. The State will not grant a tenement under the right to negotiate process until the other parties have reached an agreement about compensation. Thus it is not the State's practice to make offers of compensation to native title parties in relation to the grant of mining tenements.

[94] That practice is explicable in the context of the 'dual deed' system for right to negotiate agreements in Queensland. It is the usual practice for native title parties and grantee parties to negotiate an Ancillary Agreement dealing with, among other things, any compensation payable to the native title party. The Government party is generally not involved in the negotiation of Ancillary Agreements and is rarely provided with copies of them as they are usually regarded by the parties as being commercial-in-confidence. Following the finalisation of such an agreement, the State will enter into a Section 31 Deed with the native title parties and grantee parties. The Section 31 Deed is a tripartite agreement between the negotiation parties which is essentially a 'bare' deed to comply with the requirements of s. 31(1)(b) of the Act. Hence, much of the Government party's involvement in negotiations occurs after the other parties have finalised an Ancillary Agreement.

[95] The Government party also submits that it has no obligation to negotiate with native title parties about compensation as part of good faith negotiations. The reason for so contending is that a native title party has no legal right to claim compensation from a Government party, and the State of Queensland has transferred to the Grantee party the responsibility to pay compensation in respect of the grant of a mining tenement.

[96] The Government party refers to Tribunal determinations to the effect that, in Western Australia, a native title party has no legal right to claim compensation from a Government party for the grant of petroleum tenements or mining tenements in that State, and hence there is no obligation for the Government party to negotiate about compensation as part of its

negotiations in good faith (*Gulliver Productions* at [38]-[48]; *The Griffin Coal Mining Co Pty Ltd v Nyungar People* (2005) 196 FLR 319 at [37]-[38]).

[97] The Government party submits that this also applies in Queensland because:

(a) Part 2, Division 3, Subdivision M of the Act deals with future acts which pass the freehold test, and Part 2, Division 3, Subdivision P deals with the right to negotiate. Section 26(1)(a) states that the right to negotiate provisions apply to certain future acts covered by Subdivision M, including the grant of mining and petroleum tenements.

(b) Section 24MD sets out how future acts that pass the freehold test are to be treated, and specifies that if this section applies, the future acts are valid, if there is compliance with the right to negotiate provisions in Subdivision P.

(c) The freehold test applies to the grant of mining tenements as they are future acts which could be done in relation to the relevant land if the native title holders instead held ordinary title (s. 24MB(1)). Ordinary title includes freehold title (s. 253).

(d) Subsection 24MD(3) deals with future acts which pass the freehold test and do not involve compulsory acquisition of native title rights and interests (see s. 24MD(2) and (2A)). Mining leases fall within this category and as a result, the non-extinguishment principle applies.

(e) The similar compensable interest test in s. 240 of the Act is satisfied, as compensation is payable for the grant of a mining lease to holders of ordinary (freehold) title over the land.

[98] The Government party also refers to s. 24MD(4) of the Act which prescribes who pays compensation. For present purposes the relevant paragraph provides:

> (4) The native title holders may recover the compensation from:
> ... (b) if the act is attributable to a State or Territory:
> (i) if a law of the State or Territory provides that a person other than the Crown in any capacity is liable to pay the compensation—that person: or
> (ii) if not—the Crown in right of the State or Territory.

[99] The grant of the proposed tenement is a future act attributable to the State of Queensland under the *Mineral Resources Act 1989* (Qld) ('the MRA'). Section 279 of the MRA is 'a law of the State' for the purposes of s. 24MD(4)(b). Subsection 279(1) of the MRA provides:

> **279 Compensation to be settled before grant or renewal of mining lease**
> (1) A mining lease shall not be granted or renewed unless—
> (a) compensation has been determined (whether by agreement or by determination of the Land Court) between the applicant and each person who is the owner of land the surface of which is the subject of the application and of any surface access to the mining lease land; or
> (b) there is no person (other than the applicant) who is the owner of any of the land referred to in paragraph (a);
> and the conditions of the agreement or determination have been or are being complied with by the applicant ...

[100] In essence, the effect of the interaction of the scheme of the Act and the MRA is that a mining lease can be granted over the area proposed (on the basis that native title parties are treated as if they held ordinary title) and that, with the application of the similar compensable interest test, the applicant for the proposed tenement (i.e., the Grantee party and not the State) is liable to pay any compensation. As a consequence, there is no requirement that the Tribunal be satisfied that the Government party made reasonable offers to reach agreement with the First native title party about the grant of the proposed tenement (see *Placer (Granny Smith)* at [30]).

[101] Support for the Government party's position is given by the Grantee party which submits that 'it was well understood and accepted by all negotiation parties that any payment of compensation or other benefits to the Karingbal People would be made by the Grantee party'. It points to the minutes of the negotiation conference on 4 and 5 October 2011 and the notes of the Tribunal mediation where it is clear that the Grantee party would provide compensation and the Government party would enter a Section 31 Deed.

[102] In conclusion, the Government party wrote to the First native title party advising the First native title party of its entitlement to make submissions to the State regarding the proposed grant of the proposed tenement. The Government party also wrote to the First native title party inviting contact with the State so that negotiations could commence. No response was received to those letters. Furthermore, the way in which negotiations such as these are undertaken in Queensland and the legal context for them is clear. Accordingly, although the Government party did not make an offer, I am not satisfied that, for that reason, the Government party failed to negotiate in good faith with the First native title party.

Alleged failure of Government to negotiate with the First native title party

[103] The First native title party submits that the Government party 'failed to negotiate at all with the Karingbal People'.

[104] The Government party responded in detail about the nature and extent of its involvement in the negotiations. First, it submits that the State has a practice of attending negotiations for right to negotiate matters only when invited to do so. It did not attend any meetings with the First native title party before 4 and 5 October 2011 because it was 'not informed of, or invited to' the meeting between the First native title party and the Grantee party on 13 and 14 July 2011. The Government party was not invited to attend the introductory meeting on 19 May 2011 or the field visits in August 2011. However, due to a written request on 26 July 2011 from one of the registered claimants (Charles Stapleton) to attend future negotiation meetings, the Government party contacted the Grantee party on 3 August 2011 in relation to being invited to attend the next meeting between the parties. The Government party's representative at the negotiation meeting on 4 and 5 October 2011 agreed to take the minutes of the meeting.

[105] In addition, the Government party contends that, by negotiating directly with each other and failing to inform the Government party of negotiation meetings or invite it to such meetings, the Grantee party and the native title parties 'indicated an unwillingness to involve the State in the initial or substantive negotiations between the parties'. Such an approach, it submits, is often consistent with the 'dual deed' system in Queensland.

[106] As noted earlier (at [94]), the extent of the Government party's involvement in right to negotiate proceedings is influenced by the stage reached in negotiations between the other parties, consistently with the 'dual deed' system. In the present case, because no agreement was reached between the Grantee Party and either the First native title party or the Second native title party, no Section 31 Deed was signed by any party. Consequently, the Government party had a limited role in the negotiations before the commencement of the present future act determination application proceedings.

[107] The Tribunal has noted that a 'dual deed' practice has been followed in other jurisdictions in Australia, including Western Australia, Victoria and the Northern Territory (see *Mt Gingee Munjie Resources Pty Ltd v Victoria* (2003) 182 FLR 375 (*'Mt Gingee Munjie Resources'*); *Jabiru Metals Ltd v Victoria* (2010) 257 FLR 443 at [20]-[21]; *FMG*

Pilbara Pty Ltd v Wintawari Guruma Aboriginal Corporation (2009) 258 FLR 418 at [73]-[78]).

[108] In similar circumstances in relation to a Victorian matter, the Tribunal accepted that the system of 'split deeds' effectively meant that, as a matter of practice in that State, the Government party does not normally become involved in negotiations until there have been negotiations about the Project Consent Deed between the native title party and grantee party. Where negotiations between those two parties had not reached resolution (and hence there was no agreement about a Project Consent Deed), no Section 31 Deed had been signed by those two parties which could be put to the State Government for its consideration and 'trigger' the Government's 'more active involvement' (*Mt Gingee Munjie Resources* at [74], [91]).

[109] The Tribunal also stated that it is entitled to take into account the practice of negotiation which had developed in Victoria and that, although the obligation to negotiate in good faith was not removed from the Government party, 'in practice that obligation must be viewed on the basis that the Government party does not effectively become involved in negotiations until a Project Consent Deed is finalised between the other negotiation parties.' The content of the obligation on the Government party was thus 'conditioned' by the practice developed in Victoria (*Mt Gingee Munjie Resources* at [92]).

[110] Because the Grantee party and the First native title party to these proceedings were unable to reach agreement, the matter did not reach the stage where the Government party was to enter into an agreement with the other parties. Those circumstances conditioned the nature and extent of the Government party's involvement in the negotiations and hence what could be expected of it in the discharge of its statutory obligation to negotiate in good faith.

[111] However, the Government party contends that it did more than merely 'assist and facilitate'. In particular, the Government party contends that it:

(a) participated in discussions not only with the Karingbal people #2 and their formal representative, but also with factions of the Karingbal People #2 and their representatives (a matter considered below at [127] to [142])

(b) indicated a willingness to attend negotiation meetings to the extent of requesting an invitation to meetings between the other parties, and attended meetings from 4 October 2011 onwards

(c) investigated claims into cultural heritage issues related to the proposed tenement
(d) contacted the representatives of the Grantee party to request documentation evidencing the Grantee party's negotiations with both native title parties in this matter, and
(e) participated in mediation in the Tribunal.

[112] The Government party asserts that, at all times during these negotiations, it 'indicated a willingness to assist' the native title parties 'in any way possible'. That approach is evidenced by initial letters which it sent to the native title parties 'offering the State's assistance', attendance by its representatives at the meetings of 4 and 5 October 2011 at the request of one of the registered native title claimants for Karingbal #2, along with the 'numerous telephone calls and other communications' made by Ms Butteriss on its behalf.

[113] Evidence in support of the contentions is found in the Affidavit of Ms Butteriss, which is Annexure 7 to the Government party's statement of contentions, and the documents attached to the Affidavit.

[114] As noted earlier in these reasons, the Tribunal has stated that when determining whether the parties have negotiated in good faith a contextual evaluation is required. The approach taken by one party is normally influenced by the approach taken by another, including by the native title party. That will be relevant to deciding whether the other parties have fulfilled their obligation and may impose a lesser standard of them (see e.g. *Drake Coal* at [85], *Placer (Granny Smith)* at [30]).

[115] In further response to the allegation that it did not negotiate in good faith, the Government party made submissions in relation to the First native title party's conduct focusing particularly on a division within the applicant, that 'made it extremely difficult for the other parties to engage in negotiations with the Karingbal People #2'. The State became aware that there were 'two different factions within the First native title party' – one consisting of Charles Stapleton and at times Mark Albury, and the other consisting of the remaining persons comprising the applicant (Mark Albury, Sharleen Leisha, Marlene Leisha and Carol McLeod). This situation came to the attention of the Government party through 'communication from an archaeologist involved with the Karingbal People', Ann Wallin (of Archaeo Cultural Heritage Services), and through correspondence with Charles Stapleton. These communications also included an assertion that the other registered claimants

comprising the applicant were not legitimate 'Karingbal People' and that there was an ongoing dispute of this nature which included the lodging of a new overlapping native title claim.

[116] The State had apparently been involved in a number of other future act matters with the Karingbal People #2 where this division has been evident. On 30 June 2011, the State was provided with a copy of a letter sent by QSNTS to another company with tenements in the region of the proposed tenement (Endocoal Limited) advising that QSNTS had recently ceased to act for the Karingbal People #2 with respect to their native title claim and future act negotiations. In that letter, QSNTS stated:

> There are currently two factions within the Karingbal People Native Title claims. We understand that each faction has given the following lawyers instructions to represent the group in relation to Native Title matters. We are unsure if their retainer also extends to the negotiation of Future Act Agreements.

It provided contact details for Robert Powrie and for Redmond & Redmond Solicitors.

[117] The Government party understood that Redmond & Redmond commenced acting for the First native title party in June 2011. Despite Redmond & Redmond being the solicitors on the record, the Government party was advised by Charles Stapleton that they did not represent him. At the negotiation meetings attended by the Government party on 4 and 5 October 2011, there appeared to be some dispute about representation of the First native title party given Mr Lavery's attendance as an 'advocate' for Mr Stapleton. Mr Lavery did not appear in an official representative capacity for the First native title party. The Government party had not been aware of Mr Lavery's involvement until this time. Despite his limited role, it appeared to the Government party that Mr Lavery was taking 'a leading role in negotiating on behalf of the Karingbal #2 People'. Furthermore, the Government party submits, it was 'not made clear whether the proposals made by Mr Lavery were on behalf of one faction only, or the Karingbal People #2 as a whole'.

[118] The Government party further contends that, while Bill Redmond (of Redmond & Redmond) appeared as the legal representative of the Karingbal People #2, it was 'not confirmed whether he had authority to represent the Karingbal People #2 as a whole'. Apparently Mr Redmond was unable to confirm at those meetings that he had 'authority to represent all of the registered claimants on behalf of' the First native title party, and, in the submission of the Government party, there is a question whether he had such authority in the

meetings on 4 and 5 October 2011 ‘and in the course of negotiations generally’. Mr Redmond did not appear to make proposals at those meetings.

[119] In summary, the Government party contends that, as a result of its own observations and the information it received, ‘while the Karingbal People #2 were at all times the registered native title claimants in relation to the area, there is no doubt that there were two factions within the claim group and that each faction had separate representation’. The observations and information apparently prompted some uncertainty on the Government party’s part as to ‘who, if anyone, had authority to represent the Karingbal People #2 as a whole’.

[120] The Government party also points to the Tribunal’s determination in *Mt Gingee Munjie Resources*, a case involving a split within the native title claim group (and the applicant). The facts in that case were different from those in the present case, because one faction in that case had insisted on separate negotiations even to the extent of not agreeing to sign the same agreement as the other faction. The apparent divisions within the First native title party did not result in a failure to have negotiations in which all relevant Karingbal people could be, and for the most part were, involved together. The distinction was reflected in separate representation for Charles Stapleton rather than his exclusion from the process. Nonetheless, allowing for that significant difference between the cases, I note that Deputy President Sumner held that the split in the claimant group was a ‘highly relevant factor to whether other parties have negotiated in good faith’ (*Mt Gingee Munji Resources* at [50] and [55]).

[121] The Government party also submits that the failure of the First native title party to make a submission in response to its invitation to make one in relation to the grant of the proposed tenement is a factor that the Tribunal can take into account when determining whether the Government party negotiated in good faith.

[122] In its statement of reply the First native title party states, in summary, that:

(a) the Karingbal People are not at liberty of knowing the Government party’s internal practices and, in particular, were not aware of any need to ‘invite’ the Government party to any meetings

(b) it should not be assumed that it was up to the First native title party to ‘invite’ the Government party to a meeting that the First native title party was not convening but which the Grantee party was convening

(c) the Government party is a party to the application for the grant of the proposed tenement (i.e., it is a 'negotiation party' as defined by s. 30A of the Act) and accordingly it is reasonable to assume that the Government party would attend meetings where it has a statutory obligation to engage in good faith negotiations

(d) until the 4 and 5 October 2011 meeting, the solicitors on the record for the First native title party 'received no communication from the State', and to the best of the solicitors' knowledge 'no assistance' was provided to the members of the First native title party.

[123] In assessing that statement in reply, I bear in mind the following observation made by Deputy President Sosso in *Raymond Dann & Ors (Amangu People)/Western Australia/Empire Oil Company (WA) Limited,* [2006] NNTTA 153*:*

> Assessing whether there have been good faith negotiations requires the Tribunal to look at all circumstances and the totality of the negotiations. This is particularly the case when the parties appearing before the Tribunal do not have the monetary and human resources of the Crown or large mining companies. … So it is very important to assess negotiations recognising that the Tribunal is considering the behaviour of real people, often working in very difficult circumstances, without many resources, sometimes with major financial constraints and often with both a less than perfect understanding of their obligations under the Act and of their respective aspirations and concerns. (at [72])

[124] Nonetheless, these replies do not convince me that the Government party failed to negotiate in good faith. I am satisfied that the First native title party had legal representation from some time in June 2011, and that, even if the lawyers were unaware of the Government party's letter of 9 February 2011, they were sent and could have responded to the letter dated 30 June 2011. That letter, extracts of which are quoted at [88] clearly requested the First native title party to contact the Government party's representatives 'in order for negotiations to commence'. There was no response. The representatives of the First native title party could have contacted the nominated person for the Government party to inquire, or make arrangements, about the negotiations. Indeed, it is clear from Ms Butteriss's evidence that, had it not been for the approaches made to her by Ann Wallin and Charles Stapleton (rather than the legal representative of the First native title party), the Government party would probably not have become involved in the negotiations when it did.

[125] In hindsight it would have been preferable if there had been greater communication between the representatives of the Government party and the First native title party. Such communication early in the negotiation process might have engendered a clearer understanding in the First native title party of the nature of the Government party's role in the

‘dual deed’ system and might have influenced, though not necessarily constrained, the options for proposals that the First native title party might have put to the Government party.

[126] It is useful to recall the oft quoted Tribunal statement that negotiation involves ‘communicating, having discussions with or conferring with a view to reaching an agreement’ and that the Tribunal must look at the Government party’s conduct as a whole, including whether it has done what a reasonable person would do in the circumstances (see *Placer (Granny Smith)* at [30]). On that basis, and having regard to the way the ‘dual deed’ system operates in Queensland, the actions taken by the Government party in contacting the First native title party and its involvement in negotiations from 4 October 2011 onwards, and the relative lack of engagement by the First native title party with the Government party, I am not satisfied that the Government party failed to negotiate in good faith with the First native title party.

Implications of the Government party’s dealings with persons other than the First native title party

[127] The evidence and submissions indicate that another issue is whether the Government party’s dealings with one of the people who constituted the registered native title claimant (Charles Stapleton), and with Karingbal persons who did not comprise the registered native title claimant (i.e. were not the First native title party), and with one or more other people who purported to speak for some Karingbal people, adversely affected the discharge of its obligation to negotiate in good faith with the First native title party.

[128] Although the First native title party contends that the Government party failed to negotiate with it, its submissions refer to the Karingbal People’s understanding that the State ‘without making proper inquiry has been dealing with an individual applicant and third parties who have and at no stage have had any authority to bind the Karingbal People’. Furthermore, it is said, the solicitors for the First native title party were not informed of any requests from ‘different factions and members’ and were not given the liberty to respond to any representations made by them.

[129] It is clear from the evidence that Ms Butteriss, an employee of the State, was contacted by people who indicated they were members of the Karingbal #2 native title claim group, and by Ann Wallin on behalf of Charles Stapleton. It is not necessary to deal with the evidence in

detail. Suffice to say that Ms Butteriss recorded various oral and written communications with her about such matters as:

(a) cultural heritage (including cultural clearances, alleged breach of the *Aboriginal Cultural Heritage Act 2003* (Qld), and the registration of a Karingbal corporation as a cultural heritage body) - with Fred Stapleton (brother of Charles Stapleton), Ms Wallin, Steven Freeman, and John Hoare

(b) the composition of the Karingbal #2 native title claim group (including whether they were all Karingbal People) - with Ms Wallin

(c) which Karingbal People should be able to attend negotiations with the Grantee party - with Mr Freeman, Ms Wallin, and Charles Stapleton, and

(d) the conduct of negotiation meetings and the dates of proposed negotiation meetings - with Ms Wallin, Charles Stapleton, Fred Stapleton, and Mr Zillmann.

[130] The State responded to any inquiries it received due, it said, to its willingness to assist the Karingbal People and to provide appropriate information to interested parties. So, for example, Ms Wallin contacted the State by telephone on 25 July 2011 in relation to some concerns she held about the composition of the Karingbal #2 claim group and Charles Stapleton's opportunity to participate and be represented in negotiations, as well as concerns she had about cultural heritage issues which the State had a duty to investigate. The cultural heritage query was referred to the appropriate State agency, and the State took steps to participate in subsequent negotiations about the grant of the proposed tenement.

[131] In her Affidavit, Ms Butteriss drew on her observations of the meeting on 4 and 5 October and her previous contact with Ms Wallin, Charles Stapleton, Fred Stapleton, Mr Freeman and Mr Hoare, and correspondence from Charles Stapleton, and stated that it appeared to her that 'there was dissent amongst the Karingbal People #2 Registered Native Title Claimants'.

[132] As noted earlier, it was relevant to its role as the Government party that the State became aware of the apparent division within the Karingbal People #2 claim group.

[133] Despite what it calls 'the uncertainty in legal representation and the division within the Karingbal #2 Claim group', the Government party made 'considerable efforts' to keep in contact with 'all interested parties to these negotiations' including:

(a) Mr Lavery, who was not officially a legal representative in this matter

(b) Charles Stapleton, 'one of the claimants who indicated that he was not represented by Mr Redmond'
(c) Ms Wallin, 'an archaeologist involved with the Karingbal People who made enquiries of the State in this matter', and
(d) Fred Stapleton, Mr Freeman and Mr Hoare, 'who identified as Karingbal People and who contacted the State about this matter'.

[134] The First native title party submitted that Ms Wallin is 'not involved with the Karingbal People', and the Government party failed to make any enquiry as to the legitimacy of her claims. Had it done so, the First native title party contends, the Government party would have been informed that Ms Wallin held 'no authority on behalf of the Karingbal People'. By failing to make proper due diligence enquiries as to the legitimacy of Ms Wallin's connection with the Karingbal People, the Government party had (in the First native title party's submission) failed to act in accordance with the principles of good faith negotiations.

[135] The First native title party states that (in addition to its contact with Mr Lavery, Ms Wallin and Charles Stapleton) the Government party:

(a) kept in contact with Mr Freeman, Fred Stapleton and Mr Hoare, yet they were not registered native title claimants
(b) did not make considerable efforts to keep in contact with the First native title party's solicitors nor with the 'remaining' four people who are the applicant for the Karingbal #2 claim (Mark Albury, Carol McLeod, Marlene Leisha and Sharleen Leisha), and
(c) failed to communicate to the First native title party that it was communicating directly with people other than the registered native title claimants or their legal representatives.

Consequently, the First native title party submits that it did not request for negotiations to proceed in a different way because it was unaware of the State's communications with persons alleging to be representatives of the Karingbal People.

[136] In more general terms, the First native title party submits that:

(a) the Government party's continued communications with unauthorised persons without informing the representative of the Karingbal people is a failure to act in good faith, and

(b) any communications that the Government party had with people who were not authorised to negotiate on behalf of the Karingbal People were irrelevant to the Government party's negotiations with the Karingbal People.

[137] The State of Queensland has a range of roles and responsibilities in relation to Indigenous people in Queensland under various Commonwealth and state statutes. I accept, for example, that the State:

(a) has a role in informing and assisting any interested persons who contact it in relation to the grant of mining tenements (including land holders, local residents and community groups who are not negotiation parties in relation to a particular future act), and

(b) has an obligation to investigate claims as to breaches of the *Aboriginal Cultural Heritage Act 2003* (Qld), regardless of whether such claims are made by native title claimants or persons purporting to act in a representative capacity on behalf of any of them.

[138] The State was obliged, in its role as the Government party, to negotiate in good faith with the First native title party with a view to obtaining the agreement of the First native title party to the grant of the proposed tenement. Although the focus of these proceedings is on those negotiations, it would be artificial to disregard the effect of separate but related activities of the State on how it performed that role. The fact that the State had communications with people (including individual members of a native title claim group or a person purporting to act on their behalf) in relation to their concerns outside but concurrently with the future act negotiations does not mean that the State was treating those people as being the First native title party or that it was ignoring or undermining its formal role as the Government party in the future act negotiations. Any allegations to the contrary would have to be supported by evidence before the party making the allegation could satisfy the Tribunal that the Government party did not negotiate in good faith.

[139] It is clear that, despite its concerns in relation to the division within the native title claim group and uncertainty about the group's representation, the Government party was not relieved of its obligation under the Act to negotiate in good faith with the First native title party. That is what the Government party attempted to do. Furthermore, although it was contacted by people who advised the State that they were Karingbal People, or that they were contacting the State on behalf of particular Karingbal People, the State conducted searches in

relation to those people. Having ascertained that two of them were not people who were part of the registered native title claimant for the Karingbal #2 claim, the State did not treat them as having authority to represent the First native title party. No official correspondence to the First native title party (such as notification letters) was provided to these individuals by the Government party. Rather, the Government party's correspondence in this matter (i.e., the letters of 9 February and 30 June 2011) was provided to each person who comprised the registered native title claimant. It invited them to contact the State, and nominated Ms Butteriss as the contact person. Charles Stapleton was the only one of those persons to contact the Government party in response and, consequently, he was the only such person with whom the State had 'extensive contact' in the course of this matter.

[140] Although the Government party acknowledges that it did not advise Redmond & Redmond of issues raised by Charles Stapleton and Ms Wallin, it took that approach because the Government party understood that Mr Stapleton was part of a faction that was not represented by Redmond & Redmond. Due to the nature of the issues raised by Mr Stapleton, some of which related to the legitimacy of the other claimants' status as Karingbal people, the Government party did not consider that it was appropriate to disclose these issues to other parties.

[141] In the circumstances of this case, the Tribunal cannot be satisfied that the Government party failed to negotiate in good faith with the First native title party simply because it obtained, considered, assessed and acted on information provided to it by persons other than the legal representatives of the First native title party or all of the persons comprising the First native title party acting jointly.

[142] The negotiating environment was complicated. While criticism has been made of the Government party's approach, the State has given a reasonable explanation of why it did what it did, both as the Government party and in the performance of its other functions. Its actions have to be considered in context, and the Tribunal needs to take a reasonably robust common sense approach to what is required of the Government party (see *Drake Coal* at [85]; *Western Australia v Daniel* (2002) 172 FLR 168 at [87]). I am not satisfied that the Government party failed to negotiate in good faith with the First native title party.

[143] Despite the conclusions set out at [102], [126] and [142], the Government party might take the opportunity to review its practices in relation to right to negotiate proceedings. The

practical implications of the 'dual deed' system in Queensland for the role usually played by the Government party does not relieve the Government party of its statutory obligation to negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the future act. The Government party might reconsider the appropriateness of its standard procedures in light of the circumstances of particular negotiations. For example, it might consider following up where there is a lack of response to its standard letters to a native title party, and it might take reasonable steps to facilitate and engage in discussions between parties rather than simply await an invitation to participate (see the *Njamal* indicia quoted at [63]). I am not suggesting that the Government party sat on its hands throughout the negotiations between the First native title party and the Grantee party. Clearly, when prompted by Charles Stapleton and others, it took a more active role. However, earlier on in the process, it could have done more than simply send its two standard form letters to the First native title party, then await a response and note that none had been received. Just as the *Njamal* indicia are simply that, and not a prescriptive list, I am not suggesting that the Government party must take specific steps in every case. The circumstances of this case, however, indicate that it might have taken a more active role to encourage, and seek to maintain the momentum of, negotiations between the parties.

The Grantee party and the First native title party

[144] In its statement of contentions lodged on 13 April 2012, the First native title party contended that the Grantee party had not negotiated in good faith and hence had not fulfilled its obligations under s. 31(1)(b) of the Act.

[145] The critical issues, so far as the First native title party is concerned, seem to be the prospective loss of enjoyment of registered native title rights and interests if the proposed tenement is granted and the perceived unreasonableness or inadequacy of the compensation offered to it by the Grantee party. Accordingly, the submissions of the parties will be dealt with later in these reasons by reference to:

(a) the Grantee party's offer of compensation, and
(b) other matters.

[146] The contentions of the First native title party have to be assessed in light of the dealings between the Grantee party and the First native title party in relation to the grant of the

proposed tenement. The content of these dealings can be ascertained from documentary evidence provided to the Tribunal.

Evidence about negotiations

[147] The chronology and content of meetings and other communications between the First native title party and the Grantee party before the negotiations on 4 and 5 October 2011 can be summarised as follows:

(a) About two months after the notification date and within the notification period, the Grantee party sent a letter dated **5 May 2011** to the First native title party. The letter was addressed to QSNTS, on the understanding that QSNTS acted on behalf of the Karingbal People #2. The letter referred to the s. 29 notices, stated that Xstrata Coal Queensland Pty Ltd ('XCQ'), on behalf of the Rolleston Coal Joint Venturers, i.e., the Grantee party, 'is committed to engaging with the Karingbal People #2 and the Bidjara People in good faith negotiations regarding native title and the grant of ML 70415' and wanted to discuss with the Bidjara and the Karingbal cultural heritage matters related to all three new mining leases. The Grantee party proposed that the first meeting be held with the Karingbal People #2 on 19 May 2011 (after a separate meeting proposed for that day with the Bidjara People). The purpose of the initial meeting would be to explain the project, discuss the negotiation process, discuss on a preliminary basis the possible content of an agreement in general terms, and discuss the next stage in the negotiation, including possible future meeting dates. The Grantee party stated that, 'to assist the Karingbal People #2 applicants attend meetings to discuss the native title issues regarding the grant of the Mining Leases', it would provide funding per person of attendance fees (full day or half day), accommodation and meal expenses, travel time, travel expenses and carer payments. The letter specified the amounts payable and conditions, to be met in relation to such payments. The Grantee party was also willing to pay 'reasonable legal costs' of the First native title party for this purpose up to $25,000, with any additional legal costs being pre-approved by the Grantee party.

(b) The First native title party accepted that invitation, and a meeting was held between the First native title party and representatives of the Grantee party on **19**

May 2011. Neither party invited the Government party to attend and it was not represented at that meeting.

(c) The next meeting scheduled for 10 June 2011 was postponed at the request of the Grantee party and with the agreement of the First native title party in light of a directions hearing in the Federal Court to be held on **9 June 2011** in relation to the Karingbal #2 claim and the Bidjara claim at which point, the Grantee party suggested, 'the issues concerning the applicants, the composition of the claim group and the potential for another Karingbal People #2 claim, may become clear'.

(d) On **25 June 2011**, Charles Stapleton wrote to Mr Zillmann referring to the circumstances surrounding the Karingbal #2 claim and the 'intentions of those families who have demonstrated traditional connection to Karingbal country' to file a new native title claim (Karingbal #3/Brown River People) in 'the near future'. Mr Stapleton referred to the right to negotiate process for the Rolleston Mine that, he acknowledged, had to involve people who were currently registered applicants for the area (Karingbal #2 and Bidjara). Mr Stapleton stated that he was the only person who is both part of the Karingbal #2 applicant (i.e. the First native title party) and authorised to be an applicant for the Karingbal #3/Brown River claim. He claimed to have traditional knowledge about significant Aboriginal areas and objects in the area of the Rolleston Mine and planned extensions of it, and expressed concerns about a particular area. He referred to the difficult position he was placed in at the first meeting with representatives of the Grantee party and the First native title party which meant he had to leave the meeting early, and he expressed other concerns. He advised that he wished to be consulted in good faith as is required in the right to negotiate process and said he required legal advice. He had not given instructions to Redmond & Redmond who he said did 'not have unanimous support of the Karingbal applicants'. Mr Stapleton suggested that 'it would be wise to resource the attendance of the other people who have been authorised to be the applicant for the Karingbal #3/Brown River People native title claim'. He requested information about meetings that had occurred or were being planned and asked that Xstrata resource himself, the other people, and their nominated legal adviser to attend.

(e) On **4 July 2011**, Mr Zillmann responded by letter sent by email. He confirmed that the Grantee party 'must continue to consult in good faith with the registered

native title claimants' for the area of the proposed tenement and 'will continue to do so'. He referred to a proposed meeting towards the end of July, which would be the first communication between the parties since the meeting on 19 May 2011. He described the circumstances around the 19 May meeting and said that, after Mr Stapleton left, the meeting was devoted to a presentation on the Rolleston expansion project (a copy of which was provided to Mr Stapleton at the meeting). No negotiations transpired. As a consequence, no minutes of the meeting were taken. He reiterated the Grantee party's obligation to negotiate with registered native title claimants, and continued:

> We of course appreciate that there is currently a dispute within the Karingbal as to who are the correct or authorised applicants for the claim. With respect, this is not an issue that Xstrata has any control over. It is for the Court to resolve such issues, not Xstrata. Xstrata is not taking sides in this dispute. It will simply act in accordance with the requirements of the law. This means it will only be inviting the current registered native title claimants to the next meeting.

Mr Zillmann confirmed that Xstrata would fund one lawyer to represent the First native title party for the purposes of the right to negotiate process. He noted Mr Stapleton's comments in respect of the engagement of Redmond & Redmond, and stated that Mr Stapleton was welcome to obtain 'additional legal advice of your own, but Xstrata will not fund this'. He also noted Mr Stapleton's comments about cultural heritage matters and stated that Xstrata would be developing a Cultural Heritage Management Plan ('CHMP') for the Rolleston Expansion Project. Xstrata would negotiate with the relevant party or parties in accordance with the *Aboriginal Cultural Heritage Act 2003* (Qld) 'with a view to reaching agreement on the terms of a cultural heritage management plan for the expansion project'.

(f) A negotiation meeting took place in Rockhampton on **13 and 14 July 2011**. Representatives of the Grantee party met with the First native title party and their legal representative, Mr Redmond. Neither party invited the Government party to attend and it was not represented at the meeting. The project and terms of a possible agreement with the First native title party were discussed. The Grantee party indicated that it was proposing to offer compensation based on the unimproved value of the land that was potentially subject to native title and that it was proposing to pay half of such an amount to the First native title party because the Second native title party also had a native title claim over the area. The

Grantee party raised, as an estimate and guide, an amount in the order of $300,000. No firm compensation amount was offered as the Grantee party said the amount would depend on the area potentially subject to native title and a review of expert land valuations. (I note that, in its reply to the Grantee party's response on discrepancies, the First native title party asserts that the issues raised at the July meetings included the life of the mine and mine profits, and the correlation between the valuation of coal taken and the mooted compensation. There was no evidence before the Tribunal to substantiate the assertions and the Grantee party denies them. It says that these issues were first raised at the negotiation meetings on 4 and 5 October 2011. The First native title party asserts that no provision was made by the Grantee party for a minute taker at these meetings. The absence of agreed minutes might pose a practical issue for one or more of the negotiation parties, but there was no obligation on the Grantee party to provide them and each party was at liberty to take its own notes of the meeting.)

(g) In August 2011, at their request, the Grantee party arranged for the Karingbal #2 people to inspect the part of MLA 70415 that is potentially subject to native title. Accounts vary as to the attempted inspection on **6 and 7 (or 8) August 2011**. According to Mr Zillman's affidavit, he was informed by Steve White (the lead native title and cultural heritage negotiator for Spinifex Pty Ltd, land access consultants to XCQ) that there was concern that the wrong area was visited on that occasion. According to the First native title party's statement in reply, Karingbal People attended on site but were denied access because proper arrangements were not made by the Grantee party. Consequently, the parties had to leave and there was no inspection of the site at that time. Whatever occurred between 6 and 8 August, a further inspection was conducted on **24 and 25 August 2011**. The Grantee party funded the site visits.

(h) The new native title claim (Charles Stapleton & Ors on behalf of the Brown River People v State of Queensland QUD245/2011) was filed in the Federal Court on **29 August 2011**.

[148] Another meeting of the parties was held on **4 and 5 October 2011**. Most of the persons who together comprise the First native title party were present. Sharleen Leisha, Marlene Leisha and Carol McLeod attended on 4 October 2011 and were represented at that meeting

by Mr Redmond. Mr Lavery was also present at the meeting on 4 and 5 October as the representative of Charles Stapleton, who attended the meeting on both days. Mark Albury did not attend on either 4 or 5 October. The Government party was represented at the meeting and took minutes of the meeting (issues in relation to which are considered at [72] to [77] of these reasons for determination). The participation of the Government party resulted from correspondence between the Grantee party's legal representative and Ms Butteriss. Mr Zillmann wrote to Ms Butteriss on 26 July 2011, in reply to her letter of 30 June 2011, providing an update on the negotiations with the First native title party and the lack of engagement by the Second native title party. Ms Butteriss wrote to Mr Zillmann on 3 August 2011 advising that the State had been 'approached by a registered claimant from' the First native title party to attend future negotiation meetings between the Grantee party and the First native title party. Ms Butteriss asked for the next negotiation meeting dates(s) so that arrangements could be made for the Government party to attend them.

[149] At the meeting on **4 October 2011**, the Grantee party noted that the six months period for negotiation ended on 30 September 2011 but it wanted to continue to negotiate with the First native title party in the hope of coming to an agreement. It put an offer of compensation to the First native title party of $197,000 and explained that the amount was half the unimproved value of the area of land where native title had not been extinguished by tenure. The minutes of the meeting record that the Karingbal People questioned the figures provided by the Grantee party in calculating its offer of compensation. They asserted that, at the previous two meetings, greater amounts had been presented to them to consider. The Grantee party responded that that was not the case. Figures presented at previous meetings were estimations based on approximations of areas and valuations at the time.

[150] At the meeting, Karingbal People raised issues about cultural heritage on the land, including certain specified matters of concern to them. They expressed concern over the damage or loss of cultural heritage if they agreed to the mine, and outlined that they would not want specified items disturbed. They stated that a price cannot be put on the loss of culture. The Grantee party responded by reference to the operation of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the other Queensland legislation and the prospective use of a CHMP to address cultural heritage issues. (These matters are noted at [242].)

[151] There was a discussion about whether the Grantee party would consider making payments based on royalties. Mr Lavery asserted that payments based on the pastoral value of

land was not relevant given that mining would be taking place there. He asserted that failure to consider payments based on royalties would mean that the Grantee party was not acting in good faith. He asked for information about the amount of coal that would be extracted from the land and what the estimated profits were. The Grantee party's response was that it did not believe mining profits are relevant because the State 'owns' the minerals, and native title determinations do not include a right to minerals. Although royalties may be included in compensation arrangements, it is not a requirement that such negotiations include royalties. The Grantee party was presenting its offer based on land value (based on the loss of land and native title rights and interests over the land) rather than the value of what is to be mined from the land. There was discussion about whether royalties were or were not relevant to the loss of native title rights and interests. The Karingbal People stated that the duration of the mine was considerable and during that time they would be unable to practise and hold their rights over the land. The Grantee party clarified that the life cycle of the entire mine is 39 years (including required rehabilitation phases) and that mining on that part of the area of the proposed tenement where native title has not been extinguished by tenure 'would only occur for approximately five year blocks'. As well as asserting the relevance of the value of coal, Mr Lavery took issue with the 'values' that the Grantee party was placing on its compensation offer whilst it did not include compensation for the loss of the cultural rights or heritage.

[152] There was a discussion about the purchase by Xstrata of Meteor Downs, a nearby cattle station, for a sum that on a rate per hectare was more than the Grantee party used in calculating the offer of compensation to the native title parties. The Grantee party explained that the purchase price included improvements (such as fences, bores and feeding lots) and that the added value of such improvements was not something that Aboriginal parties have created. According to the Grantee party, it was reasonable, with reference to s. 51A of the Act, that the valuation be based on the unimproved value of the land.

[153] The discussion about the differences in the two amounts and the methods adopted by the Grantee party appears to have stalled when the First native title party was asked how Karingbal People would calculate the value differently. Mr Lavery stated that it was unacceptable for the Grantee party to present its method of calculation and expect the First native title party to respond that day. More time would be needed for Karingbal people to discuss the issues involved. The Grantee party responded that the same method was

presented at the previous meeting (almost three months earlier) and the First native title party had adequate time to respond to that method. When the Karingbal people expressed concern about the reduction in the amount of the offer between the previous meeting and this meeting, the Grantee party explained that the offer given at the previous meeting was based on estimates of a larger area (2,000 hectares) and higher rate per hectare ($300). The current offer was reduced from the original offer as the exact area of land involved and its valuation were known.

[154] When it was contended that the amount offered was relatively low given the loss of native title rights and interests, the Grantee party stated that its offer was based on the lower scale of potential compensation (calculated by reference to unimproved land values) given the status of the Karingbal #2 claim, the presence of two other competing claims over the same area, and that if the Karingbal #2 claim is determined it will be for non-exclusive native title rights and interests.

[155] There was discussion about the valuation of the Mt Kelman pastoral lease, cited by the Grantee party. Mr Lavery requested the valuation.

[156] There was also discussion of whether there had been enough time for these negotiations and related matters - issues which were raised by Mr Lavery. (It should be noted that Mr Lavery only came into this process at the 4 October 2011 meeting, after the statutory six months negotiation period had expired.) Mr Lavery requested time for the Karingbal people to research the offer. He also requested information about the mine, volume of coal and profits forecasts. The Grantee party responded that it did not see that this was relevant to the negotiation and indicated that the majority of the information is publicly available on the company's website. The Grantee party asserted that from the beginning it had stated that royalties/the value of coal would not be part of the compensation offer and questioned why the issue of royalty payments had not been raised previously. Other issues were raised before the 4 October 2011 meeting ended.

[157] On 4 October 2011, the Grantee party provided to Mr Redmond and Mr Lavery by email various documents including the table 'MLA 70415 Native title Extinguishment Assessment' (referred to earlier in these reasons at [7]) which describes the current tenures and extinguishing tenures for each of the parcels of land and roads that together cover the area of MLA 70415.

[158] The negotiations resumed on **5 October 2011**. Charles Stapleton was present. Three others who are part of the Karingbal applicant (Carol McLeod, Marlene Leisha and Sharleen Leisha) were not present due to the illness of Marlene Leisha and the fact that her daughter (Sharleen Leisha) and sister (Carol McLeod) were caring for her. Mr Redmond stated that he had received instructions from his clients and he was authorised to speak on their behalf. As noted earlier, Mark Albury was also absent.

[159] In response to requests made by Mr Lavery on the previous day:

- a letter of authorisation for Steve White and Theuns Burger (Project Manager, Rolleston Coal Expansion Project) was presented
- an excerpt from the land valuation was given to the Karingbal
- the s. 31(1)(a) letter sent by the Government party to the Karingbal people calling for submissions was presented.

[160] There was further discussion about the valuation of the land in respect of which the compensation offer was calculated, including further discussion about the value of nearby properties such as Meteor Downs. There was also discussion about whether employment opportunities would be included as part of the compensation. The Grantee party stated that all the work would be done by contractors, and it would be willing to include employment opportunities through contracting options to the Karingbal as part of the agreement. The minutes record that this option could include 'a preferred provider arrangement being established for contractors who work with Karingbal business/people'. There was some discussion about how that might be weighted.

[161] The minutes record that 'Karingbal and Mr Lavery' announced that they would be travelling to the Tribunal for a meeting. The negotiations resumed on their return about 45 minutes later, and 'the involved parties' would not disclose the reasons for or outcome of that meeting. (Given that Charles Stapleton was the only Karingbal person at the negotiation meeting on 5 October, I infer that only he and Mr Lavery were the 'involved parties'. That conclusion is confirmed in Ms Butteriss's Affidavit.)

[162] Mr Lavery (on behalf of Charles Stapleton only) presented a different model of payment (the 'counter offer'):

(a) $1.05 million upon approval of the grant

(b) $50,000 per annum (in advance of mining commencing) where the land covered by the proposed tenement is held but unused
(c) $1 million per annum when mining is occurring on that land
(d) $200,000 per annum during the rehabilitation phase.

That would bring the monetary value of the counter offer to $7 million over 35 years.

In addition, Mr Lavery requested:

(e) a full cultural heritage survey to be conducted over the area
(f) a full CHMP be developed
(g) costs associated with two visits per year with a 'technical adviser' be granted to the Karingbal People to ensure that milestones are proved
(h) the Grantee party would pay all Mr Lavery's legal expenses for work associated with getting the right to negotiate agreement signed.

There was discussion about the method adopted by Mr Lavery to come to those figures and the basis on which they were put.

[163] The parties also discussed the age and appropriateness of the valuation of Mt Kelman provided on 4 October, where Mr Lavery could obtain the information about the mine that he had requested on 4 October, and whether that information was relevant to these negotiations. They also discussed what would happen if the money was paid in accordance with the counter offer and either the Karingbal #2 claim was dismissed or another claim over the relevant area was successful. Mr Lavery said that he imagined any native title determination in relation to the Karingbal #2 claim would be for non-exclusive native title rights and interests. The Grantee party responded that the amount of the counter offer was developed using principles of exclusive native title and that the amount of compensation would be paid many times over. The Grantee party considered that the cultural heritage issues should not be taken into account as they would be required to be addressed under the *Aboriginal Cultural Heritage Act 2003* (Qld).

[164] When asked at this point whether he agreed with the model in the counter offer, Mr Redmond said he would need to seek instructions from his clients.

[165] In response to questioning from Mr Lavery, the Grantee party confirmed that $197,000 was its offer, but it was open to discussion about the offer and how and when it could be paid.

[166] Mr Lavery announced that the reason for the meeting with the Tribunal that morning was to request it to act as mediator for future negotiations between the parties. Mr Redmond confirmed that the request at that time was only from Mr Lavery (on behalf of Charles Stapleton) and that he was yet to receive instructions from his clients.

[167] There was discussion about Mr Lavery's request for his expenses to be paid. The Grantee party informed Mr Lavery (who had previously advised that he was acting in an unpaid capacity as an advocate for Mr Stapleton) that it would only be funding and reasonably resourcing one legal representative who was employed by the Karingbal People to represent their interests, Mr Redmond.

[168] Mr Lavery stressed that he would await the involvement of the Tribunal and would not allow the Grantee party to expand further on its offer or respond to his counter offer. There was some discussion of his approach and the Grantee party conveyed its wish to counter the offer proposed by Mr Lavery. He said that he would not participate in any further discussions and would not elaborate on the methodologies used to come to the amounts presented in his offer. He stated that he was not funded to provide such follow up work. The Grantee party sought clarification from Mr Redmond that he would seek out his clients for their opinions about the offer and the involvement of the Tribunal.

[169] The Grantee party stated that it believed that the counter offer provided by Mr Lavery was unreasonable as, even if the Karingbal #2 claim is successful and the Karingbal people get a determination of native title and they sought compensation after the event for the effect of the grant of the proposed tenement on their native title rights and interests, the most they would be entitled to receive would be the freehold value as per s. 51A of the Act. The Karingbal People countered by stating that they believed the $197,000 offered by the Grantee party was unreasonable, especially as it was conveyed as the Grantee party's final offer. The Grantee party strongly opposed that statement, saying the $197,000 was always only an offer and it was expecting a counter offer to that amount and a thorough discussion. The Grantee party was unable to provide a counter offer or discuss the offer proposed by Mr Lavery. It stressed that this was a negotiation process whereby offers and counter offers could be proposed and justified.

[170] Other issues about the representation of Mark Albury were discussed. Mr Redmond was to seek clarification from Mr Albury. Mr Redmond left the meeting to seek instructions

from his clients about how they wished to proceed. Upon his return he stated that he was unable to provide his response, but would discuss the issues raised at the meeting and provide his response to the Grantee party in writing. The meeting closed at 3:15 pm.

[171] In compliance with its undertaking to provide the First native title party with a written outline of the proposed compensation offer and a response to the offer put forward by Mr Lavery on behalf of Charles Stapleton, the Grantee party wrote to Redmond & Redmond on **12 October 2011**. A copy of that letter was sent to Mr Lavery.

[172] The Grantee party's letter described the 'over-riding principle that has guided' the offer of compensation as being 'to reflect the mine's impact on the registered native title claimants enjoyment and exercise of native title rights and interests' (reflecting the language of s. 31(2)). Although 'there is currently little case law or judicial guidance on how to value the impact of an action on native title rights and interests', the Grantee party was willing to offer compensation based on the unimproved value of the area where native title had not been extinguished by prior tenures (the Mt Kelman pastoral holding) in the sum of $197,000 (being half the approximated unimproved value of the land, the other half being offered to the Second native title party). The Grantee party expressly stated that whilst native title compensation 'is not assessed by reference to land value', s. 51A of the Act seeks to 'cap native title compensation at an amount no more than the amount that would be paid for the compulsory acquisition of a freehold estate over the relevant area'. In the Grantee party's opinion, the compensation 'for impact of the mine on native title rights and interests here would be substantially less than the land value' because:

(a) any native title rights that the Karingbal People #2 may establish in respect of the area where native title may still exist are highly unlikely to amount to exclusive possession rights (i.e., equating to something akin to freehold) because of the existing land tenure and use of the areas – rather, they would be limited to those native title rights which could 'co-exist' with the current legal uses of the land, and

(b) the grant of the mining lease would not extinguish native title rights – rather, native title rights will be 'suspended' during the life of the mine and will revive when the mining leases are surrendered (i.e., the 'non-extinguishment principle' would apply).

[173] Two other points were made in that letter in support of the offer being accepted by the First native title party. First, given that compensation is ‘only payable for the impact on native title rights and interests’ and that the Karingbal People #2 are yet to establish that they have native title rights and interests in the relevant area (which is subject to competing native title claims by the Bidjara People and the Brown River People), the Grantee party ‘believes that logically some discount to the amount of compensation should be applied due to the fact that the Karingbal People have yet to achieve a successful determination of native title’. Second, because the offer of compensation was not contingent on such native title rights being established by the Karingbal People #2, the Grantee party was offering ‘certainty of payment regardless of native title claim outcome and early payment of compensation in advance of a native title determination’ (see *Western Australia v Daniel* (2002) 172 FLR 168 at [46]).

[174] In that letter, the Grantee party expressed its view that ‘applying a legal test to the calculation of compensation in this case would result in a compensation of an amount of substantially less than the unimproved land value’. Or, expressed differently, the amount offered in compensation ‘significantly exceeds a calculation of compensation on a legal basis’ and therefore represents a reasonable offer.

[175] Having set out the monetary compensation offer, the letter outlined 'other' or 'additional' benefits that the Grantee party 'may offer' in an agreement between the parties. Those benefits were proposed by the Grantee party 'in response to requests/suggestions from the Karingbal People #2'. It was proposed that these benefits be reflected in the Ancillary Agreement consistent with the following:

(a) the Grantee party would include in calls for contract tenders for the Rolleston Mine Project a section regarding cultural heritage and indigenous affairs which states the importance the Grantee party puts on building and maintaining strong working relationships with local Indigenous groups including the Karingbal People #2.

(b) the Grantee party would require the tenderer to provide details of their past dealings with Indigenous or Aboriginal groups (positive or negative), any current programs they host for enhancing employment or wellbeing of Aboriginal people and how they will endeavour to provide employment opportunities for local Indigenous groups including members of the Karingbal People #2 while working

on the Rolleston Mine Project. Those tenders that provide for involvement of Indigenous groups would be given favourable consideration in the assessment of tenders.

(c) in assessing tenders, the tenderer's response on these issues will be weighted the same as for safety issues and environmental issues when considering the award of the contract.

[176] As discussed, the Grantee party also intended to negotiate a CHMP with the Karingbal People for the entire area of ML 70415 and other Rolleston expansion mining lease areas.

[177] The letter also responded to the counter offer put on behalf of Charles Stapleton by Mr Lavery (which the Grantee party described) in the following terms:

1. $1.05m on execution of the Ancillary Agreement
2. $50,000 per annum on and from approval of ML 70415 prior to coal production
3. $1m per annum during coal production
4. $200,000 per annum during rehabilitation
5. requirements for cultural heritage surveys and twice-yearly inspections of the mine site with a technical adviser to assess progress of the project
6. associated legal expenses.

[178] The First native title party was advised that the offer was 'not accepted' by the Grantee party on the basis that, and for the reasons outlined earlier in the letter, 'it is above and beyond any reasonable compensation for the effect of the grant of MLA 70415 on native title rights and interests in the area'.

[179] The Grantee party also confirmed that it had ‘attempted to respond to the offer on 5 October, but Mr Lavery did not wish to receive a response ... outside of mediation in the NNTT’. However, the Grantee party felt it was responsible to respond to the offer, ‘if for no other reason so that the other Karingbal applicants know’ the Grantee party’s position.

[180] Although the Grantee party did not accept the counter offer advanced by Mr Lavery on behalf of Charles Stapleton, the letter stated that the Grantee party’s offer as discussed on 4 and 5 October 2011 and as set out in the letter ‘still stands and remains open for acceptance at this time’. Mr Redmond was asked to advise his client’s position in respect of that offer. If the offer was not accepted, Mr Redmond was asked to advise whether the First native title party supported:

(a) the referral of the matter to the Tribunal for mediation (as proposed by Mr Lavery on behalf of Mr Stapleton alone), and/or

(b) the offer made on behalf of Mr Stapleton.

[181] On **2 November 2011** (about three weeks after the Grantee party's letter of offer), the Tribunal (Deputy President Sosso) convened a mediation attended by representatives of the parties: Mr Zillmann represented the Grantee party, Ms Butteriss represented the Government party, Mr Redmond represented the First native title party and Mr Lavery represented Charles Stapleton. Mr Zillmann repeated the offer made previously (orally and in writing) by the Grantee party. He indicated that, although the offer was considered reasonable, it was not necessarily the final offer and he was willing to obtain instructions for a sum within the 'ball park' of that figure (but not multiples of it). The offer was based on the impact of the mine on native title rights and interests (not on the mine's anticipated profits, which were considered to be irrelevant) and details of the mining footprint/activity/disturbance had been provided. Mr Lavery reiterated the counter offer made at the meeting on 4 and 5 October 2011 and Mr Redmond indicated that he agreed with it. The First native title party wanted to negotiate an offer for the life of the mine. Based on the discussions of the parties at mediation, Deputy President Sosso proposed a 'hypothetical offer' whereby:

(a) the Grantee party would pay $50,000 within 14 days of the execution of the State Deed and Ancillary Agreement
(b) the Grantee party would pay $150,000 within 14 days of the grant of the mining lease
(c) the Grantee party would pay $100,000 per annum during coal production
(d) Karingbal People #2 would be considered for job opportunities during the rehabilitation phase, and
(e) if mediation is successful, the associated/reasonable legal expenses for both Mr Redmond and Mr Lavery who represent Karingbal People #2 would be met.

Mr Zillmann, Mr Redmond and Mr Lavery agreed to seek instructions in relation to the hypothetical offer. The Tribunal was to contact parties to confirm whether another mediation conference would be required in the week commencing 14 November 2011.

[182] On **15 November 2011**, after obtaining instructions from the Grantee party, Mr Zillmann wrote to both Mr Redmond and Mr Lavery advising that the hypothetical offer was not accepted, the Grantee party remained of the view that its existing offer was 'a fair and reasonable offer of compensation for the possible impact of its mining activities on the Karingbal's claimed native title rights and interests'. The Grantee party was of the view that

the 'hypothetical offer far exceeds that amount and therefore what it considers reasonable compensation'. On the assumption that mining takes place in the relevant part of MLA 70415 where native title might exist for approximately five years, the total monetary compensation under the hypothetical offer would be $700,000 (or more than three times the Grantee party's original offer).

[183] However, 'in the interests of seeking a commercial settlement to this matter', the Grantee party was willing to make the following 'revised offer':

(a) $50,000 within 14 days of the execution of an agreement providing for the Karingbal People's consent to the grant of the mining lease;
(b) $150,000 payable within 14 days of the grant of MLA 70415;
(c) $20,000 per annum for each of the first three years of coal production from the relevant area of MLA 70415 where native title rights may still exist; and
(d) beneficial consideration to contact tenders which promote opportunities for local indigenous groups as outlined in our correspondence of 12 October 2011.

The financial payments under the 'revised offer' would total $260,000. The benefits would be paid regardless of whether agreement is reached with the Bidjara People in respect of the grant of the mining lease, but the offer was conditional upon the First native title party accepting the offer and executing the necessary agreements (including a Deed with the State) to give effect to the terms of the offer on or before 23 December 2011. The Grantee party proposed to advise the Tribunal and other parties on its view as to the utility of a further Tribunal mediation conference once it had received the Karingbal People's response to its revised offer.

[184] On **21 December 2011**, Mr Lavery sent an email to Mr Zillmann advising that he had not had occasion to get instructions but was 'hoping to get to Bauhinia during the upcoming holidays to discuss the matter with Mr Stapleton'. However, in the meantime he suggested that an alternative to the hypothetical offer approach based on profits made should be explored, and requested information about how long the grant of the proposed tenement would extend the life of the Rolleston Mine, the projected tonnage of coal to be extracted from the area of the proposed tenement, and the anticipated income and profits to be derived from the extended life of the project. He suggested that if the information could be provided 'in the next few weeks' it might be that the Tribunal could be asked to convene another mediation conference 'to discuss the issues further'.

[185] No response to the Grantee's revised offer was received from the First native title party or their legal representative, Mr Redmond, before 23 December 2011.

[186] On **23 December 2011**, Mr Zillmann sent an email to Mr Lavery (copied to Mr Redmond) in response to Mr Lavery's proposal to base compensation on profits made by the Grantee party. Mr Zillmann advised that, having considered this approach and having discussed it with Mr Lavery and his client previously, the Grantee party's position 'remains that it considers that it is not reasonable in this case to calculate compensation for the impacts the mining operation may have on native title rights, on the basis of profits that might be made from coal mining (in that part of ML 70415 that may be the subject of native title rights)'. Mr Zillmann also:

- stated that the Grantee party had proposed an alternative basis for compensation that it 'considers is reasonable'
- noted that Mr Lavery was yet to receive instructions from Mr Stapleton on the Grantee party's revised offer of 15 November 2011
- stated that he implied that Mr Lavery continued to represent Mr Stapleton only and that Mr Redmond 'continues to represent the other Karingbal #2 applicants'
- stated that he had not received a response from Mr Redmond on behalf of his clients to the Grantee party's revised offer of 15 November 2011
- stated that the Grantee party requests a response from 'all of the Karingbal applicants' and hence he copied the email to Mr Redmond
- requested that Mr Lavery and Mr Redmond obtain instructions from their respective client(s) and that both provide the Grantee party with 'the Karingbal #2 applicant's response' to the revised offer of 15 November on or before Friday 13 January 2012 (to which date the Grantee party extended its revised offer), and
- copied the email to Ms Butteriss 'given the State is a negotiation party and is involved in the mediation'.

[187] The Grantee party received no response from Mr Redmond or Mr Lavery on behalf of the First native title party to the email of 23 December 2011 or the revised offer made by the Grantee party on 15 November 2011.

[188] On **2 February 2012**, Mr Lavery sent an email to Mr Zillmann noting that the Grantee party's disinclination to negotiate on a tonnage or profits basis had been made reasonably

clear at their meeting, and reiterating his request for the information sought in his email of 21 December 2011. Mr Zillmann replied to Mr Lavery by email on **27 February 2012** and attached:

(a) information about 'the anticipated extension to the Rolleston coal mine life that will result from the expansion project (which includes MLA 70415)'

(b) Xstrata's *Mineral Resources and Ore Reserves* report as at 31 December 2011, which includes a description of the 'probable coal reserves within "Rolleston West"', which area includes reserves within both MLA 70415 and MLA 70416

(c) the *Rolleston Coal Expansion Project - Initial Advice Statement* (dated 9 August 2011), giving further information on the project.

Mr Zillmann did not provide anticipated profits or income from the expansion project as 'such information is regarded as confidential and commercially sensitive'.

[189] On **8 March 2012**, the Grantee party applied to the Tribunal for a future act determination in relation to the grant of the proposed tenement.

[190] On **9 March 2012**, Mr Zillmann wrote separately to Mr Lavery and Mr Redmond advising of the referral of the matter to the Tribunal. He stated that that the 'statutory negotiation period' had commenced on 30 March 2011 (almost 12 months earlier) and that agreement had not been reached 'despite the negotiation efforts of both parties'. The Grantee party had not received 'a formal response' from either lawyer or their client(s) to the 'revised offer to the Karingbal on 15 November 2011' and so it considered it necessary to 'take this latest step to bring some finality to the matter'. The Grantee party, however, advised that the revised offer remained open for acceptance if the First native title party wished to settle the matter by agreement. If written confirmation of acceptance of the offer was not received by 21 March 2012 the Grantee party would 'assume that the offer is not accepted and it will be withdrawn'.

[191] Except when specifically noted, the evidence referred to above was not disputed and I rely on it. I am satisfied that, in summary:

(a) The Grantee party first indicated the potential scope and basis of its offer of compensation at the meeting in Rockhampton on 13 and 14 July 2011.

(b) The offer was explained in more detail at the negotiation meeting on 4 and 5 October 2011. At that meeting, Mr Lavery (on behalf of Charles Stapleton) put what was described as a ‘counter offer’.

(c) The Grantee party’s offer and the basis for it was set out in a letter dated 12 October 2011, sent to Redmond & Redmond, and copied to Mr Lavery. That letter also responded to the counter offer.

(d) There was further email correspondence between Mr Zillmann and Mr Lavery concerning information about the projected extension of the life of the Rolleston Coal Mine, the projected tonnage of coal to be extracted from the area of the proposed tenement, and the anticipated income and profits to be derived from the extended life of the project.

(e) The Grantee party made a revised offer on 15 November 2011, but received no response from Mr Redmond or Mr Lavery on behalf of the First native title party to the revised offer or to the Grantee party’s email of 23 December 2011.

(f) Despite those communications and mediation by the Tribunal, the parties did not agree on the amount of compensation that might be paid.

[192] Before considering the contentions made by the First native title party it is appropriate to:

(a) put Mr Lavery’s actions in context, and

(b) make some observations about the reliance placed on s.51A of the Act in the negotiations.

[193] *Role of Mr Lavery:* It is clear that Mr Lavery played an active role in the negotiations from the meeting on 4 and 5 October 2011 onwards. According to the minutes of that meeting, he was ‘acting in a support role for Mr [Charles] Stapleton in an unpaid capacity’. Apparently, prior to that meeting, the other people who comprise the First native title party were not aware of the new representative arrangement and expressed their concerns about it. The minutes of the meeting record that Mr Stapleton indicated that he was not legally represented by Mr Redmond but by Mr Lavery. Mr Redmond confirmed that he acted on behalf of the remainder of the people who comprise the Karingbal applicant present at the meeting (i.e., Carol McLeod, Marlene Leisha and Sharleen Leisha). They expressed their concerns over the new arrangement of representation but agreed to continue with it on the day. According to Ms Butteriss’s Affidavit, Mr Redmond appeared to be taking notes of the

meeting and generally allowed Mr Lavery to conduct the negotiation meeting on behalf of the Karingbal People, even though Mr Lavery was appearing for Mr Stapleton.

[194] The minutes record that Mr Lavery's involvement in the negotiations included:

(a) questioning why the Grantee party was following the right to negotiate process rather than an indigenous land use agreement
(b) requesting details of the amount of coal that would be extracted from the land and what the estimated profits were
(c) asserting that the value of coal extracted from the ground was relevant to the negotiations
(d) referring to s. 33(1) of the Act and asserting that the failure to include royalty payments in the Grantee party's offer was evidence that the Grantee party was not acting in good faith under that section
(e) stating that the offer of $197,000 as compensation was 'unacceptable'
(f) questioning the values informing the Grantee party's offer and suggesting that the offer did not include compensation for the loss of cultural rights or heritage
(g) requesting the provision of the valuation of the Mt Kelman pastoral lease
(h) requesting other material from the Government party
(i) raising whether employment opportunities would be included as part of the compensation
(j) putting a detailed counter offer to the Grantee party.

[195] The First native title party, in its statement of reply, submits that Mr Lavery is not a representative of the First native title party. There was no suggestion that he was. It is apparent that Mr Lavery only purported to represent Charles Stapleton, and not the First native title party. The Grantee party accepted that was the case, and submitted that, as a consequence, the First native title party could not rely on the actions of Mr Lavery. Therefore, the Grantee party submitted, the First native title party made no counter offers at the negotiation meeting on 4 and 5 October 2011, and it made no requests for information about mine life, profits or royalties or to negotiate compensation based on these terms. The First native title party's reply, however, implies that it gave tacit support to what Mr Lavery was advancing on behalf of Mr Stapleton. It notes that all parties were present when the counter offers and the request for additional information about mine life, profits and so on were made. It submits that there was no reason to raise these matters separately and, in any

case, these matters were canvassed at the mid-July 2011 meetings. As noted at [147](f), the second part of the reply is disputed by the Grantee party. The first part of that reply seems to disregard the fact that four of the five persons who comprise the First native title party were not present at the meeting on 5 October 2011, that the one who was present elected to be represented by Mr Lavery, and that at the end of the meeting, when asked whether he agreed with the model in the counter offer, Mr Redmond said he would need to seek instructions from his client about the counter offer (and the proposed involvement of the Tribunal). Nonetheless, Mr Redmond attended the Tribunal mediation conference on 2 November 2011 and indicated that he agreed with the counter offer put by Mr Lavery.

[196] For the purposes of these proceedings, the fact that Mr Lavery (rather than Mr Redmond) took a leading role at key points in the negotiations, put a counter offer and (by initiating and participating in the Tribunal mediation) helped to facilitate a hypothetical offer which in turn prompted a revised offer from the Grantee party, is not critical to the issue whether the Grantee party negotiated in good faith with the First native title party. The Grantee party does not contend otherwise. While the Grantee party understandably queried whether the First native title party adopted the approach and the options advanced by Mr Lavery on behalf of Charles Stapleton, it did not ignore what Mr Lavery was doing. Rather, it responded to both the counter offer and the hypothetical offer directly, independently of and before seeking a formal response to Mr Lavery's approach from the First native title party. The Grantee party copied Mr Redmond into relevant written communications. Accordingly, for the purpose of resolving the good faith issue, I will proceed on the basis that it is not necessary to identify the actions taken by Mr Lavery (and their consequences) and then put them to one side.

[197] *Calculating compensation for native title – s.51A*: In the context of negotiations about compensation for the grant of mining leases references were made by the parties to s. 51A of the Act. This matter is dealt with more fully later in these reasons in the section dealing with the Second native title party and the Grantee party (see [311] to [315]). I simply note here that, for the reasons outlined later, s. 51A would seem to have no application to such negotiations. In its terms, the section applies when compensation is payable for an act that 'extinguishes all native title' in relation to particular land or waters. In proceedings such as these, the future act is one to which the non-extinguishment principle applies.

[198] Furthermore, the compensation payable would be (as the parties to these proceedings repeatedly acknowledged) for any loss, diminution, impairment or other effect of the future act on the First native title party's native title rights and interests. The amount payable would be determined by applying the similar compensable interest test, i.e. by applying any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in s. 240 of the Act. In this case the MRA is the relevant law.

[199] The Tribunal's reasons for determination in *Thomas v Western Australia* (1996) 133 FLR 124 are relevant here (even though the determination was made before s. 51A was inserted in the Act). As the Tribunal stated (at 195-196), it does not inevitably follow that the maximum amount of compensation payable must be the fee simple value of the land. It is conceivable, for example, that extensive damage to land which has a relatively low market value could give rise to a determination of compensation well in excess of the market value of that land or the damaged part of it. That does not mean that a substantially large amount will be payable in every case or that an uneconomically large amount would be payable in any particular case. Indeed, if appropriate conditions are imposed and practices are adopted to avoid damage to areas and sites of significance and to minimise environmental effects of the activity, there might be relatively little loss or damage which is compensable. The entitlement to compensation and the amount of compensation must be established by reference to evidence and the relevant criteria.

The Grantee party's offer of compensation

[200] The First native title party's contentions in relation to the Grantee party's offer of compensation are, in summary, that:

- (a) under the Act, the holders of native title are entitled to compensation for future acts (s. 48) and that compensation is to be on 'just terms' for 'any loss, diminution, impairment or other effect' of the future act on their native title rights and interests (s. 51(1))
- (b) where, as in these circumstances, native title is 'affected' but not extinguished, native title holders are entitled to compensation in accordance with the State law under which freehold title holders could be compensated (i.e., the similar compensable interest test applies (ss. 51(3), 240)
- (c) the Tribunal must take into account the matters listed in s. 39 of the Act when making a decision

(d) the offer of compensation made by the Grantee party is ‘far from reasonable when one considers the enormity of the project and the effect it will have on the Karingbal People and their native title rights’.

[201] The First native title party also contended, in summary, that:

(a) the Karingbal People advised the Grantee party at several instances throughout both meetings that it had concerns about the loss of native title rights and interests to access and use its native title land within the project area and that these rights and interests were not being considered by the Grantee party

(b) the material aspect to compensation is the impact upon native title rights and interests and the assessment of compensation should make allowance for any special attachment to the land which is established

(c) the Karingbal People did not accept the Grantee party’s offer of compensation based on the unimproved freehold value of the land on the basis that the effect on its native title rights to access and use its native title land was not considered by the Grantee party

(d) whether one looks at the offer on the basis of a ‘purely economic valuation’ or by reference to a number of ‘non-economic factors’ that are relevant to this effect on native title, the offer of compensation from the Grantee party ‘is far from reasonable when one considers the enormity of the project and the effect it will have upon the Karingbal People and their native title rights’; indeed it is ‘reprehensible’ in that ‘it does not respond prudently to any of the impacts that the mining lease will cause. The negotiations failed to opine the effects upon Native Title with the value of the country in relation to the significance and profitability of the project.’

(e) the Karingbal People made a counter offer at the meeting in October 2011

(f) although there is no statutory obligation on the Grantee party to negotiate profit or royalty type payments (of the kind contemplated by s. 33 of the Act), the Grantee party’s failure to negotiate such payments in these circumstances is an indication of a failure to negotiate in good faith.

(As is apparent from the evidence summarized earlier, contention (e) is not strictly correct. The First native title party did not make a counter offer at the meeting in October 2011. However, Mr Redmond subsequently indicated agreement to it at the Tribunal mediation on 2

November 2011. Accordingly, that misstatement need not affect the Tribunal's consideration of the substance of the First native title party's contentions.)

[202] The First native title party correctly contends that the material aspect to compensation is the impact of the future act upon native title rights and interests. It then contends that issue can be addressed by having regard to a number of non-economic factors and on the basis of an economic valuation.

[203] As to the non-economic factors, the First native title party contends that:

(a) courts will make allowance for any special attachment to the land which is established,

and that, beyond economics and in line with s. 33 of the Act, further factors should be taken into account regarding compensation, such as:

(b) the improved land value and not the unimproved value (given that the mining project is more than speculative)

(c) the intergenerational and communal link to and ownership of the country (given that many current and successive generations of people have and will have rights to the relevant land and waters).

[204] The First native title party also contends that, notwithstanding the non-extinguishment principle, the act of mining in the area will significantly affect native title rights of the Karingbal People to access and use the land and waters. It cites the public notice about the draft terms of reference for an Environmental Impact Statement in relation to the proposed Rolleston Coal Expansion Project.

[205] The relevance and import of these contentions to the good faith issue have to be assessed by reference to the combined operation of ss. 31(1)(b), 31(2), 33 and 36(2) of the Act.

[206] Section 33 of the Act is central to the contention. Subsection 33(1) provides that negotiations 'may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to' the amount of profits made, or any income derived, or any thing produced by the Grantee party as a result of doing anything in relation to the land or waters concerned after the proposed

tenement is granted. The First native title party makes three observations in relation to s. 33(1), namely that the subsection:

(a) has little to do with the valuing of land in a conventional sense
(b) has little to do with attempting to assess compensation based upon the effect of the proposed tenement upon native title rights and interests
(c) is premised upon giving native title parties a share in projects developed in their country.

[207] The First native title party also refers to s. 33(2) which provides that the nature and extent of the following may be taken into account in negotiations:

(a) existing non-native title rights and interests in relation to the land or waters concerned
(b) existing use of the land or waters concerned by persons other than native title parties
(c) the practical effect of the exercise of those existing rights and interests in relation to the land or waters concerned.

[208] It is apparent from the opening words of each of those subsections that they indicate potential topics for negotiation. The words 'without limiting the scope of any negotiations' indicates that negotiations need not be confined to those topics or the matters mandated by other sections of the Act. Negotiations could range more widely. On the other hand, these subsections are facultative not directory. The types of conditions listed s. 33(1) 'may, if relevant' be included as a 'possibility' in negotiations. The nature and extent of the items in s. 33(2) 'may be taken into account' in negotiations. However, the Federal Court has stated that, if a party had a policy that it would not reach an accord with a native title party for the making of payments described in s. 33, it may be said that the party would not be negotiating in good faith with the native title party (see *Brownley v Western Australia* (1999) 95 FCR 152 (*'Brownley'*) at [54]). Thus, although there is no obligation for a government party or a grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate about such payments may in some circumstances be an indication of a failure to negotiate in good faith.

[209] It should be noted that the Act was amended in two respects following the *Brownley* judgment. Section 31(1)(b) was amended to extend the obligation to negotiate in good faith

from the Government party to all negotiation parties, and s. 31(2) was inserted to provide that, if a negotiation party refuses or fails to negotiate about matters unrelated to the effect of the future act on the native title rights and interests of the native title parties, that does not mean that the negotiation party has not negotiated in good faith for the purposes of s. 31(1)(b).

[210] Subsection 31(2) apparently relieves the negotiation parties from having to negotiate about any matter unrelated to the effect of the proposed future act on the native title parties' registered native title rights and interests. The Explanatory Memorandum to the Native Title Amendment Bill 1997 (at paragraph 20.31) stated that what became s. 31(2) was intended to ensure 'that the negotiations should focus on relevant matters'. There does not seem to be any further explanation as to why it was inserted in any of the other extrinsic materials, such as the second reading speech to the Bill.

[211] In *Western Australia v Dimer* (2000) 163 FLR 426 (*Dimer*) at [126], determined after s. 31(2) had been inserted, Member Lane said:

> The question of negotiation about compensation under the right to negotiate regime was considered by Lee J in *Brownley* (at 168-170 [48]-[57]). Although that decision considered the obligation of the Government party, it is relevant to the present case. Section 33 of the Act plainly contemplates that the parties may include compensation and royalty issues in their negotiations. Paraphrasing what Lee J said in *Brownley* (at 169 [55]), the grantee party may not be obliged to reach agreement, but it is required to receive and consider, a proposal from the native title party in a manner that has regard to the particular facts of the case and to the merits of the proposal. Bearing in mind the fact that it is the responsibility of the Government party ultimately to pay compensation, it is nevertheless open to the government to permit the native title party and grantee party to negotiate about monetary payments in consideration for the grant of the tenement.

The Tribunal found the grantee party's behaviour in relation to compensation negotiations was a factor in its decision that, overall, the grantee party had not negotiated in good faith as required by s 31(1)(b) of the Act.

[212] However, as Deputy President Sumner pointed out in *South Blackwater Coal Ltd v Queensland* ((2001) 165 FLR 232 at [35]), whether the obligation has been satisfied will be highly fact specific. This is apparent from the qualified terms in which s. 33(1) is expressed, i.e. 'Without limiting the scope of any negotiations, *they may, if relevant, include the possibility* of including a condition that has the effect ...' (emphasis added).

[213] In *The Griffin Coal Mining Co Pty Ltd v Nyungar People* ((2005) 196 FLR 319 (*'Griffin Coal'*) at [44]), after noting that neither of these decisions specifically considered

whether the insertion of s. 31(2) affected the authority of *Brownley*, Deputy President Sumner found that it had not because:

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

[214] Subsequently, in *Cox v Western Australia* (2008) 219 FLR 72, one of the native title parties argued that the grantee party had not negotiated in good faith because the financial package it proposed in the Land Access Agreement negotiations did not contain a component based upon the amount of profits made, any income derived or any things produced (a reference to s. 33(1) of the Act). Deputy President Sosso noted that s. 33 contemplates that parties can negotiate about profit or royalty type payments by a grantee party, and it outlines a non-exhaustive list of matters that can be taken into account in those negotiations. He wrote:

> In short, s 33(1) is not a mandatory provision that requires a grantee party to negotiate about profit or royalty type payments. Instead, it is designed to allow such a matter to be discussed voluntarily because it cannot be imposed involuntarily by the Tribunal. Accordingly s 33(1) of itself does not provide any basis for suggesting that the royalty payments must be negotiated or that failure to reach agreement on such payments can be in any way conclusive of the question of good faith negotiations. (at [36])

He noted that, although there is no statutory obligation for a government or grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate such payments may in some circumstances be an indication of a failure to negotiate in good faith (at [37]). He quoted the judgment of Lee J in *Brownley* (at [54]-[55]) to the effect that the Government party is not obliged to reach agreement on such a matter but is required to receive, and consider, a proposal from a native title party ‘in a manner that has regard to the particular facts of the case and to the merit of the proposal in all the circumstances’.

[215] As Deputy President Sosso stated, the Tribunal has followed that interpretation of the law and accordingly:

> the obligation imposed on a grantee party is to receive and consider fairly, dispassionately and proportionately any proposal from a native title party for a payment of the type outlined in s 33(1), but without an obligation to ‘capitulate in order to reach agreement’. (at [38])

[216] He concluded, in relation to this issue, that the key guiding principle in evaluating good faith negotiations is to determine if, having regard to all the circumstances, the relevant parties have acted reasonably.

> There is no obligation on a grantee party to strike a deal involving payments of the type outlined in s 33. The refusal of a grantee party to make such payments may or may not, in the circumstances, be unreasonable. (at [40])

[217] The relevant legal issue for the purpose of this part of these proceedings is whether the matters referred to in s. 33(1) are related to the effect of the act on the registered native title rights and interests of the native title party for the purposes of s. 31(2). If they are not so related, then the terms of s. 31(2) indicate that a failure to negotiate in good faith about those matters would not constitute a failure to negotiate as required by s. 31(1)(b).

[218] Having considered the Tribunal's decisions referred to in [211] to [216], all of which were made after the judgment in *Brownley* and after the insertion of s. 31(2) into the Act, I have concluded that, while s. 31(2) should not be read too narrowly, the circumstances where a failure of a grantee party to negotiate with a native title party about payments of a type listed in s 33(1) would be confined to negotiations that were about the amount and method of paying compensation for the effect of the future act on the registered native title rights and interests of the native title party or parties. Even then it would be for the native title party to make a proposal to that effect. The grantee party would be obliged to consider the proposal in the manner explained in *Brownley* (see *Griffin Coal, Cox v Western Australia*). The issue of whether a party negotiated in good faith in accordance with s 31(1)(b) in relation to matters listed in s. 33 can only be determined by reference to the circumstances of each case.

[219] The circumstances of this case do not support the contentions of the First native title party insofar as they are relevant to the good faith issue. That is, when regard is had to s. 31(2) and its implications for s. 33, the evidence does not support a finding that the Grantee party failed to negotiate in good faith. So far as s. 33(1) is concerned, although Mr Lavery raised the issue of whether royalty type payments (or possibly profit based payments) might be made by the Grantee party, neither he nor the First native title party put a specific proposal of that nature to the Grantee party for it to consider. The Grantee party indicated that it did not consider royalties or profits based payments were relevant to the payment of compensation, or reasonable, in the circumstances of this case. However, in the absence of an appropriate proposal to consider, its behaviour was not unreasonable. So far as s. 33(2) is concerned, although the First native title party made broad assertions about the potential

impact of the grant of the proposed tenement on its registered native title rights and interests, there is no evidence before the Tribunal that the Grantee party was provided with information relating to native title rights and interests on that part of the proposed tenement where there was no extinguishment. Nor did the First native title party question the validity of the extinguishing tenures in a way that might have broadened the area over which it could then have provided information about the existence of native title rights and interests. Irrespective of how the present proceedings or the overlapping native title claims proceedings are resolved, the Grantee party will have to fulfil its obligations under the *Aboriginal Cultural Heritage Act 2003* (Qld) in relation to any tenements granted to it. In its correspondence to the First native title party and in meetings, the Grantee party acknowledged that obligation and expressed its wish to discuss with the First native title party cultural heritage matters related to all three new mining leases (including the development of a CHMP for the Rolleston Expansion Project). It appears that the Grantee party was to some degree compartmentalising native title and cultural heritage matters. Nonetheless, it clearly raised and discussed these issues in the course of communications about the grant of the proposed tenement.

[220] The First native title party also criticises the Grantee party's offer, when that offer is assessed on a 'purely economic valuation basis'. According to its contentions, other Queensland negotiations for compensation of land concerning a lump sum one-off payment start at $400 per hectare for grazing land and increase significantly for agricultural land. Even on that basis, the First native title party submits, the 63 square kilometres of land would have an approximate value of $2.5million. Hence the Karingbal People would receive compensation of half of that amount (i.e., $1.25 million).

[221] It should be remembered that, given the tenure analysis and assessment of the extent to which native title has been extinguished over much of the area of the proposed tenement, the relevant part of the proposed tenement being considered in these proceedings has an area of 1,449 hectares. Even if a valuation of $400 per hectare were to be adopted (and there was no evidence before the Tribunal in relation to that figure or its applicability to the Mt Kelman pastoral holding), the total would be $579,600, and the Karingbal People would receive half of that amount (i.e., $289,800).

[222] In reply to the submissions by the First native title party, the Grantee party submits that it has made 'reasonable offers of compensation'. It explains that (as is apparent from the

correspondence) the offer was based on the unimproved land value of ‘that part of the area within MLA 70415 where native title rights in some form may still exist’, which amount was divided by two to reflect the fact that there were two registered native claimants over the area at that time, and the Grantee had proposed to pay each native title party half the total amount it had assessed as ‘reasonable compensation’. The Grantee party had communicated why it considered this amount ‘justified and reasonable in the circumstances’ in its letter of 12 October 2011.

[223] On 15 November 2011, after participating in mediation convened by the Tribunal and in the interests of settling the matter, the Grantee party made a revised and increased offer equal to $260,000. The offer was repeated on 23 December 2011. The First native title party has not responded to the offers, nor is there any evidence before the Tribunal as to why no response was given to these or the first offer of compensation.

[224] Given:

(a) that the First native title party and the Grantee party agree that the compensation should be for the effect of the future act on the native title rights and interests of the native title party

(b) the Grantee party’s contention that, in the absence of judicial authority, an offer of compensation based on the unimproved value of land is reasonable in the circumstances of this case, and

(c) the First native title party’s contention that the offer of compensation was ‘far from reasonable’ and was ‘reprehensible’, and that compensation could or should be calculated in other ways or by reference to other criteria than land value

the issue between them goes to the amount of compensation on offer and, perhaps, how that amount might best be calculated. However, the issue for the Tribunal to decide is whether the Grantee party negotiated in good faith.

[225] The Tribunal has dealt with similar contentions previously. The approach taken was explained in *Drake Coal.* In his reasons for determination, Deputy President Sosso reviewed the Federal Court judgments dealing with the general proposition that, when deciding whether a party has negotiated in good faith, 'it is not for a court or tribunal to assess the reasonableness of each offer' (*Strickland* 85 FCR 303 at 321, per RD Nicholson J). The reasoning in support of that proposition was accepted by Carr J, with 'one slight reservation' in *Walley v Western Australia* ((1999) 87 FCR 565 at (15)), and Carr J was followed by Lee J

in *Brownley* (95 FCR 152 at [34]-[35]). Accepting the approach outlined by Carr J, Deputy President Sosso wrote:

> It is not open to the Tribunal to determine the question of good faith on the basis of whether the compensation calculated by reference to a formula proposed by the grantee parties constituted a reasonable offer. However, it is open to the Tribunal to assess whether the grantee party has acted reasonably in the negotiations on the basis of the offers and counter offers it put forward. (at [197])

He continued:

> The Tribunal would only consider the fairness of a compensation package in two circumstances. First, if the offer of the grantee party is so manifestly and obviously unfair that any reasonable person would regard it as a 'sham' or 'unrealistic' offer. Second, if independent material is produced to the Tribunal which indicates that an offer is potentially unfair or unrealistic, such that the party put that proposal forward is not negotiating in good faith. (at [201])

[226] I adopt the Tribunal's approach described in *Drake Coal* for the purposes of these proceedings. I am not satisfied that, having regard to the circumstances of this case, either the original offer or the revised offer made by the Grantee party was so manifestly and obviously unfair that any reasonable person would regard it as a 'sham' or 'unrealistic' offer. There was no independent material (from the First native title party or any other party), to demonstrate that the original offer or the revised offer is potentially unfair or unrealistic.

[227] Consequently, the First native title party's contentions about the Grantee party's offer of compensation will only be relevant if, for some other reason, it demonstrates that the Grantee party did not negotiate in good faith with the First native title party.

[228] That much seems to be accepted in part of the First native title party's statement of contentions which notes that there is no statutory obligation on the Grantee party to negotiate profit or royalty type payments. However, the First native title party submits that the Grantee party's failure to negotiate such payments in these circumstances is an indication of a failure to negotiate in good faith. In support, it relies on a passage in *Brownley* (95 FCR 152 at [54]-[55]), referred to earlier, where Lee J wrote:

> If the State had a policy that it would not reach an accord with a registered native title claimant to facilitate an agreement with a grantee party for the making of payments described in s 33, and that policy were applied to control the participation of the State in negotiations prescribed in s 31(1)(b), it may be said that the State would not be negotiating in good faith with the native title party.
>
> If, in negotiations with native title parties for the obtaining of the agreement of those parties to the grant of a mining lease, the State maintained an inflexible position that it "would not pay compensation" and relied upon that position to decline to engage in negotiations in respect of matters provided for in s 33, it may be said that the State would not be participating in negotiations in good faith. The State is not obliged to reach agreement on such a matter but it is required to receive, and consider, a proposal from a registered native title claimant in a manner

that has regard to the particular facts of the case and to the merit of the proposal in all the circumstances.

[229] Even if that one reads 'Grantee party' for 'State' and makes other appropriate adaptations to the text for the purpose of these proceedings, that passage does not lead to the conclusion sought by the First native title party. The Grantee party asserted from the beginning that royalties would not be part of its compensation offer. However, the evidence does not demonstrate that the Grantee party had a policy not to negotiate in relation to payments of a type referred to in s. 33(1) which controlled the negotiations about compensation, or that it did not receive and consider a proposal from the First native title party in a manner that had regard to the particular facts of the case and to the merit of the proposal in all the circumstances. The evidence in relation to the meeting on 4 and 5 October 2011 and subsequent correspondence between Mr Lavery and the Grantee party shows that the issue of tonnage or profits based approach to compensation was raised with and discussed, but was not accepted, by the Grantee party. There is no evidence that the Grantee party failed to consider the matter and the documentary evidence indicates otherwise.

[230] It is also apparent from the evidence that the Grantee party was willing to pay compensation. It put an offer on a basis of a valuation of the relevant land, engaged with the First native title party (or at least Mr Lavery) in relation to the counter offer put by Mr Lavery and explained, orally and in writing, why it did not accept the counter offer. The Grantee party asked the representative of the First native title party to advise of his client's position in respect of its offer, and to advise whether the First native title party supported the counter offer made on behalf of Charles Stapleton. The Grantee party communicated its position to the First native title party on the basis that it considered that 'it is not reasonable in this case' to calculate compensation for the impact that the mining operations might have on native title rights 'on the basis of profits that might be made from coal mining' in the relevant part of the area covered by the proposed tenement. The Grantee party reiterated its original offer and later made a revised offer after considering another approach raised in Tribunal mediation. It asked Mr Lavery and Mr Redmond to obtain instructions and provide the Grantee party with the First native title party's response to the revised offer. No such response was provided.

[231] In the same vein, the First native title party submits that the Grantee party's 'failure to discuss terms of compensation is a failure to negotiate in good faith in accordance with its obligation'. Expressed in such broad terms, the submission flies in the face of the evidence.

However, the submission (made in reply to the Grantee party's statement of contentions) particularises the submission by contending that 'the correlation between the value of the coal being taken from the mine and the mooted compensation' was raised with the Grantee party 'in terms of calculation of compensation and linking compensation by way of royalty or profit based payment'. According to the First native title party, the Grantee party stated that it would not consider any negotiation of compensation on that basis. It would appear from the minutes of the 4 October meeting that, although the Grantee party acknowledged that royalties may be included in compensation arrangements, it is not required that they be included. Nor did the Grantee party consider that mining profits were relevant because the State 'owns' the minerals.

[232] The minutes provide a useful insight into the ebb and flow of the negotiations. The minutes record discussions about a range of matters including concerns about the impact of the proposed mining activity on the cultural heritage of the Karingbal People and how those concerns might be met, what is an appropriate way to calculate compensation that might be paid to the First native title party, and what would be an appropriate amount of compensation. The minutes record discussions in which differing views were put, positions and assertions were defended, queried and tested. The same can be said about the subsequent correspondence.

[233] Negotiations about compensation for the effect the proposed grant on the registered native title rights and interests of the First native title party are relevant to these proceedings. However, the First native title party has not satisfied the Tribunal that the Grantee party did not negotiate in good faith with a view to obtaining the agreement of the First native title party to the grant of the proposed tenement.

Other matters

[234] The First native title party touched on various matters in addition to or related to the compensation issue in order to make its case that the Grantee party had not negotiated with it in good faith. Although there might be some overlap with material covered earlier in these reasons, for the sake of completeness I will deal with these other matters.

[235] In its statement of contentions, the First native title party states that, although the proposed tenement is the only mining lease that the Grantee party has applied for where native title has not been extinguished, the First native title party had not received from the

Grantee party a basis for the assertion that the extinguishment has occurred in relation to the other two mining leases applied for (ML 70416 and ML 70418).

[236] There is some dispute between the parties about whether the First native title party requested information about extinguishment of native title over the three MLA areas. The Grantee party states that at no time has the First native title party requested that information. In reply, the First native title party states that, at the meeting on 13 and 14 July 2011, Mr Redmond requested information from Mr Cobb, including a specific request for the historical evidence of extinguishment in respect of all the land that the current mining lease occupies and the land subject of the expansion. There is no direct evidence in relation to that request, nor any evidence of any follow up by Mr Redmond of it. However, on 4 October 2011 (following a request by Mr Redmond and Mr Lavery that day), the Grantee party provided Mr Redmond and Mr Lavery with information about the extent of extinguishment in relation to the area of the proposed grant, i.e. the area which is the subject of the s. 29 notice and these proceedings.

[237] Whether or when information was sought about MLA 70416 and MLA 70418, the sole subject of the s. 29 notice, and thus the only future act in respect of which the Grantee party and the Government party were seeking the consent of the native title parties (and the only future act that the Tribunal has jurisdiction to consider) is the proposed tenement. Neither the Grantee party nor the Government party is seeking any consent or undertakings from the native title parties in respect of MLA 70416 and MLA 70418. The extent of native title which has been extinguished in respect of MLA 70416 and MLA 70418 is irrelevant to these proceedings and hence is irrelevant to whether the Grantee party has negotiated in good faith with the First native title party in relation to the grant of the proposed tenement.

[238] That is enough to dispose of the issue raised by the First native title party, but it is relevant to note also that the information about land tenure grants over those other areas is publicly available and the First native title party could have obtained and assessed it in relation to those parts of the Karingbal #2 claim.

[239] The First native title party also submits that the Grantee party has not been sincere in its negotiations, withheld information being the valuation and the evidence of extinguishment, and has negotiated on the basis that:

(a) the Tribunal is limited as to what it can grant as compensation

(b) has not taken into account the loss of native title rights and interests

(c) has not taken into consideration:

   i. the purchase price paid by the Grantee party or associated entity for the adjoining property known as 'Meteor Downs', and

   ii. the amount paid as compensation for the variation of the agreement with the prior registered native title applicant to enable the Grantee party to mine the Lagoon.

The First native title party submits that when the Grantee party refers to a valuation, the valuer inserted into its valuation a print out of the Valuer-General's valuation for 2008. That information is out of date but the basis on which the Valuer-General values land is not unimproved capital value as it is understood in valuation terms.

[240] Some of these matters have been dealt with earlier in these reasons or in my previous decision. For completeness, I note that:

(a) although it appears that the allegation that the Grantee party had 'withheld information' (being the valuation and the evidence of extinguishment) was raised late in the proceedings, there is evidence that information about the extent of extinguishment by prior tenures in relation to MLA 70415 was provided to the First native title party late on 4 October 2011 and information about the valuation of the area within MLA 70415 where native title has not been extinguished by tenures (i.e. Mt Kelman pastoral holding) was provided to the First native title party orally and in writing on 4 and 5 October 2011

(b) the evidence of the basis on which the Grantee party calculated its offer of compensation was clearly stated, disputed and discussed orally and in writing during the negotiations

(c) the reasons why the Grantee party did not rely on the purchase price for Meteor Downs when calculating the offer of compensation to the First native title party was explained at the meeting on 4 and 5 October 2011 (see [152] and [160] above)

(d) the amount paid as compensation for the variation of the agreement with the prior registered native title claimant to enable the Grantee party to mine the Lagoon (or the basis on which that sum was reached) was not in evidence in these proceedings, and its relevance (if any) was not the subject of submissions.

[241] Further, the First native title party submits that the Grantee party would not discuss the loss of native title rights and interests. When the matter was raised by various claimants and their representative, the Grantee party would interrupt and state that these were matters of cultural heritage and were not relevant to the negotiation. No additional evidence was adduced by the First native title party in this respect. The evidence of the meetings on 4 and 5 October 2011 and the subsequent correspondence, summarised above do not provide sufficient substantiation of the First native title party's assertion.

[242] It is clear, however, that the Grantee party was aware of its legal obligations in respect of cultural heritage matters and that those matters were to be dealt with separately, if not concurrently, with native title matters. In his letter to the First native title party dated 5 May 2011, Mr Tiedt wrote: 'XCQ would also like to discuss cultural heritage matters related to all 3 new mining leases with the Bidjara and Karingbal'. The PowerPoint slides for the presentation on 19 May 2011 state that a CHMP is required with both Karingbal #2 and Bidjara over the expansion mining leases. Mr Zillmann wrote to Charles Stapleton on 4 July 2011 noting his comments about cultural heritage matters (in a letter to Mr Zillmann on 25 June 2011) and stating that Xstrata would be developing a CHMP for the Rolleston Expansion Project. Xstrata would be negotiating with the relevant party or parties in accordance with the *Aboriginal Cultural Heritage Act 2003* (Qld). In the letter of offer dated 12 October 2011 (sent to Mr Redmond and Mr Lavery), Mr Zillmann wrote: 'Finally, as discussed, we intend to also negotiate a cultural heritage management plan with the Karingbal People for the entire area of ML70415 and other Rolleston expansion mining lease areas.' Similar statements were made in comparable correspondence with the Second native title party. It is not clear from the evidence how far those negotiations advanced. There is a letter from the Grantee party to the Second native title party dated 22 December 2011 giving notice of the Grantee party's intention to develop a CHMP for its mining and related activities on the four mining leases within the overlapping registered native title claim areas (MLAs 70415, 70416, 70418 and 70458). The Second native title party was advised that if it wished to take part in developing the CHMP it must give written notice to the Grantee party by 30 January 2012. No such letter from the Grantee party to the First native title party was in evidence, so I do not know whether it was sent. In context, it seems likely that such notice was also given to the First native title party.

[243] It is also submitted that the Grantee party adopted a 'very rigid approach' in discussions about compensation and noted that if the Karingbal People sought compensation the Tribunal could not give an amount 'greater than the amount noted in' the Act. On that basis, the Grantee party would not offer any more than the 'absolute maximum they would have to pay if the NNTT were required to adjudicate'. Again no additional evidence was adduced by the First native title party in this respect. The evidence of the meetings on 4 and 5 October 2011 and the subsequent correspondence indicates that the Grantee party was adopting a firm approach on the compensation issue. But it is clear that at points in the negotiation process it was willing to vary its offer, both as to the amount of money it would pay and the 'other' or 'additional' benefits it might offer. The evidence does not provide sufficient substantiation of the First native title party's assertion that, on that basis, the Grantee party failed to negotiate in good faith with it.

[244] Having regard to the limited evidence in relation to the other issues discussed above, and for the reasons given earlier, I am not satisfied that the Grantee party did not negotiate in good faith with the First native title party in accordance with s. 31(1)(b).

[245] For its part, the Grantee party submits that it negotiated in good faith with the First native title party during and well beyond the six months negotiation period. In summary, the Grantee party:

(a) initiated contact with the First native title party on 6 May 2011 to propose a meeting
(b) attended and funded a briefing session and discussion of the negotiation process on 19 May 2011
(c) attended and funded the negotiation meetings on 13 and 14 July and 4 and 5 October 2011
(d) arranged for and funded the First native title party to visit the relevant area of the proposed tenement on 6, 8, 24 and 25 August 2011
(e) made a written offer of compensation on 13 October 2011 and responded to a verbal counter offer (made on behalf of at least one of the people who comprise the Karringbal People #2 applicant)
(f) participated in Tribunal mediation requested by the Karingbal People #2 on 2 November 2011
(g) made a revised and improved written offer on 15 November 2011

(h) repeated, and extended the date for acceptance of, the revised offer on 23 December 2011, even though no response had been received from the First native title party, and

(i) provided further information about the proposed mining project as requested to the Karingbal People #2 on 27 February 2012.

[246] That conduct, it submits, is evidence of the Grantee party's genuine attempts to resolve the matter by agreement during a negotiation period of almost 12 months. The Grantee party also submits that the fact that it was willing to negotiate and extended an offer even after it had applied to the Tribunal for a determination, and when there was no obligation on it to do so (see *South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232), is further evidence of its good faith negotiations (see *WMC Resources Limited/Western Australia/Richard Guy Evans (Koara)* [2000] NNTTA 259 at [11]; *Drake Coal* at [98] and [168]).

[247] Given the conclusion that the First native title party has not satisfied the Tribunal that the Grantee party did not negotiate in good faith in relation to compensation for the grant of the proposed tenement or the other matters raised by the First native title party, it is not necessary to make a decision in relation to the submission that the Grantee party negotiated in good faith.

The Government party and the Second native title party

[248] The first assertion by the Second native title party that the Government party did not negotiate in good faith was in the Second native title party's response to the Grantee party's contentions on 9 May 2012. The Second native title party's representative did not make the assertion in the preliminary conference on 19 March 2012. Rather he stated that the essential claim was against the Grantee party. He had not received specific instructions in regard to the Government party, and said that he would take the issue on notice. The assertion about the Government party was not made in the Second native title party's statement of contentions dated 13 April 2012. Consequently, the Government party's statement of contentions dated 1 May 2012 recorded that the 'Bidjara People have made no assertions in relation to the Government Party'. Similarly, the Grantee party stated, accurately at the date of its statement of contentions (also 1 May 2012), that the 'Bidjara People do not contend that the State has not negotiated in good faith'. In reply to the latter statement, the Second native title party denied that it does not contend that the State had not negotiated in good faith:

> ... quite the opposite the SNTP has specifically alleged the State has not "negotiated in good faith" but has little other evidence as a direct attempt to negotiate with the SNTP was not made or any offer made to be considered.

[249] In its subsequent submissions (dated 10 May 2012) the Second native title party wrote:

> The file on this matter has correspondence or notes to file regarding any attempt by the State to contact the SNTP to meet or otherwise discuss the future act and s29 notification. Discussions within the representatives of the SNTP disclosed no contact whatsoever with the State.
>
> In the circumstances as no negotiations were conducted and the SNTP party [sic] did not refuse to negotiate then it cannot be said that the State has negotiated in good faith.

The correspondence or notes to file referred to in the first paragraph of that submission were not put into evidence. However, it might be inferred from the rest of the extract just quoted that there are no such items of correspondence or notes to file with the legal representative and that 'no' should have been included before 'correspondence'.

[250] The Second native title party relied, in support of its submission, on paragraph [90] of the determination of the Tribunal in *Cox v Western Australia* (2008) 219 FLR 72. The submission did not identify what part of the passage was germane to its case, but it might be inferred that particular emphasis was on the Tribunal's statement that parties would:

> not meet the good faith requirements of the Act if the negotiations conclude while they are still at an early stage. The Act, when referring to the right to negotiate, is envisaging negotiations which have advanced to such a stage where reasonable efforts have been made to reach an accord. The indicia of good faith negotiation are all centred on the parties meeting, discussing, compromising and actively engaging in discussions. In short the indicia recognise a process which is comprised of numerous activities and negotiations which, unless a native title party refuses to participate, has reached an advanced stage.

[251] The Tribunal's determination was subject to a successful appeal to a Full Federal Court in *Cox*, where the Court rejected the conclusion reached by the Tribunal that there cannot be negotiation for the purpose of s. 31(1)(b) of the Act if the negotiations are only embryonic. The Full Court stated: 'We do not agree that there is a requirement for negotiations to have reached a certain sta*ge.* The Act makes no reference to the parties reaching any particular stage in their negotiations.' (at [23])

[252] The Full Court also stated that, as has been repeatedly recognised:

> the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and concerned with a party's state of mind as manifested by its conduct in negotiations (at [20]).

[253] The Government party criticised the relative lateness of the good faith challenge, the absence of any reason being offered as to why the assertion was not made in the original contentions, and the fact that the reference to the Government party was not made in response to its contentions but in response to the contentions of the Grantee party. Nonetheless, the Government party appeared to accept the conclusion of the Tribunal in another case involving a similar (but not the same) set of circumstances that, despite the fact that it is undesirable for a native title party to raise the issue of good faith negotiations late in the proceedings, the Tribunal will usually have no alternative but to consider and resolve the issue because it goes to the question of whether the Tribunal has power to exercise its jurisdiction and make a determination (see *Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia*, [2003] NNTTA 82 (9 July 2003), Deputy President Sumner at [12]-[15], *Cox* at [11]).

[254] The Second native title party's brief contentions can be considered by reference to two components:

(a) the alleged failure of the Government party to negotiate in good faith with the Second native title party, and

(b) the alleged failure of the Government party to contact the Second native title party.

Alleged failure of Government party to negotiate in good faith with the Second native title party

[255] In response to the allegation that it had not negotiated in good faith, the Government party pointed to s. 36(2) of the Act which, as noted earlier, has the effect of placing an evidential burden on the party alleging that another party did not negotiate in good faith. That would normally require the party to produce evidence to support its contentions (see e.g. *Placer (Granny Smith)* at [28]). The Government party submitted that the Second native title party had failed to provide any evidence to support that allegation.

[256] In addition, the Government party made submissions to support a finding that it had negotiated in good faith.

[257] The basis of that submission is that there is a 'dual deed' system for right to negotiate agreements in Queensland described earlier in these reasons (at [94] and [105] to [110]. As noted there, it is the usual practice for native title parties and grantee parties to negotiate an Ancillary Agreement dealing with, among other things, any compensation payable to the native title party. The Government party is generally not involved in the negotiation of Ancillary Agreements and is rarely provided with copies of them as they are usually regarded by the parties as being commercial-in-confidence. Following the finalisation of such an agreement, the State will enter into a Section 31 Deed with the native title parties and grantee parties. The Section 31 Deed is a tripartite agreement between the negotiation parties which is essentially a 'bare' deed to comply with the requirements of s. 31(1)(b) of the Act. Hence, much of the Government party's involvement in negotiations occurs after the other parties have finalised an Ancillary Agreement.

[258] In the present case, because no agreement was reached between the Grantee Party and either the First native title party or the Second native title party, no Section 31 Deed was signed by any party. Consequently, consistently with the 'dual deed' system, the matter did not reach the stage where the Government party was to enter into an agreement with the other parties and the Government party played a limited role in the negotiations before the present future act determination application proceedings commenced.

[259] As if to illustrate the point, the Tribunal was advised by the Government party that on 12 April 2012, after the commencement of these proceedings in the Tribunal, the Grantee party's representatives advised the Government party that there was a possibility of the Grantee party reaching agreement with the Second native title party. Accordingly, the Government party provided a Section 31 Deed to the Grantee party's representatives on 17 April 2012.

[260] Perhaps for completeness (given that the compensation issue was not raised expressly by the Second native title party, although it asserted that no offer was made for it to consider), the Government party also contends that it has transferred to the Grantee party the obligation to pay compensation to native title parties in respect of the grant of a mining tenement. Accordingly, the State has no obligation to negotiate with native title parties about compensation as part of good faith negotiations. That contention was also relevant to the submissions of the First native title party. It is dealt with more fully, and accepted, in these reasons for determination at [93] to [102].

Alleged failure of Government party to contact Second native title party

[261] In response to the Second native title party's submissions regarding any attempt by the Government party to contact it, the Government party refers to correspondence that it sent to QSNTS on behalf of the Bidjara People on three occasions. The Government party obtained confirmation from QSNTS that this correspondence was sent to the registered claimants on behalf of the Bidjara People. In summary, this correspondence can be described as follows:

(a) a letter dated 9 February 2011 notifying the Second native title party of the proposed grant of the tenement, informing the Second native title party of its entitlement under s. 31 of the Act to make submissions to the State of Queensland (in writing or orally) regarding the proposed grant of the tenement, and advising the Second native title party to contact Ms Julieanne Butteriss of the State if they had any queries about the letter or the right to negotiate process

(b) a letter dated 30 June 2011, at the end of the three month notification period, providing advice about the right to negotiate process and the obligation on all parties to negotiate in good faith, and requesting that the Second native title party consider its availability 'over the next four weeks' and contact Ms Butteriss in 'order for negotiations to commence', and

(c) a letter dated 3 January 2012, asking the Second native title party to 'advise the State of the status' of their negotiations with the Grantee party and of any 'future proposed negotiations' and inviting the Second native title party to contact Ms Butteriss if they wished to discuss this matter further or any other aspect of the right to negotiate process.

[262] The first two letters were forwarded (on 18 February and 19 July 2011 respectively) by QSNTS to most of the persons who together comprise the registered native title claimant and to Creevey Russell Lawyers, the Second native title party's future act representative at the time. The third letter was also sent by QSNTS to those individuals on 19 January 2012, and by the Government party to RFG Finlayson and Associates, who the Government party understood to be representing the Second native title party at that time. The Government party did not send any correspondence directly to Mr Hauff as it was not aware until the preliminary conference in this matter that he was representing the Second native title party. That could explain the apparent absence of correspondence on Mr Hauff's file.

[263] Each item of correspondence invited the Second native title party to contact the State, and provided contact details of the relevant state officer. The Government party received no contact from the Second native title party or their representatives.

[264] The Government party's involvement in negotiations with the Second native title party is detailed in the Affidavit of Julieanne Maree Butteriss at Annexure 6 to the Government party's statement of contentions filed on 1 May 2012. The Affidavit and documents annexed to it show that, in addition to its initial notification correspondence of 9 February 2011, the Government party attempted to keep itself informed about the progress of negotiations between the other parties, and to assist the parties when difficulties arose. In particular:

(a) the Government party contacted the Grantee party to request copies of documentation relating to the Grantee party's negotiations with the Second native title party, which was provided on 7 March 2012

(b) the Government party became aware through contact from the Grantee party's representatives that negotiations were not progressing well, and as a result, on 3 August 2011, the Government party sent a letter to the Grantee party asking if the Grantee party had considered seeking Tribunal mediation 'to assist the parties to commence negotiations', and

(c) as already noted, the Government party wrote to the Second native title party on 3 January 2012 to offer to discuss the current or future proposed negotiations, however, the Second native title party did not accept the Government party's invitation.

[265] The Government party contends that:

(a) in the course of these negotiations, it acted in accordance with negotiation practices that have developed in Queensland, and the Tribunal may take these practices into account in making its decision

(b) if the Bidjara People had wanted a different negotiation procedure to be followed, they could have contacted the State in this regard, and

(c) the Government party afforded the Second native title party a number of opportunities to request greater assistance or involvement from the State, but the Second native title party chose not to do so.

Accordingly, the Government party contends both that it negotiated in good faith with the Second native title party and that the Second native title party has failed to demonstrate that the Government party has not negotiated in good faith.

[266] Passages from the Tribunal's reasons for determination in *Gulliver Productions* are relevant here. In that case, the native title party contended that there was no evidence that the Government party had engaged in any communication which could be characterised as negotiation, or that it had contributed to the mediation conferences, made any other contact with the native title party or otherwise made any procedural, substantive or material contribution towards reaching an agreement. The facts in that case are different from those in the present proceedings, but the observations of Deputy President Sumner are apposite. As he wrote, whether negotiations in good faith have occurred requires 'examination of a party's overall conduct in relation to the whole of the negotiations' (at [28]). That includes the content and timing of correspondence from the Government party to a native title party (see [30]-[35]).

[267] Deputy President Sumner repeated (at [11]) a passage from *Placer (Granny Smith)* at [30]) in which the Tribunal summarised the obligation to negotiate in good faith. That passage is quoted earlier in these reasons at [61].

[268] The negotiations which occurred in *Gulliver Productions* were consistent with those conducted in relation to the grant of mining and petroleum titles in Western Australia where negotiations are concluded by a Section 31 Agreement which is signed by all negotiation parties (i.e. a State deed) and lodged with the Tribunal, as well as an Ancillary Agreement between the grantee party and native title parties. The Ancillary Agreement contains much greater detail of the agreements entered into between them relating to such things as heritage protection and compensation payments. In many instances (including in the *Gulliver Productions* negotiations), details of these Ancillary Agreements are not made known to the Government party. Deputy President Sumner noted that in *Njamal* the Tribunal anticipated that the factual context and particularly the nature of the future act would be important to determining whether the obligation to negotiate in good faith had been fulfilled (at [36]). In *Njamal* (decided before s. 31(1)(b) was amended in 1998), the Tribunal stated:

> In deciding on the reasonableness or otherwise of the Government party's actions, the fact that the obligation is imposed on the Government party while much of the content of the negotiations and any agreement must involve the native title and grantee parties, may need to be

> taken into account. Depending on the circumstances, it may be that the Government party has little that it is able to offer in resolution of the dispute. (Njamal at 225)

[269] In *Gulliver Productions*, decided nine years later, Deputy President Sumner wrote (at [37]):

> Experience of negotiation in good faith since *Njamal* has confirmed this position. The practice developed in each State/Territory influences the content of the negotiations with the Government party. For example, in Victoria the Tribunal has had regard to the practice which developed in that State whereby the grantee and native title parties do not involve the Government party in negotiations until after an Ancillary Agreement had been signed (*Mt Gingee Munjie v Victoria and Others* [2003] NNTTA 125; (2003) 182 FLR 375 para [91]-[93]).

[270] Later in *Gulliver Productions*, Deputy President Sumner wrote (at [49]):

> The general principles on negotiation in good faith refer to the making of proposals, communicating about them and holding discussions with a view to reaching agreement about them. Negotiations do not occur in a vacuum, they must be about proposals. An opportunity is provided for a native title party to make submissions about the doing of the act (s 31(1)(a)) which is an opportunity for it to put forward proposals for negotiation. If a native title party makes no proposals on an issue to the Government or grantee parties it is difficult to see how after the event the other parties can be accused of not negotiating in good faith in relation to them.

Those passages, with which I agree, apply to the circumstances in this case, insofar as they involve the Government party.

[271] On the evidence before the Tribunal, I find that:

(a) the Government party had, on 9 February 2011 and in subsequent correspondence, sought to inform the Second native title party about the proposed grant of the tenement and its entitlement to make submissions to the State of Queensland and about other aspects of the right to negotiate process, invited the Second native title party to contact the State in order to commence negotiations, and sought information from the Second native title party about the status of negotiations with the Grantee party

(b) the Second native title party did not respond to that correspondence

(c) the Government party also attempted to assist the progress of negotiations between the Grantee party and the Second native title party by writing to the Grantee party on 3 August 2011 (in reply to the Grantee party's letter of 26 July 2011) asking whether the Grantee party had considered seeking mediation from the Tribunal 'to assist the parties commence negotiations'

(d) consistently with usual practice in Queensland, the Government party would not usually have a more direct role in the negotiations until an Ancillary Agreement

was negotiated between the Grantee party and the Second native title party and a Section 31 Deed was to be prepared.

[272] Accordingly, I conclude that, on the evidence in these proceedings, the Government party acted reasonably. The Second native title party has not satisfied the Tribunal that the Government party did not negotiate in good faith.

[273] Despite that conclusion, I refer to and reiterate the suggestion made at [143] that the Government party review its practices in relation to the right to negotiate proceedings.

The Grantee party and the Second native title party

[274] In its statement of contentions lodged on 13 April 2012, the Second native title party contended that the Grantee party had failed to negotiate in good faith because:

(a) the Grantee party engaged in 'disingenuous conduct amounting to obfuscation and pettifoggery' by:

i. refusing to pay reasonable costs of the applicant's representative to attend a negotiation conference

ii. creating division between members of the Bidjara people by approaching only two members of the Bidjara People (only one of whom is a current applicant) and arranging for them to be parties to a Cultural Heritage Agreement, knowing they did not have the authority to bind the Bidjara people, which facilitated an alleged fraud by those two people against the Bidjara People in circumstances where they were paid by the Grantee party the sum of $100,000.00 dollars and were paid $50,000.00 each personally

iii. obtaining and paying for the services of a barrister to represent those two people as alleged representatives of the Bidjara People (together with other native title groups) knowing full well that firstly, these two people no longer had the authority to represent the Bidjara People and secondly, did not inform the Bidjara People Applicant representatives who they were dealing with in regard to other Cultural Heritage matters as to their actions with those two people and thirdly knowing that the Bidjara People already had solicitors representing the Bidjara People

iv. negotiating other Cultural Heritage Agreements through the solicitors on the record representing the Bidjara People without informing them of the other arrangements being made with those two people

v. refusing to attend a negotiating conference, because the Bidjara People had alleged that the Grantee party had aided the alleged fraud by those two people

vi. setting up the façade of appearing to negotiate in good faith without any genuine desire to do so

(b) the Grantee party has shown an absence of good faith such as by deliberate delay, sharp practice, misleading negotiating and other unsatisfactory or unconscionable conduct as detailed in (a) above

(c) the Grantee party has unreasonably made an offer based on the unimproved value of the land, on a 'take it or leave it' basis with [sic] a genuine attempt to negotiate in good faith and without considering the issues raised in ss. 33 and 39 of the Act

(d) the Grantee party has adopted a rigid non-negotiable position, on a 'take it or leave it' basis with no options

(e) the Grantee party's policy was that it would not consider the issues raised in s. 33(1)(a), (b) and (c) of the Act and therefore without more has not negotiated in good faith

(f) the Grantee party has not complied with the directions of the High Court in *North Ganalanja Aboriginal Corporation & Waanyi People v Queensland* [1996] HCA 2; (1996) 185 CLR 595 (21 March 1996) as to what constitutes 'to negotiate in good faith'

(g) the Grantee party has not honestly attempted to negotiate in good faith and has failed to have reasonable regard to the Bidjara People's interests and concerns

(h) the Grantee party has acted arbitrarily, capriciously, and unreasonably, by not considering the interests of the Bidjara People, either with respect to the payment of meeting costs, or with regard to the offer made on a 'take it or leave it' basis

(i) the Grantee party has failed to address the development of the social, cultural and economic structures of the Bidjara People in particular:

i. training and apprentice opportunities;

ii. employment opportunities

iii. local infrastructure for cultural, social and economic benefits.

[275] As noted earlier, the effect of s. 36(2) of the Act is to place an evidential burden on the party alleging that another party did not negotiate in good faith which would normally require it to produce evidence to support its contentions.

[276] The evidence provided in support of such wide ranging contentions was a witness statement by Trevor George Hauff, the lawyer representing the Second native title party, and copies of letters and emails between XCQ and the Bidjara People native title claim group, and notice of a CHMP for the Rolleston Coal Project Expansion.

[277] The submission of the parties in relation to these contentions can be dealt with by reference to the following topics:

(a) the 'bad faith' issue
(b) Grantee party's alleged failure to pay reasonable costs of the Second native title party's representative to attend a negotiation conference
(c) Grantee party's alleged unreasonable offer based on the unimproved value of the land and adoption of a rigid non-negotiable position
(d) Grantee party's alleged failure to consider issues raised in s. 33(1)(a), (b) and (c) of the Act
(e) Grantee party's alleged failure to have reasonable regard to the Bidjara People's interests and concerns
(f) the timing of the Grantee party’s application to the Tribunal for a future act determination.

The ‘bad faith’ issue

[278] The contentions (a)(ii)-(vi) and (b) listed in paragraph [274] can be described as the ‘bad faith’ issue. They were considered in the written reasons in relation to an application by the Second native title party for an oral hearing concerning the bad faith issue ([2012] NNTTA 55 (30 May 2012)).

[279] In that part of these proceedings, I was not satisfied on the evidence that:

(a) a finding in relation to the bad faith issues is relevant to the good faith issue before the Tribunal in relation to the grant of the proposed tenement, and
(b) the taking of oral evidence in a hearing, or the production of witness statements, from some or all of those persons would assist the Tribunal to decide whether the

Grantee party negotiated in good faith in relation to the grant of the proposed tenement.

Consequently, based on the submissions and evidence before the Tribunal, I also concluded that the application for:

(c) an oral hearing in relation to the bad faith issue, or

(d) in the alternative, the production of witness statements in relation to the bad faith issue,

should be refused.

[280] For the reasons given previously, I am not satisfied that those allegations of bad faith are relevant to the good faith issue before the Tribunal in relation to the grant of the proposed tenement.

Grantee party's alleged refusal to pay reasonable costs of the Second native title party's representative to attend a negotiation conference

[281] The Second native title party contends that the Grantee party engaged in disingenuous conduct amounting to obfuscation and pettifoggery by refusing to pay reasonable costs of the applicant's representative to attend a negotiation conference (see [274](a)(i)). In support of this contention, the Second native title party submits, in summary, that:

(a) the courts generally have taken the bargaining power of the parties into consideration in contracts generally and specifically in consideration in relation to whether funding by the grantee party is relevant to the issue of negotiating in good faith

(b) the standard of negotiating behaviour expected of the Grantee party is much higher than it would be for a smaller mining company given the Grantee party's size and resources (which the Second native title party described as a 'multinational corporation and one of the world's largest mining companies, with billions of dollars in turnover and profits with the best legal advice money can buy')

(c) the 'substantial difference in bargaining power' between the Grantee party and the Second native title party ('a small group of aboriginals with little education and money to spend on expensive lawyers') puts the Second native title party at a 'substantial disadvantage' relative to the Grantee party, and the funding of

meetings is a way to address the imbalance to enable the parties to 'engage in quality negotiations'

(d) the Grantee party refused to fund the attendance of the Second native title party as requested by them to attend a face-to-face meeting for the purposes of negotiating in good faith the proposed future act in circumstances where other mining companies of lesser size and stature in the mining community than the Grantee party had been prepared to do so

(e) the parties never met as the Grantee party would not fund a meeting of them 'in accordance with the normal funding fees paid by other mining companies'

(f) the Grantee party has used the stance of the Second native title party to require the Grantee party to pay reasonable funding costs for meetings 'as a ploy firstly not to meet and secondly to delay and use up the negotiating period to make an application for a s. 38 determination'. The 'unsuspecting' Second native title party was 'effectively duped and manipulated into a position' where the matter could be referred to the Tribunal 'to avoid the necessity to consider the issues' in s. 33 of the Act.

[282] Although the contention refers to an alleged refusal to pay reasonable costs of the applicant's 'representative' to attend 'a negotiation conference', the submissions in support of that contention summarised at (d) to (f) in the preceding paragraph are more broadly cast. They refer to funding the attendance of 'the Second native title party as requested by them', a meeting 'of them' and the requirements of the Second native title party that the Grantee party pay reasonable funding costs for 'meetings'. Clearly the complaint is that the Grantee party refused to pay for a number of people (e.g. the Second native title party and their representative) to attend one or more meetings. I proceed on that understanding of the contention.

[283] The factual basis for a decision about these contentions can be found in the evidence currently before the Tribunal, primarily letters and email communications between representatives of the Grantee party and the Second native title party. Relevant passages from the correspondence are summarised and quoted below.

(a) **5 May 2011**: letter from Bryan Tiedt, Group Manager Environment & Community, XCQ to the Bidjara People native title claim group c/- QSNTS, which referred to the Rolleston Coal Joint Venturers (i.e. the Grantee party)

having applied for three mining leases (MLAs 70415, 70416 and 70418) adjacent to the current Rolleston mine (ML 70307) and noting that the State had issued notices under s. 29 of the Act regarding the grant of the proposed tenement (being 'the only lease where native title may not have been extinguished at law over all the mining lease area'). XCQ on behalf of the Grantee party, stated that it:

- 'is committed to engaging with the Bidjara People and the Karingbal People #2 in good faith negotiations regarding native title and the grant of ML 70415'
- 'would also like to discuss cultural heritage matters related to all 3 new mining leases with the Bidjara and Karingbal'
- 'is proposing initial meetings with the Bidjara and Karingbal People #2 to discuss the Mining Leases'
- 'will provide the following funding per person to assist the Bidjara People applicants attend meetings to discuss native title issues regarding the grant of the Mining Leases' [sic]:
  - attendance fees:

    $450 per full day (four hours or more)

    $225 per half day (four hours or less)
  - accommodation and meal expenses:

    $300 per day if the meeting is in Brisbane as required (i.e. if it is reasonably necessary for an applicant to spend one or more nights away from their house to attend negotiations, and if not otherwise provided by XCQ); a revised accommodation/meal rate if meetings are agreed to be held in a town other than Brisbane to take into account reasonable expenses for such items in that location.
  - travel time:

    $250 each way, but only if the applicant is travelling before or after the meeting
  - travel expenses:

    reasonable travel expenses provided they are referred to XCQ in advance of the meeting

If the applicant lives in the city where the meeting is taking place, reasonable travel expenses incurred in attending the meeting (e.g. taxi fares, parking costs)

- carer payments:

  $100 per day (for one carer per applicant, plus the carer's travel expenses provided that the travel by the carer with the applicant to and from the meeting is other than by car with the applicant (e.g. plane, bus or train).

- 'is willing to pay reasonable legal costs of the Bidjara People applicants in relation to the negotiation of the native title agreement for the grant of the Mining Leases' [sic] up to $25,000 with the proviso that any costs incurred above that amount 'must be pre-approved by XCQ'
- 'would like to meet with the Bidjara People to discuss the native title agreement for the grant of the Mining Leases' [sic] and proposed that the first meeting be held on 19 May 2011 in Brisbane, with the purpose of that meeting being 'to explain the project to the Bidjara, discuss the negotiation process, discuss on the preliminary basis the possible content of an agreement in general terms, and discuss the next steps in the negotiation, including possible future meeting dates'.

(b) **16 May 2011**: Email at 11:31 am from Corinne Lloyd, Manager of Sandlewood Aboriginal Projects Ltd, to Bryan Tiedt attaching 'the draft budget for the Bidjara meeting' and asking him to 'confirm if the budget is approved'. That budget listed 12 people who were to attend the one day meeting. (The 12 people included some who were not the nine people who together comprise the applicant on the Bidjara claim.) Each was to be paid $650 per day for the meeting and 11 of them were to be paid $650 per day for two days of travel and costs of travel. The total amount of daily fees was $22,100 to which was apparently added a sum for travel expenses. The total cost of the draft budget was calculated as $38,658.40, comprising a sub-total of $33,297.48 plus admin cost @ 20% ($3,350.58) plus GST @ 10% ($2,010.34).

(c) **16 May 2011**: Email at 5:47 pm from Simon Cobb (solicitor for the Grantee party) to Perry Russell (solicitor for the Bidjara People) referring to their discussion that day and to a draft budget received that day, noting that the rates

'are significantly in excess of those proposed by Xstrata in its letter of 5 May 2011' and stating that the 'rates are not accepted by Xstrata'. Mr Cobb then:

- confirmed that, as Xstrata 'has already communicated, it is willing to meet the reasonable costs of the Bidjara applicants attending meetings regarding this projects' [sic]
- stated that the 'rates proposed by Xstrata are reasonable and consistent with what Xstrata has offered, and which has been accepted by traditional owners in respect of other future act negotiations throughout the State'
- requested that arrangements be made for the draft budget to be re-issued 'calculated in accordance with the rates specified in the attached letter'
- stated that, whilst Xstrata 'is keen to commence good faith negotiations with the Bidjara, if the Bidjara are not prepared to meet based on the offered rates, the meeting on 19 May 2011 will, regrettably, not proceed'

(d) **17 May 2011**: Email at 8:31 am from Perry Russell to Simon Cobb in relation to the draft budget and the basis on which fees should be calculated, and stating that:

- Mr Russell's clients 'need to know URGENTLY if Xstrata are prepared to meet Bidjara's costs. If they are not then it is unlikely the other back to back meeting will proceed.'
- 'Bidjara believe the fees offered by Xstrata are unreasonable and have instructed they are not prepared to pay [sic] them.'

(e) **17 May 2011**: Email at 3:36 pm from Ben Zillmann to Perry Russell referring to the previous email and stating that Xstrata's position remains:

- Xstrata will only fund people who are Bidjara applicants to attend the meeting, consistently with Xstrata's legal obligation to negotiate with these individuals on behalf of the Bidjara People
- Xstrata's offer regarding payments remains as per its letter of 5 May and Xstrata 'is of the firm view these rates are reasonable'.

He stated that, as previously advised, the rates Xstrata has offered 'are considered fair' and 'go beyond Xstrata's legal obligations, and are consistent with what Xstrata has agreed with other groups. Just as importantly, Xstrata is not just dealing with Bidjara in respect of this project – the Karingbal also have equal

legal standing and Xstrata is conscious to treat both parties equally and offer them the same opportunities and terms for negotiations.'

(f) **17 May 2011**: Email at 3:51 pm from Perry Russell to Ben Zillmann advising that, having not received a response to his previous email until 3:36 pm, 'we have had to cancel the back to back meeting'. He continued 'Our clients do not agree to your fee proposal, if [sic] fails to take account of the distances needed to be travelled or the costs sought by our clients which are our clients usual fees paid by other mining companies. *On this basis* there will be no meeting with your client on Thursday.' (emphasis added)

(g) **17 May 2011**: Email at 4:48 pm from Ben Zillmann to Perry Russell noting Mr Russell's advice that the Bidjara would not be attending on Thursday and responding to other matters about timing, particularly noting previous exchanges of correspondence about budget options and stating that on 16 May 2011 Xstrata was first 'made aware that the Bidjara did not accept the terms of the proposed meeting'.

(h) **5 July 2011**: letter from Bryan Tiedt to the Bidjara People native title claim group c/- Perry Russell, Creevey Russell Lawyers, referring the previous correspondence regarding a meeting to discuss the application for ML 70415 with the Bidjara People. XCQ on behalf of the Grantee party repeated its invitation to meet with the Bidjara and proposed a full day meeting on 20 July 2011.

> As previously advised, Xstrata will provide the funding outlined in our correspondence of 5 May 2011 to assist the Bidjara People applicants to attend the meeting and will of course meet your costs in attending to assist the Bidjara. Could you please confirm the Bidjara's agreement to the proposed arrangements and for Sandlewood or the Bidjara to provide a budget (consistent with the rates in our correspondence of 5 May 2011) to Steve White of Spinifex ... so that travel and meeting facilities can be arranged.

(i) **5 July 2011**: email from Perry Russell to Simon Cobb confirming that 'our clients are prepared to meet with your clients and enter into good faith negotiations, but require the meeting to be properly funded in accordance with Bidjara's accepted funding terms. These have been previously provided to you by our client's service provider Sandlewood. Our clients consider your clients funding proposal is inadequate and they advise that they will not meet with your client at the rates proposed.' He wrote that his clients 'would be able to meet with your client on 20th July as requested if the issue of the budget can be sorted out quickly'.

(j) **12 July 2011**: letter sent by email from Ben Zillmann and Simon Cobb to Perry Russell referring to Mr Russell's letter of 6 July 2011 in respect of the proposed meeting with the Bidjara People on 20 July 2011 in Brisbane to discuss the grant of ML 70415. 'As previously advised, our clients, Xstrata Coal Queensland Pty Ltd, are of the view that they have offered funding arrangements which are fair and reasonable in the circumstances to assist the Bidjara applicants to attend these meetings and to meet your reasonable costs as their legal adviser.

Although there is no requirement for Grantee parties to fund native title claim groups to attend right to negotiate meetings under the Act, their client 'is nevertheless offering substantial funding to facilitate meetings with the Bidjara.'

> The offered payments are consistent with those offered to, and accepted by, other native title claim groups in Queensland that Xstrata has negotiated with. In particular, they are the same as offered to, and accepted by, the Karingbal People #2, with whom our clients are holding concurrent negotiations in relation to the grant of ML 70415. It is important to our client that it acts fairly by treating all native title parties it negotiates with equally and consistently. It is not prepared to pay special or higher rates to one group.

On behalf of their clients, they reiterated their 'desire to engage with the Bidjara to discuss the grant of ML 70415 and restate the proposed funding arrangements as set out in their correspondence to you of 5 May 2011.'

(k) **19 July 2011**: email from Perry Russell to Simon Cobb stating that his clients:

> are willing to meet with your clients at a suitably convenient time however they will not accept the meeting fees offered. Your client seems to continue to maintain the position that the fees offered are what they pay other groups therefore that is what they will pay Bidjara. They fail to accept the converse being the rate proposed by Bidjara is the rate other proponents pay for meeting with Bidjara. My clients believe the fees offered are unreasonable and do not take account of the distances and disruption my clients encounter in attending meetings with proponents. They do not believe your clients are acting in good faith. My clients have tentatively arranged meetings in Brisbane on 28 & 29 July and we may be able to arrange a meeting around these times but your client will need to change it's [sic] position on meeting fees for this to occur.

(l) **26 July 2011**: email from Simon Cobb to Perry Russell advising that Xstrata 'is unable to meet this week to discuss the grant of ML 70415, however, the weeks commencing 8 and 15 August 2011 are available for a one day meeting (either in Brisbane or Rockhampton, whichever is preferable to the Bidjara).' He rejects 'absolutely' the allegation that the Grantee party is 'not acting in good faith'. The Grantee party 'is ready and willing to meet with the Bidjara. It has offered funding beyond its legal obligations to facilitate this. We also note that the obligation to negotiate in good faith applies to all parties.' He stated that Xstrata:

- ‘has offered to meet the actual reasonable travel expenses of each Bidjara applicant to attend the meeting provided they are referred to Xstrata in advance’
- ‘will pay the travel time, attendance fees and accommodation and meal expenses referred to in our letter to you of 5 May 2011 in respect of each Bidjara applicant’
- ‘agreed to meet the Bidjara’s costs in relation to legal representation for the meeting’, and continued:

> If the group refuse to engage in good faith in accordance with the proposal above, Xstrata will have to consider its other options. Negotiations with the Karingbal People #2 are already advanced on this issue and Xstrata is not willing to delay indefinitely due to the current impasse with the Bidjara.

(m) **26 July 2011**: letter from Ben Zillmann and Simon Cobb to Julieanne Butteriss (Principal Project Officer, Senior State Negotiator – Native Title Services, with the then Department of Employment, Economic Development and Innovation) describing meetings with the First native title party, and advising that the Bidjara People ‘have repeatedly refused to engage with Xstrata on the same terms as offered and agreed by the Karingbal People #2 (which include the reasonable travel, accommodation and meal costs and “attendance fees” and funding for their legal representative). Xstrata has proposed rates consistent with those offered and accepted by native title groups with whom Xstrata has negotiated throughout the State. The rates, in Xstrata’s opinion, are more than sufficient to ensure the applicants incur no out of pocket expenses and are in fact remunerated for attending the meetings to discuss the grant of the mining lease. Nevertheless, the Bidjara are demanding higher payments.’

(n) **24 October 2011**: letter sent by email from Ben Zillmann and Simon Cobb to Perry Russell referring to previous correspondence regarding the ‘ongoing desire’ of the Grantee party ‘to meet with the Bidjara to discuss the grant of’ ML 70415. They stated that, although the ‘mandatory negotiation period’ for the purposes of the Act concluded on 30 September 2011, negotiations continue with the Karingbal People #2 and the Grantee party ‘remain committed to trying to reach a negotiated outcome with the native title *parties* to the area.’ (emphasis added)

At a meeting ‘recently held’ with the Karingbal People #2, the Grantee party had ‘put forward an offer by way of compensation for the effect of the grant of the

mining lease on native title rights and interests.' The Grantee party 'wishes to treat each of the Karingbal People #2 and the Bidjara People equally on this issue' and 'would have preferred the opportunity to discuss these issues directly with the Bidjara applicants first'. However, as a meeting 'had not been possible to date', the Grantee party 'wanted to communicate the offer in writing.' The offer was $197,000 payable in two tranches ($50,000 within 14 days of execution of the State deed or Ancillary Agreement, and $147,000 within 14 days of the grant of ML 70415). The offer of compensation 'is made in return for the Bidjara applicants' consent to the grant of MLA 70415'. The reasoning as to why the Grantee party 'considers the offer is reasonable' is set out. These payments 'are offered regardless of whether a referral to the NNTT for a determination is required in the event agreement cannot be reached with the Karingbal People #2 (subject of course to a condition that the Bidjara will not oppose the mining lease grant).'

Certain 'other benefits' by way of undertakings with regard to contract tendering for the Rolleston Mine in addition to the payment of compensation were specified.

The letter stated that the Grantee party:

- 'intends to negotiate a cultural heritage management plan with the Bidjara People for the entire area of ML 70415 and other Rolleston expansion mining lease areas'
- would welcome the Bidjara's response to the offer
- 'will gladly arrange a meeting on the terms outlined in our original correspondence of 5 May 2011' if the Bidjara would prefer to meet with the Grantee party 'to discuss the offer and the project'
- 'would wish for any such meeting to occur before 30 November 2011.'

(o) **15 November 2011:** letter from Perry Russell to Ben Zillmann referring to Mr Zillmann's letter of 24 October 2011.

> Our clients renew their previous requests for a meeting with your clients to discuss the grant of ML 70415. You have previously been provided with our clients' sitting fee rates by their service provider Sandlewood and our clients will sit with you at a convenient time in Brisbane. The rates previously proposed by Xstrata are not, in the view of our clients, reasonable to allow our clients to attend a meeting in Brisbane and the proposed payment rates are inconsistent with Bidjara rates paid by other proponents. We await your advice.

(p) **8 March 2012**: letter from Trevor Hauff to Ben Zillmann advising that Trevor Hauff Lawyers act for the Bidjara People and that Creevey Russell Lawyers no longer act for the Bidjara in this matter. Mr Hauff referred to the offer made in the email from Ben Zillmann dated 24 October 2011, and to the offer referred to in a conversation between Trevor Hauff and Ben Zillmann 'around two weeks' before 8 March 2012. Mr Hauff reiterated the disagreement about the way in which the amount of compensation to the Second native title party should be calculated and the basis on which 'a true bona fide negotiation should take place' under the Act. He stated that an up front payment, royalties and jobs, contracts and training for the local Indigenous people were 'proper issues to be considered and the real basis on which proper in good faith negotiations could be concluded and a refusal to negotiate *on that basis* in our view would not constitute negotiation "in good faith" by Xstrata/RJV'. (emphasis added)

Mr Hauff set out a range of other concerns (in relation to the bad faith issue, referred to earlier in these reasons) and stated 'We are prepared to continue negotiations in good faith and suggest that you contact Mr.Trevor Hauff ... to make arrangements to do so ...' (adding that if negotiations were not continued within seven days of the letter, action would be taken against the Grantee party in relation to the bad faith allegations).

(q) **9 March 2012**: letter sent by email from Ben Zillmann to Trevor Hauff, after the future act determination application had been made to the Tribunal. The letter dealt with various issues raised in a telephone conversation between them on 17 February 2012 and in Mr Hauff's letter of 8 March 2012. It advised that, despite the matter having been referred to the Tribunal for determination, the Grantee party 'remains open to settling this matter with the Bidjara before the matter is substantially progressed through the determination process' and for that purpose 'is willing to repeat its offer regarding the terms of an agreement, as set out in the 24 October 2011 letter'. Additionally, if the Bidjara wish, the Grantee party is willing to meet with Bidjara on 22 March 2012 in Brisbane and 'will fund the Bidjara's attendance at that meeting on the terms previously offered' in the letter of 5 May 2011, as well as funding a legal representative to be present to represent the Bidjara People at the meeting. The Grantee party 'requires the Bidjara to provide a budget for the meeting calculated at these rates, and identifying the

individuals that would attend the meeting, so that can be agreed in advance of the meeting occurring.'

[284] The correspondence summarised and quoted above indicates that the funding issue was the reason that the parties did not meet to engage in substantive future act negotiations. In summary:

(a) each party repeatedly expressed a willingness to negotiate with the other in relation to the grant of the proposed tenement

(b) the Grantee party offered to provide funding to assist the Second native title party attend meetings and to cover legal costs in the amounts and on the basis set out in its letter to the Second native title party on 5 May 2011

(c) the Second native title party considered that the amounts offered by the Grantee party were 'unreasonable', 'not reasonable', 'inadequate' and 'inconsistent with Bidjara rates paid by other proponents'

(d) the Second native title party provided the Grantee party with a budget calculated using higher amounts than those offered by the Grantee party (and for more people than those nominated by the Grantee party) and would not meet with the Grantee party at the rates proposed by it

(e) the Grantee party considered the rates proposed by the Second native title party, was not willing to pay the 'special or higher rates', and repeated its offer to meet on the funding arrangements set out in its letter of 5 May 2011 on the basis that its proposed funding arrangements were fair and reasonable in the circumstances

(f) the impasse over funding arrangements continued even after a written offer for compensation and 'other benefits' was made by the Grantee Party on 24 October 2011.

[285] That conclusion is confirmed in the submissions of the Second native title party regarding the Grantee party (dated 10 May 2012) where, having contended that the Grantee party 'refused to fund the attendance of the SNTP as requested by them to attend a face to face meeting for the purposes of negotiating in good faith the proposed future act', the Second native title party states:

> In this matter the parties never did meet as the GP would not fund a meeting of the parties in accordance with the normal funding fees paid by other mining companies. [Contention 1(a) paragraph 6]

[286] Accordingly, it is open to conclude on the evidence before the Tribunal that the absence of agreement about funding of the Second native title party's participation in negotiations was the principal if not the sole reason why the parties had not met before 8 March 2012 to negotiate in relation to the grant of the proposed tenement.

[287] As part of its submissions, the Second native title party relies on extracts from the following passage from the reasons of Deputy President Sosso in *Drake Coal* at 310-311/[189]-[190]:

> There is no automatic obligation placed on a grantee party to fund the attendance at negotiation meetings of the native title party. Clearly it can be in the interests of the grantee party to do so, lest the negotiations are aborted due to the resource constraints of the native title party. However it would be incorrect to proceed on the assumption that there is a legal obligation placed on a grantee party in every instance to fund meetings, pay attendance fees and the like. Thus in *Western Australia v Daniel* (2002) 172 FLR 168 Deputy President Sumner said (at [146]): "Section 31(1) refers to negotiations, the definition of which is dealt with above. There is nothing in that definition to suggest that one of the parties which is obliged to negotiate in good faith should fund one of the others."
>
> A large and well funded grantee party such as QCoal is in a qualitatively different position to a small miner. The standard of negotiating behaviour expected of an entity such as QCoal would necessarily be different to that of a small and impecunious miner with few resources and possibly no legal representation. A corporate entity such as QCoal has the resources and the professional assistance to engage in quality negotiations. Further, the proposed mining projects in this matter are significant, with the potential to generate considerable revenue.

[288] The passage from *Drake Coal* does not support the Second native title party's case. First, it makes clear that there is no obligation on a grantee party to provide funds to a native title party to attend negotiations. Although an offer to fund the attendance of a native title party at negotiation meetings is an indication of good faith negotiations (see *Western Australia v Daniel* (2002) 172 FLR 168 at [152]), the failure to provide funds or to provide funds in the amount requested by a native title party (or even to negotiate about the extent of such funding) does not necessarily establish that the Grantee party did not negotiate in good faith about the future act (see also *Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia* [2010] NNTTA 211, at [58], [60]).

[289] Second, if there was an expectation that the Grantee party would act consistently with what was intimated by the latter paragraph from *Drake Coal,* it attempted to do so by offering to pay attendance fees and meet a range of related expenses, including legal costs.

[290] The Grantee party then adopted a rigid position in respect of its offer, which it appeared to put on a take it or leave it basis. There might be a sound reason for this approach, but none

was proffered to the Second native title party or the Tribunal, other than the statements that the Grantee party wanted to treat the native title parties equally and that its offer had been acceptable to other groups, including the First native title party. That might not be ideal behaviour given that the purpose of the negotiations was to obtain the agreement of each of the native title parties to the grant of the proposed tenement. For its part, the Second native title party appears to have adopted a similarly rigid approach to what it sought by way of payments, asserting that such payments had been made by others who wished to negotiate with the Second native title party.

[291] It is not easy to compare directly the assistance packages offered and sought. They had some common elements (though different sums of money for them) and some different elements. For example, the Grantee party's offer expressly included payment of carers' and legal costs and factored in allowance for accommodation costs being incurred. The Second native title party's draft budget did not expressly include accommodation costs but envisaged payment for travel days. The Grantee party did not seem to query elements of the draft budget put on behalf of the Second native title party or try to reconcile them with the package that it offered. The Grantee party simply rejected it. For its part, the Second native title party did not seem to attempt to negotiate about meeting costs either. There was a standoff about the issue.

[292] In summary, there appears to have been no negotiation to see if agreement could be reached about the funding arrangements in order to get to the stage when there could be negotiation meetings about whether the Second native title party would agree to the grant of the proposed tenement.

[293] The Second native title party also relies on the last sentence in paragraph [33] of the Tribunal's reasons for determination in *White Mining (NSW) Pty Ltd v Franks* (2011) 257 FLR 205. It is appropriate, however, to quote the full paragraph in which Deputy President Sosso wrote:

> It is incorrect to assume, nonetheless, that when arbitration is sought after the six month period has elapsed and negotiations have not advanced in a "physical sense" that it invariably follows that the Tribunal will find that the parties have negotiated in good faith. Whilst is not relevant to look at the stage of the negotiations to assess whether the obligation to negotiate in good faith has been met, it is relevant to ascertain whether a party has been misled into negotiating preliminary issues or if another party has deliberately engaged in a stalling process such that by the time the six month period has elapsed, there was never any real intention to reach an accord. As the Full Court recognised, it is central to a good faith assessment to have regard to a negotiation party's state of mind as manifested by its conduct. A party will fail to negotiate in good faith if it proposes a course of action which could be characterised as stalling, and then

> seeking arbitration after six months when the other party or parties reasonably would have expected that negotiations be on-going. In short, while good faith is not evaluated on the basis of the "status", "stage" or "substance" of negotiations, it is evaluated on how negotiations are conducted. Consequently, if a party has deliberately taken advantage of another party's understandable misapprehension that the negotiations would lead to an accord and delays in putting offers on the table or engaging in substantive negotiations to "buy time" so that the six months would elapse and arbitration could be sought, then the Tribunal will find that there have not been good faith negotiations.

[294] Again, the passage cited does not support the Second native title party's case. The evidence indicates that the Grantee party did not delay or fail to put an offer on the table and did not engage in a stalling process so that the six month negotiation period would elapse and arbitration could then be sought. Rather, despite there being no negotiation meetings because the parties could not agree on payments, the Grantee party put an offer in writing to the Second native title party and continued to seek direct negotiations in relation to it.

[295] The evidence establishes that, although it was not legally obliged to do so, the Grantee party made repeated offers to pay attendance fees (for full days or half days), accommodation and meal expenses, travel time, travel expenses and carer payments at rates that were apparently acceptable to other native title parties in unrelated negotiations and were accepted by the First native title party for the purpose of negotiations in relation to the grant of the proposed tenement. The Grantee also expressed its willingness to pay reasonable legal costs of the Second native title party in relation to the negotiation of an agreement for that grant. The fact that negotiations did not proceed was principally, if not solely, because the Second native title party did not accept the package of payments on offer.

[296] The behaviour of the parties is to be assessed on a comparative or relative standard, and it is a question of reasonableness of the behaviour of the Grantee party and the Second native title party. The Grantee party's behaviour might have been less than ideal on this issue. However, the Second native title party has not satisfied the Tribunal that the Grantee party failed to negotiate in good faith as required by s. 31(1)(b) by reason of its failure to agree on the meeting and associated costs that it would pay to the Second native title party.

Grantee party's alleged unreasonable offer based on the unimproved value of the land

[297] The Second native title party contends that the Grantee party has:

(a) 'unreasonably made an offer based on the unimproved value of the land, on a "take it or leave it" basis with [sic] a genuine attempt to negotiate in good faith and without considering the issues raised in Section 33 and 39 of the Act', and

(b) adopted a rigid non-negotiable position, on a 'take it to leave it' basis with no options.

[298] The contention appears to take issue with three things: the basis on which the offer was made, the failure to consider the issues raised in ss. 33 and 39 of the Act, and the 'take it or leave it' rigid non-negotiable stance adopted by the Grantee party. In other words, the alleged unreasonableness of the Grantee party is in relation to the basis on which the offer was put, and the Grantee party's behaviour in not attempting to negotiate in relation to ss. 33 and 39 issues and in its negotiation stance. I will deal with each of those contentions.

[299] *Whether the Grantee party's offer of compensation was unreasonable:* As noted earlier, although parties had not held a negotiation meeting, the Grantee party wrote to the Second native title party on 24 October 2011 advising that, at a meeting recently held with the Karingbal People #2, the Grantee party put forward an offer by way of compensation for the effect of the grant of the mining lease on native title rights and interests. The offer was $197,000 payable in two tranches:

(a) $50,000 within 14 days of execution of the State Deed or Ancillary Agreement, and

(b) $147,000 within 14 days of the grant of ML 70415.

[300] The Grantee party stated that it wished to treat 'each of the Karingbal People #2 and the Bidjara People equally on this issue', and described why it considered the offer to be 'reasonable'. In summary, the 'overriding principle' that had guided the offer of compensation was that the compensation offer 'is to reflect the mine's impact on the registered native title claimants enjoyment and exercise of native title rights and interests'. While acknowledging that 'there is currently little case law or judicial guidance on how to value the impact of an action on native title rights and interests', the Grantee party was of the opinion that the compensation here would be 'substantially less' than the land value of the land because:

(a) any native title rights that the Bidjara People may establish in respect of the area where native title may still exist are 'highly unlikely to amount to exclusive possession rights (i.e. equating to something akin to freehold)' because of the co-existing land tenure and use of the areas, and

(b) the grant of the mining lease would not extinguish native title rights - rather, those rights would be 'suspended' during the life of the mine and will revive when the mining leases are surrendered (i.e. the 'non-extinguishment principle' would apply).

[301] Despite its assertion that compensation would be substantially less than the land value, the Grantee party offered compensation to the Second native title party calculated by reference to a valuation of that part of the MLA 70415 area where prior tenures are not deemed to have extinguished native title, i.e. the Mt Kelman pastoral holding with an area of approximately 1,449 hectares. Taylor Byrne valuers had calculated the unimproved value of the land at $272/hectare, a total of $394,000.

[302] The rationale for the offer calculated in that way was explained by the Grantee party as follows:

> Whilst native title compensation is not assessed by reference to land value, s 51A of the Native Title Act 1993 (Cth) does seek to cap native title compensation at an amount no more than the amount that would be paid for the compulsory acquisition of a freehold estate over the relevant area.

Given that the First native title party also had a registered native title claim over the same area, and neither native title party had been determined to hold native title rights and interests, the Grantee party was willing to offer $197,000 as compensation to each native title party. For various reasons, the Grantee party stated that the amount 'significantly exceeds a calculation of compensation on a legal basis, and therefore it represents a reasonable offer'.

[303] In his letter to Mr Zillmann dated 8 March 2012, Mr Hauff wrote:

> We firmly disagree that s 51 of the Native Title Act 1993 caps NT compensation to the value of freehold land as s 53 specifically requires the compensation to be on "just terms". The Courts have yet to determine the extent of what constitutes "just terms" in Native Title matters and if need be we will ask the Court to determine the issue.

Read in context of the letter from the Grantee party of 24 October 2011, I infer that Mr Hauff was referring to s. 51A rather than s. 51.

[304] Mr Hauff seemed to accept, however, that the unimproved value of land might be one basis for the negotiation of compensation when he wrote that it 'was not the *only* basis upon which a true bona fide negotiation should take place under the Native Title Act' (emphasis added). He went on to state that 'an up front payment, royalties and jobs, contracts and

training for the local indigenous people were proper issues' to be considered and 'the real basis on which proper in good faith negotiations could be concluded'.

[305] It is worth recalling that the written offer made by the Grantee party on 24 October 2011 included items other than monetary compensation, such as requiring tenderers to provide details of 'how they will endeavour to provide employment opportunities for local indigenous groups including members of the Bidjara people while working on the Rolleston Mine Project' and that 'in assessing tenders, the tenderer's responses to these issues will be weighted the same as for safety issues and environmental issues when considering the award of the contract'.

[306] In considering the Second native title party's contentions that the Grantee party has 'unreasonably' made an offer based on the unimproved value of the land it needs to be clear that the Tribunal generally does not determine whether the offer of compensation made by the Grantee party was reasonable.,

[307] As noted earlier (see paragraphs [225] and [226]), generally speaking it is not for the Tribunal to assess the reasonableness of each offer. I adopt the Tribunal's approach described in *Drake Coal* for the purposes of these proceedings. The Tribunal would only consider the fairness of a compensation package if the offer is so manifestly and obviously unfair that any reasonable person would regard it as a 'sham' or 'unrealistic' offer, or if independent material is produced to the Tribunal. I am not satisfied that the Grantee party's offer was so manifestly and obviously unfair that any reasonable person would regard it as a 'sham' or 'unrealistic' offer. Nor is there independent material (from the Second native title party or any other party) to satisfy me that the offer is potentially unfair or unrealistic.

[308] Consequently, I am not satisfied that the Second native title party has established that, by putting its offer of compensation based on the unimproved value of the land, the Grantee party has not negotiated in good faith.

[309] However, in this context, it is appropriate to make some observations about the legislative framework governing negotiations about the compensation to be paid to a native title party or parties.

[310] The correspondence between the parties refers to ss 51A and 53 of the Act and I will consider those sections first.

[311] Section 51A of the Act was inserted in 1998. It provides:

51A Limit of compensation

Compensation limited by reference to freehold estate

(1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

This section is subject to section 53

(2) This section has effect subject to section 53 (which deals with the requirement to provide "just terms" compensation).

[312] The Explanatory Memorandum in relation to s 51A states:

Compensation payable to native title holders

24.8 The Bill includes a provision to clarify the amount of compensation that native title holders can get under Division 5 of Part 2 of the NTA for extinguishment of their native title. The maximum compensation native title holders can get in these circumstances will be capped at the same level that a person with freehold title would have got if their land was compulsorily acquired **[Schedule 1, item 19, subsection 51A(1)]**. This provision equates native title with freehold title for the purposes of the compensation provisions but it does not mean that native title will be regarded in all circumstances as equivalent to freehold. In addition, it does not mean that compensation would be payable at the capped level (e.g. compensation for the extinguishment of co-existing native title rights would probably be significantly less than the capped level). The compensation needs to be assessed on a case-by-case basis having regard to the nature of the native title rights and interests affected.

27.9 The Bill makes it clear that the new provision does not displace 'just terms' compensation that needs to be paid to native title holders to meet constitutional requirements. **[Subsection 51A(1)]**

[313] Subsection 53(1) of the Act was amended in 1998. It provides:

53 *Just terms* compensation

Entitlement to ***just terms*** compensation

(1)Where, apart from this section:

(a) the doing of any future act: or

(b) the application of any of the provisions of this Act in any particular case;

would result in a paragraph 51 (xxxi) acquisition of property of a person other than on paragraph 51(xxxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:

(c) if the compensation is in respect of a future act attributable to a State or a Territory—the State or Territory; or

(d) in any other case—the Commonwealth;

as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms.

[314] The Explanatory Memorandum in relation to the amendment to s 53 states:

'Just terms' compensation

21.40 The Senate made **Government amendment (46)** which is included in the Bill. The amendments inserts Schedule 1 **items 26A** and **26B** which amend section 53 of the current

> NTA. Section 53 is a safety net providing 'just terms' compensation where the NTA does not already do so. Items 26A and 26B ensure that section 53 applies in relation to all future acts, not just Commonwealth ones. If the future act is attributable to a State or Territory, the State or Territory must pay the required compensation.

[315] Whatever its effect is held to be (in its own terms or read with s. 53), s. 51A would not apply directly to negotiations such as those in this case. It applies to compensation for an act that 'extinguishes all native title' in relation to particular land or waters. The grant of the proposed tenement would not extinguish all native title. Rather the 'non-extinguishment principle' (see s. 238) would apply.

[316] When considering the approach taken by the Grantee party in relation to its offer of compensation it is appropriate to consider ss. 51 and 240 of the Act. Subsection 51(1) provides that the entitlement to compensation under Division 3 is an 'entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'. Subsection 51(1) is expressed to be 'subject to' s. 51(3) of the Act, which provides that if the similar compensable interest test is satisfied in relation to a future act (other than the compulsory acquisition of all or any of the native title rights and interests) the court, person or body making the determination of compensation 'must ... apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240'.

[317] Section 240 states, insofar as it is relevant to these proceedings:

> **240 Similar compensable interest test**
>
> The **similar compensable interest test** is satisfied in relation to a ... future act if:
> (a) the native title concerned relates to an onshore place; and
> (b) the compensation would, apart from this Act, be payable under any law for the act
>
> on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned.

[318] As noted earlier in these reasons, the relevant law for these purposes is the MRA, s. 279(1) of which provides that a mining lease shall not be granted unless compensation has been determined between the applicant for the lease and the owner of the land. The MRA does not set out heads of compensation to be covered in an agreement between the parties. However, it provides that, if agreement has not been reached, an application may be made to the Land Court to determine the amount of compensation and the terms, conditions and times of payment of it. Paragraph 281(3)(a) of the MRA provides that the Land Court shall settle the amount of compensation an owner of land is entitled to as compensation for:

> (i) deprivation of possession of the surface of land of the owner;
> (ii) diminution of the value of the land of the owner or any improvements thereon;
> (iii) diminution of the use made or which may be made of the land of the owner or any improvements thereon;
> (iv) severance of any part of the land from other parts thereof or from other land of the owner;
> (v) any surface rights of access;
> (vi) all loss or expense that arises;
> as a consequence of the grant or renewal of the mining lease.

[319] That scheme is a key legislative component to any assessment of how compensation for native title rights affected by the grant of the proposed tenement would be assessed when applying the 'similar compensable interest test' set out in s 240 of the Act (see *Thomas v Western Australia* (1996) 133 FLR 124 (*Thomas*) at 190-194).

[320] In *Thomas* the Tribunal considered s. 51(3) and stated:

> The subsection contemplates that, in some circumstances, native title holders may receive other than just terms compensation. It may be, for example, that a relevant law specifies a maximum amount of money payable to an owner of land as compensation for loss or damage resulting from mining activity on the owner's land.
>
> To the extent that any inference can be drawn from s.51, read in the context of the Act (including the Preamble), the inference is that native title holders are to be compensated for any loss, diminution, impairment or other effect of the act on their native title rights and interests, so long as such consideration can be determined by reference to the *Mining Act*. (at 193)

[321] In *Thomas*, the Tribunal disagreed with submissions that the compensation payable under s. 123 of the *Mining Act 1978* (WA) to an owner of land for 'loss and damage suffered' as a result of mining could not exceed the value of the fee simple title to the land. The Tribunal wrote:

> It does not inevitably follow from ss. 23(4) and 240 of the Act that the maximum amount of compensation payable must be the fee simple of the land. Furthermore, in our opinion, the determination of compensation for loss and damage by reference to the market value of land does not involve comparing like with like. It seems conceivable, for example, that extensive damage to land which has a relatively low market value could give rise to a determination of compensation well in excess of the market value of that land, or the damaged part of it. (at 195)

The Tribunal continued:

> If the market value of land does not provide a notional limit to the amount of compensation, then the amount is to be determined by reference to all relevant criteria. That does not mean that a substantial amount will be payable in every case or that an uneconomically large amount will be payable in any particular case. Indeed, if appropriate conditions are imposed and practices are adopted to avoid damage to areas and sites of significance and to minimise environmental effects of the activity, there may be relatively little loss or damage which is compensable. The entitlement to compensation and the amount of compensation must be established by reference to evidence and the relevant criteria. In these cases, the criteria are set out in s.123 of the M*ining Act*. (at 195-196)

[322] Any compensation would be for the effect of the future act on registered native title rights and interests. In circumstances where there are two or more registered native title claims (or where there is a determination of native title in favour of two or more native title holders), the amounts of compensation payable to the different groups would have to be calculated appropriately.

[323] *Whether consideration should have been given to issues in ss. 33 and 39:* The Second native title party's contention not only takes issue with the basis on which the Grantee party's offer of compensation was calculated, it also states that 'consideration should have been given' to ss. 33 and 39 of the Act.

[324] The Act encourages negotiation parties to reach agreement and provides some guidance as to what the negotiations may include or take into account (see e.g. s 33). It is for the parties to agree as to what they will accept and, in particular, on what basis each native title party will agree to the doing of the future act. The parties will know, however, that if agreement is not reached and the Tribunal is asked to arbitrate, particular provisions of the Act will govern what the Tribunal must and may do (and what it must not do). Such provisions might inform the content and conduct of the negotiations.

[325] Section 33 of the Act provides:

> **33 Negotiations to include certain things**
>
> Profits, income etc.
>
> (1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
> (b) any income derived; or
> (c) any things produced;
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.
>
> Existing rights, interests and use
> (2) Without limiting the scope of any negotiations, the nature and extent of the following may be taken into account:
> (a) existing non-native title rights and interests in relation to the land or waters concerned;
> (b) existing use of the land or waters concerned by persons other than native title parties;
> (c) the practical effect of the exercise of those existing rights and interests, and that existing use, on the exercise of any native title rights and interests in relation to the land or waters concerned.

[326] As noted earlier in these reasons (see paragraphs [209] to [219]), parties are not usually obliged to negotiate about the topics in s 33. However, in some circumstances, failure to

agree to negotiate about such payments may be an indication of a failure to negotiate in good faith.

[327] Section 39 of the Act lists the criteria that the Tribunal must take into account in making its determination that the future act may be done (with or without conditions) or must not be done.

[328] In *Brownley* (95 FCR 152 at [24]), Lee J wrote that the terms of s. 39 of the Act 'indicate the scope of matters in respect of which negotiations may be conducted'. Section 39 'alerts a government party' (and, presumably, a grantee party) to the 'various interests in respect of which a native title claimant may seek to reach accord' with that other party for the doing of a proposed act 'in a manner that respects those interests'. His Honour continued (at [25]), stating that if a government party ignores the requirements of the Act and seeks to exercise power 'without considering, and responding to, any submissions put to it by the native title claimant, relevant to the matters referred to in s 39, it will not be negotiating in good faith'.

[329] As noted earlier, the Act was amended in two respects following the *Brownley* judgment. Section 31(1)(b) was amended to extend the obligation to negotiate in good faith from the Government party to all negotiation parties, and s. 31(2) was inserted to provide that, if a negotiation party refuses or fails to negotiate about matters unrelated to the effect of the future act on the native title rights and interests of the native title parties, that does not mean that the negotiation party has not negotiated in good faith for the purposes of s. 31(1)(b). Subsection 31(2) apparently relieves the negotiation parties from having to negotiate about any matter unrelated to the effect of the proposed future act on the native title parties' registered native title rights and interests.

[330] The Tribunal has found that s. 31(2) limits the scope of the negotiations that must be conducted as a precondition to the making of an application to the Tribunal pursuant to s. 35 in relation to the effect of the future act on the native title parties' registered native title rights and interests. However, the Tribunal has taken the view that s. 31(2) should not be read too literally, and that the matters related to those rights and interests found in s. 39(1)(a) are properly the subject of negotiations. In other words, the obligation to negotiate in good faith is not only related to s. 39(1)(a)(i), which specifically refers to the effect of the act on the

enjoyment of registered native title rights and interests, but could extend to include other matters listed in paragraph (a): see *Griffin Coal* at [31], [34] and at [18] to [19].

[331] Subsection 31(2) has not been considered judicially. However, in 2009 the Full Federal Court in *Cox* proceeded on the basis that:

> There is some guidance from the statute as to the matters which might be canvassed in negotiations. Section 39 lists a variety of matters which, it has been held, may provide some guidance as to those that may reasonably be expected to form part of the negotiations (see *Brownley* 95 FCR 152 at [24]-[25]. However, the manner in which they are dealt with (apart from a good faith obligation with a view to obtaining agreement), is not prescribed. (at [35])

[332] In my view, depending on the circumstances of the case (e.g. the nature of the registered native title rights and interests), some or all of the matters listed in s. 39(1)(a) of the Act could be relevant to the obligation to negotiate in good faith with a view to obtaining the agreement of each native title party to the doing of the act (with or without conditions) (s. 31(1)(b)) and might not be precluded by s. 31(2). The matters set out in s. 39(1)(a) could involve, and hence would be related to, the effect of the future act on the registered native title rights and interests of a native title party. To the extent that such matters are relevant in a particular case, an obligation to negotiate in good faith about them is not obviated by s. 31(2) of the Act

[333] Because there was no meeting between the Grantee party and the Second native title party, and there was no counter offer or substantive response to the Grantee party's letter of 24 October 2011, there was no opportunity to discuss with the Grantee party whether any of the matters set out in s. 33 or s. 39 might be taken into account in reaching agreement about the grant of the proposed tenement. Consequently, I am not satisfied that the Grantee party failed to negotiate in good faith by not considering the issues raised in ss. 33 and 39 of the Act.

[334] *Whether the Grantee party adopted a rigid non-negotiable position:* The Second native title party also contends that the Grantee party has adopted a rigid non-negotiable position, on a 'take it or leave it' basis with no options and that it would not consider issues raised in s. 33(1) of the Act. The part of this contention concerning s. 33(1) has already been considered in [209] to [219] and [326].

[335] In the Second native title party's submission, the offer of compensation based on the unimproved value of land was the only offer made by the Grantee party during the

negotiation period. Furthermore, according to Mr Hauff, in his conversation with Mr Zillmann on 17 February 2012, Mr Zillmann was 'adamant' that s. 51A of the Act set a ceiling on any compensation offer and was 'adamant' that the unimproved value of the land was 'the only offer'. Mr Zillmann also characterised the offer of compensation calculated on that basis as 'generous'. Mr Hauff canvassed the issue in his letter to Mr Zillmann dated 8 March 2012. The Second native title party submits that this was understood as a rigid position of 'take it or leave it', and the stance taken by the Grantee party shows that there were 'no negotiations at all'. Rather there was 'simply a rigid offer, such that negotiations in good faith did not occur'. In support of its submission, the Second native title party quotes a passage from the judgment of RD Nicholson J in *Strickland* (85 FCR 303) at 313 quoting the *Njamal* indicia of failure to negotiate in good faith including '(xiv) adopting a rigid non-negotiable position'.

[336] The Grantee party denies that it adopted a rigid, non-negotiable position on a 'take it or leave it approach'. Rather it notes that, as the Second native title party had not met with it due to funding disputes, the Grantee party wrote to the Second native title party on 24 October 2011 with an offer, including payment of $197,000 in compensation. That letter, noted earlier in these reasons, was not expressed in 'take it or leave it' terms. It described the basis of the offer and explained why the Grantee party considered the offer to be 'a reasonable offer', and suggested that it 'significantly exceeds a calculation of compensation on a legal basis'. In addition to the offer of monetary compensation, the Grantee party was prepared to offer undertakings with regard to contract tendering for the Rolleston Mine. It proposed that these be reflected in the Ancillary Agreement consistent with the following:

(a) the Grantee party would include in calls for contract tenders for the Rolleston Mine Project a section regarding cultural heritage and indigenous affairs which states the importance the Grantee party puts on building and maintaining strong working relationships with local indigenous groups including the Bidjara People.

(b) the Grantee party would require the tenderer to provide details of their past dealings with Indigenous or Aboriginal groups (positive or negative), any current programs they host for enhancing employment or wellbeing of Aboriginal people and how they will endeavour to provide employment opportunities for local Indigenous groups including members of the Bidjara People while working on the Rolleston Mine Project. Those tenders that provide for involvement of Indigenous groups would be given favourable consideration in the assessment of tenders.

(c) in assessing tenders, the tenderer's response on these issues would be weighted the same as for safety issues and environmental issues when considering the award of the contract.

[337] The Grantee party's letter concluded:

> We would welcome the Bidjara's response to the above offer. If acceptable to the Bidjara we will draft the relevant agreement for your consideration.
>
> To the extent the Bidjara would prefer to meet with the RJV to discuss the offer and the project, RJV will gladly arrange a meeting on the terms outlined in our original correspondence of 5 May 2011. RJV would wish for any such meeting to occur before 30 November 2011.

[338] The Second native title party, which was represented at that time by Creevey Russell, did not respond to that offer.

[339] The first written response came from Mr Hauff on 8 March 2012, more than four months after the letter from the Grantee party, more than three months after the latest date for the proposed meeting, and on the same day as the future act determination application was made to the Tribunal. In that letter, referred to earlier in these reasons, Mr Hauff described a previous discussion with Mr Zillmann, noted the amount of compensation on offer, took issue with the suggestion that s. 51 of the Act caps compensation to the value of freehold land, and indicated that the unimproved value of the land was not the only basis upon which negotiation should take place. Mr Hauff stated that 'an up front payment, royalties and jobs, contracts and training for the local Indigenous people were proper issues to be considered and the real basis on which proper in good faith negotiations could be concluded'. The letter then went on to deal with assertions in relation to bad faith issue. The letter did not constitute a substantive response to the Grantee party's offer, in that it did not expressly reject the offer and did not make a counter offer for consideration by the Grantee party. The correspondence up to the date of the future act determination application to the Tribunal does not support the Second native title party's contention.

[340] The only support for the contention of the Second native title party might be found in the conversation between Mr Hauff and Mr Zillmann on or about 17 February 2012. Mr Hauff's account is noted above. Mr Zillmann denies saying that 'the unimproved value of the land was the only basis they were prepared to negotiate'. Rather he contends that his letter of 9 March 2012 to Mr Hauff contains an accurate summary of their conversation. Among the points made in that letter, Mr Zillmann stated:

> I do confirm that you indicated the unimproved value of land may not be the only basis for determining compensation and that you raised the possibility of compensation being based on royalties or some other factor. I responded that I was aware that the parties could agree on a variety of means by which compensation might be determined, but that RJV had made an offer that it considered was reasonable in the circumstances. It was at that point I suggested to you that you should inform yourself of the terms of the offer we had made and the basis for that offer as was contained in our correspondence of 24 October 2011. I suggested that you would either be able to obtain this correspondence and associated documentation from Creevy Russell's files if you had taken over the matter from them, or I assumed you could obtain it from your client. I expressed some concern at that point that you were making various assertions as to what was, or might not be, appropriate compensation or terms of an agreement, in circumstances where it seemed you had no actual knowledge of the mining lease, the area involved or the terms of the offer that had been made by our client.

[341] It is not possible to reconcile these accounts of the conversation on this point, nor is it necessary to do so. The Grantee party had adopted a clearly articulated basis for its offer of compensation. It had also invited in writing a response from the Second native title party to that offer. None was forthcoming. Nor were there any negotiations in relation to that offer.

[342] The potential for substantive negotiations between the Second native title party and the Grantee party early in 2012 seems to have been affected by the uncertainty about who was the legal representative of the Second native title party. According to Mr Zillman, when he was contacted by Mr Hauff on 17 February 2012, he asked Mr Hauff to confirm that he represented the Second native title party. Mr Hauff indicated that their legal representation was fluid, a situation apparently confirmed when Mr Russell contacted Mr Zillmann by telephone on 23 February 2012 about the same matter. It seems that Mr Russell had no knowledge of Mr Hauff's asserted role in representing the Second native title party in this matter and considered that he was still their representative. The position was clarified by Mr Hauff's letter of 8 March 2012 which stated: 'We act for the Bidjara People represented by their elder Mr Robert Ray Robinson. Creevy Russell Lawyers no longer act for the Bidjara in this matter'. Mr Zillmann sought confirmation of this from Mr Russell who informed him by email on 9 March 2012 that he was no longer acting for Bidjara in the matter and that Mr Hauff now acted. By that stage the future act determination application had been made to the Tribunal.

[343] The evidence establishes that, despite there being no face-to-face negotiations between the Second native title party and the Grantee party:

(a) the Grantee party made an offer for compensation to which a response was invited but no formal response or counter offer was received from the Second native title party, and

(b) the Grantee party's offer was not expressed in 'take it or leave it' terms.

In the absence of negotiations between the parties, there is no evidence to support a finding that the Grantee party adopted a rigid, non-negotiable position.

[344] Consequently I am not satisfied that the Grantee party adopted a rigid, non-negotiable position or a 'take it or leave it' approach to the compensation it would be willing to pay the Second native title party in order to obtain the consent of the Second native title party to the grant of the proposed tenement. Hence, I am not satisfied that the Grantee party did not negotiate in good faith as required by s. 31(1)(b).

Grantee party's alleged failure to consider issues raised in s. 33(1)(a), (b) and (c) of the Act

[345] The Second native title party contends that:

(a) the Grantee party's policy was that it would not consider issues raised in s. 33(1)(a), (b) and (c) of the Act and therefore without more has not negotiated in good faith

(b) the Grantee party has not complied with the directions of the High Court in *North Ganalanja Aboriginal Corporation & Waanyi People v Queensland* (1996) 185 CLR 595 as to what constitutes 'to negotiate in good faith'.

[346] No evidence was provided by the Second native title party in support of the former contention.

[347] However reference can be made to the notes of the conversation between Mr Hauff and Mr Zillmann on 17 February 2012 and the correspondence on 8 March 2012. According to Mr Hauff, he raised with Mr Zillmann the issue of compensation as a royalty based on revenue earned from the mine in the mining lease area. In particular, Mr Hauff said that he raised the issue of other native title parties who had received royalty payments in the Pilbara in Western Australia, Ranger in the Northern Territory, the Western Cape and Stradbroke Island in Queensland in the range of 2% to 4% on revenue. By Mr Hauff's account, Mr Zillmann was 'adamant' that s. 51A of the Act sets a ceiling on any compensation offer, that the offer of compensation based on the unimproved value of the land was the only offer and that it was generous.

[348] Mr Zillmann's version of the conversation is quoted earlier in these reasons (at [340]). He acknowledged that Mr Hauff had indicated that the unimproved value of land may not be the only basis for determining compensation and that Mr Hauff had raised the possibility of compensation being based on royalties or some other factor. Mr Zillmann said that he responded that he was aware that parties could agree on a variety of means by which compensation might be determined, but that the Grantee party had made an offer that it considered was reasonable in the circumstances.

[349] Although the two accounts are different in some respects, it is clear that the Second native title party's desire to look at ways of assessing compensation other than by reference to the value of the land was raised in communications in February and March 2012. However, in the absence of any substantive negotiations, it is not possible to ascertain whether, for the purpose of these negotiations, the Grantee party would not have considered issues raised in s. 33(1) had a proposal of the type referred to in [218] of these reasons been put by the Second native title party.

[350] As to the latter contention, the Second native title party relies on the highlighted sentence at the end of the following statement of Justice McHugh in *North Ganalanja Aboriginal Corporation & Waanyi People v Queensland* (1996) 185 CLR 595, at 631-2:

> Upon acceptance of a claim, a government of the Commonwealth, a State or a Territory can only grant or vary mining rights, or compulsorily acquire native title rights for the benefit of non-government parties, in respect of land covered by the accepted application if certain procedures are followed (ss. 26, 28). Those procedures require the government to notify any registered native title claimant of such proposed action (s. 29). The government is also required to negotiate in good faith with the native title claimant and the parties who are to be granted rights over the land, with such negotiations to be carried out "with a view to obtaining the agreement of native title parties" to the granting of the rights (s. 31). *Relevant matters that may be negotiated include payments to native title parties calculated by reference to profits made, income derived or things produced by the grantee party by using the land. (s. 33) (emphasis added)*

[351] The Second native title party submits that this constitutes 'directions of the High Court … as to what constitutes "to negotiate in good faith"'. It does not. The sentence only summarises what s. 33(1) provides, namely that parties 'may' negotiate about 'the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to' the amount of profits made, or any income derived, or any things produced by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done. Neither s. 33(1) of the Act nor Justice McHugh's

statement constitutes a direction to parties to negotiate about specified matters. Nor do they constitute a direction as to what it means to negotiate in good faith.

[352] The second native title party also relies on the statements of Justice Lee in *Brownley* (95 FCR 152 at [54] and [55]) quoted earlier in these reasons at [228].

[353] As noted at [211] to [216] above, the Tribunal has considered those passages. For example, in *Cox v Western Australia* (2008) 219 FLR 72, Deputy President Sosso wrote (at [37]) that 'although there is no statutory obligation for a government or grantee party to negotiate profit or royalty type payments, the failure to agree to negotiate such payments may in some circumstances be an indication of a failure to negotiate in good faith'. Having quoted paragraphs [54] and [55] from *Brownley,* Deputy President Sosso continued (at [38]):

> The Tribunal has, in a series of good faith decisions, followed the above interpretation of the law and, accordingly, the obligation imposed on a grantee party is to receive and consider fairly, dispassionately and proportionately any proposal from a native title party for a payment of the type outlined in s. 33(1), but without an obligation to "capitulate in order to reach agreement." – *Western Australia/Western Australia Petroleum Pty Ltd & Anor/Hayes & Ors on behalf of the Thalanyji People* [2001] NNTTA 18 at [37] [37] per Deputy President Sumner.

[354] The Second native title party asserts that in this case the Grantee party 'has refused to even consider negotiating' on the matters in s 33 of the Act and 'have made no effort to consider the issues raised in' s. 39. Hence, in accordance with *Brownley*, the Grantee party 'has not negotiated in good faith'.

[355] Contentions based on the legal effect of ss. 33 and 39 of the Act were dealt with earlier in these reasons (at [208] to [219], and [326] to [332]). No evidence was provided in support of the present contentions that the Grantee party had not negotiated in good faith because its policy was that it would not consider issues raised in s. 33, that it had refused to even consider negotiating on the matters in s. 33, and that it made no effort to consider the issues raised in s. 39.

[356] It is sufficient to repeat the observation made earlier that, because there was no meeting between the Grantee party and the Second native title party, there was no opportunity to discuss with the Grantee party whether any of the matters set out in s. 33 or s. 39 might be taken into account in reaching an agreement about the grant of the proposed tenement. Consequently, on the basis of those contentions, I am not satisfied that the Grantee party did not negotiate in good faith with the Second native title party.

Grantee party's alleged failure to have reasonable regard to the Bidjara People's interests and concerns

[357] The Second native title party contends that the Grantee party has not honestly attempted to negotiate in good faith and has failed to have reasonable regard to the Bidjara People's interests and concerns. In its submission, the Second native title party asserts that the Grantee party 'has made very little genuine attempt to reach an accord', and draws together contentions and assertions made elsewhere in its submissions, namely:

(a) the Grantee party failed to fund the meetings between the parties 'in accordance with normal rates paid by other mining companies of much lesser stature' than the Grantee party (which the Second native title party described as 'one of the biggest mining companies in the world with billions of dollars in revenue each year')

(b) the Grantee party 'acted dishonestly by approaching non representative parties of the [Second native title party] and may have facilitated a criminal act, certainly created bad blood between the parties and mistrust not conducive to negotiation at all let alone in good faith', and indeed it 'acted in bad faith'

(c) when the opportunity came up to meet 'to discuss the real issues and the matters of royalties on revenue' as provided for in s. 33, the Grantee party refused to meet with the Second native title party, would not discuss the matter further and immediately referred the matter to the Tribunal, and

(d) the Grantee party would not consider the matters raised in s. 39 and its only offer was a 'take it or leave it' offer based on the unimproved value of the land.

[358] Furthermore, the Second native title party contends that the Grantee party has acted arbitrarily, capriciously, and unreasonably, by not considering the interests of the Bidjara people, either with respect to the payment of meeting costs, or with regard to the offer made on a 'take it or leave it' basis.

[359] The Second native title party offered no additional evidence in support of this submission. Rather, it referred to a passage from the Tribunal's determination in *Cox v Western Australia* (2008) 219 FLR 72, at [90], highlighting the statement: 'The Act, when referring to the right to negotiate, is envisaging negotiations which have advanced to such a stage where reasonable efforts have been made to reach an accord'.

[360] As noted earlier in these reasons (at [251] to [252]), the Tribunal's determination was subject to a successful appeal to the Full Federal Court in *Cox*, where the Court rejected the conclusion reached by the Tribunal that there cannot be negotiation for the purpose of s. 31(1)(b) of the Act if the negotiations are only embryonic. The Full Court stated:

> We do not agree that there is a requirement for negotiations to have reached a certain stage. The Act makes no reference to the parties reaching any particular stage in their negotiations. (at [23]).

[361] In the absence of any additional evidence in support of the four contentions set out in [357] above, and for the reasons set out earlier in relation to those issues, the Second native title party has failed to establish that the Grantee party did not negotiate in good faith.

[362] In the same vein, the Second native title party contends that the Grantee party has acted arbitrarily, capriciously, and unreasonably, by not considering the interests of the Bidjara People, either with respect to the payment of meeting costs, or with regard to the offer made on a 'take it or leave it' basis.

[363] That contention has been dealt with already and, for the reasons given, I am not satisfied that the contention has been made out by the evidence and hence, I am not satisfied that the Grantee party did not negotiate in good faith.

[364] The Second native title party also contends that the Grantee party has failed to address the development of the social, cultural and economic structures of the Bidjara people, in particular:

(a) training and apprenticeship opportunities
(b) employment opportunities
(c) local infrastructure for cultural, social and economic benefits.

[365] The Second native title party did not provide any evidence in support of it nor did it provide information to the Grantee party about those issues or how they should be taken into consideration. However, as was clear from the letter sent by the Grantee party to the Second native title party on 24 October 2011, the Grantee party was prepared to offer undertakings with regard to contract tendering for the Rolleston Mine in addition to the payment of $197,000 compensation and that these undertakings be reflected in the Ancillary Agreement (see [336] above). The undertakings would include requiring tenderers to provide details of how they would endeavour to provide employment opportunities for local indigenous groups

including members of the Bidjara People while working on the Rolleston Mine Project. The Second native title party did not respond formally to that offer, so it is not possible to say whether the Grantee party might have been willing to negotiate in respect of any of the other matters listed above.

[366] Given my response to that contention, I am not satisfied that the Grantee party did not negotiate in good faith, as required by s. 31(1)(b).

Timing of the Grantee party's application to the Tribunal

[367] The Second native title party is critical of the timing of the Grantee party's application to the Tribunal for a future act determination (see [357](c)).

[368] As noted earlier in these reasons, the Second native title party submits that the Grantee party has used the stance of the Second native title party to require the Grantee party to pay reasonable funding costs for meetings 'as a ploy firstly not to meet and secondly to delay and use up the negotiating period to make an application for a s. 38 determination'. The 'unsuspecting' Second native title party was 'effectively duped and manipulated into a position' where the matter could be referred to the Tribunal 'to avoid the necessity to consider the issues' in s. 33 of the Act. Furthermore, when the Second native title party 'conceded and accepted' the Grantee party's terms to have a meeting, the Grantee party refused to meet for two reasons:

(a) because the Bidjara people had alleged that the Grantee party had aided the alleged fraud by two Bidjara people, and
(b) to avoid having to discuss the proper compensation namely a royalty on revenue pursuant to s. 33 of the Act.

[369] Given the range of these assertions, it is appropriate to look at the evidence about the circumstances leading to the future act determination application being made.

[370] The Grantee party first intimated a possible future act determination application to the Tribunal in Mr Zillmann's letter to Ms Butteriss on 26 July 2011, in reply to her letter of 30 June 2011 in relation to the grant of the proposed tenement. Mr Zillmann referred to previous and proposed meetings with the Karingbal #2 people, and stated:

> Unfortunately the Bidjara People (QUD 216/2008), whose claim overlaps the Karingbal People #2 claim area, have repeatedly refused to engage with Xstrata on the same terms as offered and agreed by the Karingbal People #2 ...
>
> Xstrata will continue to try to meet with the Bidjara People and have informed the Karingbal People #2 that the agreement of both groups is required to avoid the need for a determination in the NNTT. We note in this respect that 6 months will have passed since the notification day on 1 October 2011.

[371] On the same day, Mr Cobb sent an email message to Mr Russell, in response to Mr Russell's email of 19 July 2011, concerning a proposed meeting between the Grantee party and the Second native title party. He wrote:

> We look forward to engaging with the Bidjara, however, if the group refuse to engage in good faith in accordance with the proposed above, Xstrata will have to consider its other options. Negotiations with the Karingbal People #2 are already advanced on this issue and Xstrata is not willing to delay indefinitely due to the current impasse with the Bidjara.

[372] The letter from the Grantee party to the Second native title party dated 24 October 2011 referred to previous correspondence regarding the right to negotiate process for the grant of the proposed tenement and the Grantee party's 'ongoing desire to meet with the Bidjara to discuss the grant of the mining lease'. The letter continued:

> The mandatory negotiation period for the purposes of the *Native Title Act 1993* concluded on 30 September 2011, however, negotiations continue with the Karingbal People #2 and the RJV remain committed to trying to reach a negotiated outcome with the native title parties to the area. However, if agreement cannot be reached within suitable timeframes, RJV will ultimately have no option but to refer the matter to the National Native Title Tribunal (NNTT) for determination.

The letter concluded by stating that RJV would wish for any meeting with the Second native title party to occur before 30 November 2011.

[373] It will be recalled that, while these communications were occurring, the Grantee party was negotiating with the First native title party and setting, then extending, deadlines for proposed agreement. In particular, when making its revised offer on 15 November 2011, the Grantee party wrote that the benefits would be paid to the Karingbal regardless of whether agreement is reached with the Bidjara People in respect of the grant of the mining lease. But the offer was conditional upon the First native title party accepting the offer and executing the necessary agreements to give effect to it on or before 23 December 2011. Having not received a response by that date, the Grantee party sent an email to Mr Lavery, copied to Mr Redmond, requesting that they obtain instructions and provide the Karingbal #2 applicant's response to the revised offer on or before Friday 13 February 2012. The Grantee party received no response from Mr Redmond or Mr Lavery on behalf of the First native title party

to the email of 23 December 2011 or the revised offer made by the Grantee party on 15 November 2011 (see [185] to [186], [190]).

[374] In his affidavit sworn on 1 May 2012, Mr Zillmann recounts his telephone conversation with Mr Russell on 23 February 2012. It appears that at that date Mr Russell considered himself to be representing the Second native title party in this matter. Mr Zillman advised him that, 'due to the time that had elapsed, RJV was now considering referring the matter for determination'.

[375] In a letter to Ms Butteriss dated 27 February 2012, in response to her request for a 'good faith log' of the Grantee party's correspondence with the Bidjara People, Mr Zillmann wrote: 'As discussed, RJV is considering applying to the NNTT for a determination in order to facilitate the grant of MLA 70415'.

[376] In the same affidavit Mr Zillmann states that he applied for a future act determination on 8 March 2012 'after negotiations between the RJV, the Bidjara People and the Karingbal People #2 with respect to Mining Lease Applicaiton 70415 failed to reach an outcome'.

[377] In his letter of 9 March 2012 to Mr Hauff, Mr Zillmann wrote that his client considered that it was necessary to make a future act determination application to the Tribunal 'given it has been approximately one year since the Bidjara were first notified of this matter and the parties have not been able to conclude an agreement'. Mr Zillmann also wrote that in their telephone conversation on 17 February 2012 he advised Mr Hauff that, as it had been almost a year since the negotiation process had commenced and no progress had been made in progressing an agreement, the Grantee party was considering referring the matter to the Tribunal 'shortly' for determination. That occurred on 8 March 2012, 'on the same date your correspondence was received'.

[378] The overall import of the evidence is that the Grantee party had in mind the procedural option of making a future act determination application to the Tribunal as it attempted to negotiate agreements with both native title parties. The trigger for making the application to the Tribunal was not the expiration of six months after the notification day. Rather, it appears that the Grantee party was willing to continue to negotiate with the First native title party in an attempt to reach agreement. For as long as there was some prospect of such an agreement, the Grantee party would not make an application to the Tribunal and would also continue to attempt to set up a negotiation meeting or meetings with the Second native title party.

However, nearly a year after the notification day, with no agreement with the First native title party and no meeting scheduled with the Second native title party, the Grantee party made its application.

[379] Why the application was made on 8 March 2012 was not explained, nor was it necessary for the Grantee party to do so. Mr Hauff has speculated that the timing was linked to issues raised for negotiations, and allegations made, by him on behalf of the Second native title party. No evidence was provided in support of that speculation and, in any case, the outcome of this aspect of the proceedings does not turn on it.

[380] It is clear that the making of a future act determination application to the Tribunal is not, in itself, evidence of lack of good faith on the part of the negotiation party (or parties) making the application. In *Strickland,* RD Nicholson J wrote that the statutory entitlement to lodge a future act determination application is:

> the reason why the obligation in s 31(1)(b) to negotiate in good faith cannot be interpreted as an obligation to continue negotiations until some particular point in the negotiations has been reached. The statutory right to lodge the future act application has the consequence the act of lodgement cannot be relied upon to establish bad faith in the negotiating process. ((1998) 85 FCR 303 at 322)

[381] As Deputy President Sumner wrote in *Austmin Platinum Mines Pty Ltd v Western Australia:*

> If a grantee party makes a s 35 application which is premature because the required negotiations in good faith have not occurred then the application will be dismissed. The fact of making the application cannot in itself be evidence of a failure to negotiate in good faith.' ((2010) 258 FLR 216 at [46])

[382] To that can be added the statement by the Full Federal Court in *Cox* that:

> the act of lodging an application under s 35, taken alone, cannot be relied upon in order to establish bad faith in the negotiating process (*Strickland 85* FCR at 322). If negotiations reach a standoff, notwithstanding attempts in good faith to negotiate within the relevant six-month period, there are no further obligations after the completion of the six-month period on a party which wishes to lodge a notice under s 35 of the Act. There is no need, for example, to give further warning of the intention to do so. (at [19])

[383] In this case, the six month period had passed long before the future act determination application was made to the Tribunal. The negotiations between the Grantee party and the First native title party had not resulted in the agreement of the First native title party to the grant of the proposed tenement. By that stage, there appeared to be no prospect that the Grantee party and the Second native title party would meet for substantive negotiations. The negotiations had reached a standoff (if only over the question of payments for attendance at

meetings). The Grantee party was at liberty to make the application to the Tribunal and was under no obligation to warn the Second native title party of its intention to do so. Accordingly, I am not satisfied that the making of the application or the timing of that application is evidence that the Grantee party was not negotiating in good faith with the Second native title party as required by s. 31(1)(b).

Behaviour of the Second native title party

[384] The Grantee party submits both that the Second native title party has not produced evidence to satisfy the Tribunal that the Grantee party has not negotiated in good faith, and that the evidence points to a lack of good faith in negotiations by the Second native title party. In particular the Grantee party submits that, in considering whether it has negotiated in good faith, the Tribunal should consider this in the context of the actions and conduct of the Second native title party (see *Drake Coal* at [85]). In support of its submission, the Grantee party refers to the Second native title party's position in refusing to meet unless the Grantee party satisfied the Second native title party's meeting fee demands, the Second native title party's failure to respond meaningfully to the offer made by the Grantee party on 24 October 2011 and its delay in proving any response of substance to that offer, the Second native title party's failure to make a substantive offer or to explain or justify why compensation should be calculated at a different amount or on a different basis, and the conduct of the Second native title in relation to allegations described earlier as the bad faith issue.

[385] Given the conclusions already reached in relation to each of the contentions made by the Second native title party about the Grantee party, it is not necessary to make findings or draw conclusions in relation to those matters.

Conclusion

[386] For the reasons set out above I am not satisfied that:

(a) the Government party did not negotiate in good faith with the First native title party

(b) the Grantee party did not negotiate in good faith with the First Native title party

(c) the Government party did not negotiate in good faith with the Second native title party

(d) the Grantee party did not negotiate in good faith with the Second native title party

as required by s. 31(1)(b) of the Act.

Consequently, the Tribunal has power to exercise its jurisdiction in relation to the future act determination application brought by the Grantee party on 8 March 2012.

Graeme Neate
President