NATIONAL NATIVE TITLE TRIBUNAL

Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal **[2014] NNTTA 74 (29 July 2014)**

Application Nos: WF2013/0027, WF2013/0028 & WF2013/0029

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Muccan Minerals Pty Ltd (grantee party)

- and -

Johnson Taylor & Ors on behalf of Njamal (WC1999/008) (native title party)

- and -

The State of Western Australia (Government party)

DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN INQUIRY

Tribunal: James McNamara, Member
Place: Brisbane
Date: 29 July 2014

Catchwords: Native title – future acts – application for a determination in relation to mining lease applications – jurisdiction – power – whether grantee party has negotiated in good faith – scope of the obligation to negotiate in good faith (s 31(2)) – grantee party has not negotiated in good faith – Tribunal does not have power to proceed with future act determination inquiry.

Legislation: *Acts Interpretation Act 1901* (Cth), s 36(2)

Native Title Act 1993 (Cth), ss 29, 30(1), 30A, 31, 35, 36(2), 38, 39, 109(3), 151(2)

Cases:

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

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

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

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

June Ashwin on behalf of the Wutha People/Western Australia/Contact Uranium Limited [2008] NNTTA 129 (19 September 2008) ('*Wutha v Contact*')

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

Re Koara People (1996) 132 FLR 73; [1996] NNTTA 31 (*'Koara 1'*)

Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274 (*'Koara 2'*)

Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd, [2009] NNTTA 35 (*'Cosmos v Mineralogy')*

Strickland v Minister for Lands for Western Australia [1998] FCA 868; (1998) 85 FCR 303; (1998) 100 LGERA 50 ('*Strickland v Minister for Lands*')

Townson Holdings Pty Ltd & Anor/Ron Harrington-Smith & Ors on behalf of the Wongatha People and June Ashwin & Ors on behalf of the Wutha People/Western Australia [2003] NNTTA 82 ('*Townson Holdings v Harrington-Smith'*)

Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo) [2003] NNTTA 4 ('*Western Australia v Wong-goo-tt-oo*')

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

Western Australia v Taylor (1996) 134 FLR 211; [1996] NNTTA 34 (*'Western Australia v Taylor'*)

White Mining (NSW) Pty Ltd v Franks (2011) 257 FLR 205; [2011] NNTTA 72 (*'White Mining v Franks')*

WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333 ('*WMC Resources v Evans*')

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

Representatives of the grantee party:	Mr Greg Abbott, M & M Walter Consulting Ms Cecilia Camarri, Creasy Group
Representative of the native title party:	Mr Marcus Fort, Yamatji Marlpa Aboriginal Corporation
Representatives of the Government party:	Ms Janice Goodwin, Department of Mines and Petroleum Ms Cobey Taggart, State Solicitor's Office

REASONS FOR DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT THE INQUIRY

[1] On 10 September 2008, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice ('the notice') under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of three future acts, namely the grant of mining lease applications M45/1160, M45/1162 and M45/1163 ('the proposed leases') to Muccan Minerals Pty Ltd ('the grantee party').

[2] Any person who, four months after the notification day, is a native title party (i.e. registered native title claimant or a body corporate according to the specified time frames in s 30(1) of the Act) in relation to any of the land or waters that will be affected by the future act, has a procedural right to negotiate in relation to the future act (see s 30(1)(a) and s 31 of the Act).

[3] At the four month closing day, being 12 January 2009 (moved from 10 January to the next working day: see s 36(2) of the *Acts Interpretation Act 1901* (Cth)) the native title claim of Njamal ((WC1999/008) – registered from 3 June 1999) wholly overlapped the proposed leases and was on the Register of Native Title Claims. The claim remains on the Register and is the native title party in respect of these proceedings (see s 29(2)(b)(i) of the Act).

[4] The proposed leases are situated in the Shire of East Pilbara. The location and size of each lease (according to Tribunal spatial analysis) is outlined in the table below:

Proposed lease	*Approximate size of proposed lease (km^2)*	*Location*
M45/1160	9.56	8 km north of Shay Gap
M45/1162	9.55	5 km east of Shay Gap
M45/1163	9.72	33 km south of Shay Gap

[5] The rights which would be conferred by the mining lease (if granted) are set out in s 85 of the *Mining Act 1978* (WA) ('*Mining Act*').

[6] This decision is about whether the Tribunal can be satisfied the grantee party negotiated in good faith with a view to obtaining the agreement of the native title party, as required by s 31(1)(b) of the Act. If any negotiation party satisfies the

Tribunal that any other negotiation party (other than the native title party) did not negotiate in good faith, the Tribunal must not make a determination pursuant to s 38 (see s 36(2) of the Act). The implications of s 36(2) were explained by the Full Federal Court in *FMG Pilbara v Cox* (at 143) 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.

[7] There is no submission that the Government party failed to negotiate in good faith.

The future act determination application

[8] On 16 December 2013, the grantee party made applications, pursuant to s 35 of the Act for the Tribunal to make a future act determination under s 38 of the Act in relation to the proposed leases. The applications were made on the basis that negotiation parties had not been able to reach agreement of the kind mentioned in s 31(1)(b) of the Act and at least six months had passed since the notification day specified in the s 29 notice (see s 35 of the Act). On 16 December 2013, Member Shurven was appointed as Member to conduct the inquiry into the future act determination applications. Due to operational requirements, on 6 March 2014, the appointment of Member Shurven was revoked, and President Webb QC was appointed, and then on a further occasion, being 2 April 2014, President Webb QC revoked the appointment of herself and I was appointed as Member to conduct the inquiry.

[9] A preliminary conference was convened on 13 January 2014. At that conference, the native title party representative stated that she needed to seek instructions on whether the native title party intended to allege a lack of good faith in relation to either of the other negotiating parties. Pending the native title party's instructions, Member Shurven set directions at that conference, requiring the parties to submit contentions and evidence on the question of good faith (the preliminary issue) and in relation to the s 39 criteria (the substantive issue). The native title party subsequently confirmed that it would be pursuing a good faith challenge in relation to the grantee party, however did not intend to make such allegations against the Government party.

[10] On 28 March 2014, directions were amended to allow the grantee party the opportunity to clarify 'factual errors' they claimed were contained in the native title party's good faith contentions.

[11] On 29 April 2014, the directions were further amended to extend the dates relevant to the substantive issue.

[12] On 15 July 2014, pursuant to parties' request, the existing directions were vacated pending a decision on whether the parties negotiated in good faith. However, further directions were made, again at the parties' request, relating to the 'issue of whether a heritage survey was undertaken prior to drilling in respect of E45/2835 (including the land within M45/1163)'. Pursuant to these directions, the grantee party provided a submission on 18 July 2014, and the native title party provided a reply on 22 July 2014.

[13] Parties' views were sought on whether the good faith inquiry should be decided on the papers or whether an oral hearing should take place. All parties indicated they were agreeable to the matter proceeding on the papers.

[14] I have considered the material before the Tribunal and am satisfied the matter can be decided on the papers pursuant to s 151(2) of the Act.

Information regarding mediation conferences

[15] In a letter to the Tribunal, dated 20 March 2014, the Government party sought to raise potential issues around submissions made by both the grantee party and native title party which rely upon statements made in the course of mediation conferences convened by the Tribunal under s 31(3) of the Act. The Government party did not seek to oppose the use of this material in the good faith considerations, acknowledging that s 31(4)(b) of the Act provides for this. However, the Government party noted that this provision also prevents the Tribunal from using that same material for any other purpose, without the consent of the relevant parties, including purposes relating to s 38 and 39 of the Act. The Government party observed that the directions that were on foot at the time appeared to contemplate the Tribunal either making a decision on good faith negotiations concurrently to the s 38 and 39 submissions being lodged, or perhaps after those submissions have been lodged and

considered by the Member. The Government party contended that the Tribunal's ability to separate considerations of those conferences from considerations regarding ss 38 and 39 of the Act (or to avoid the appearance of conflation of those considerations), particularly where there are matters in dispute relating to the conferences, would be difficult at best.

[16] The question the Government party has raised is not whether the information pertaining to the mediation conferences is admissible for the purposes of s 38 and 39 considerations, as no party has yet sought to adduce this evidence for those purposes (were any party to, I would need to consider that question based on the facts before me). Therefore, it is a question of whether it can be separated in my consideration of the issues, and also maintain an *appearance* of separation. The Tribunal has previously dealt with the issue of whether the appointed Member can hear the substantive inquiry, having been privy to without prejudice material in the course of the negotiation in good faith inquiry and for the purposes of this decision I adopt the findings in *Western Australia v Wong-goo-tt-oo* at [19]-[23].

The obligation to negotiate in good faith

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

> **s 31 Normal negotiation procedure**
>
> (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
>
> (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
>
> (b) the negotiation parties must negotiate in good faith with the view to obtaining the agreement of each of the native title parties to:
>
> (i) the doing of the act; or
> (ii) the doing of the act subject to conditions to be complied with by any of the parties.
>
> (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of the paragraph.

[18] The 'negotiation parties' are the Government party, the grantee party and the native title party (see s 30A of the Act). Where an allegation of a lack of good faith is made, it is the conduct of only the grantee party and/or the Government party which is

relevant to the Tribunal's power to make a determination under s 38 of the Act. As stated at [6] above, the Tribunal must not make a determination if any negotiation party satisfies the Tribunal that either the Government party or the grantee party did not negotiate in good faith (also see s 36(2) of the Act). If the Tribunal were so satisfied, the parties would need to recommence negotiations although it would be possible for a future act determination application to be made again in relevant circumstances.

[19] Whether the native title party negotiated in good faith is not part of the consideration under s 36(2), though the native title party's conduct can be taken into consideration when the Tribunal is assessing how reasonable the conduct of the grantee party or Government party has been in the circumstances (see *Xstrata v Albury* at [65] and *Placer v Western Australia* at [30]).

[20] Although the Tribunal is not bound by the rules of evidence (see s 109(3) of the Act), the effect of s 36(2) is to require the party alleging the lack of good faith to produce material to support the allegation. As explained in *Gulliver v Western Desert Lands Aboriginal Corporation* (at [10]):

> The Tribunal has said that the practical effect of s 36(2) is to place an "evidential burden" on the party alleging lack of good faith negotiations which would normally require it to produce evidence to support its allegations. The Tribunal is not required to adopt strict rules on burden of proof but any party alleging a lack of good faith negotiations must provide contentions and documents which specify in detail the matters it relies on. (*Dempster, Western Australia and Bayside Abalone* [1999] NNTTA 235 Hon EM Franklyn QC (at 4, 21); *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 (21 December 1999) (at [21]-[28]).)

[21] Good faith is not defined in the Act, though the description in *Placer v Western Australia* (at [30]) is informative. The references to a Government party are also applicable to a grantee party. It reads as follows:

> 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.

[22] The parties are not required to reach any particular stage of negotiations before applying for a future act determination application, however, it is insufficient to merely go through the motions and the quality of the conduct must be assessed (see *FMG Pilbara v Cox* at [20] and [24]). In *White Mining v Franks*, Deputy President Sosso outlined key elements of the Full Federal Court's decision in *FMG Pilbara v Cox* and went on to explain (at [33]):

> ... 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.

[23] In *Western Australia v Taylor*, Member Sumner (as he then was) provided a series of indicia of conduct to be taken into consideration when assessing good faith, which have been consistently referred to by the Tribunal. The indicia are not to be interpreted as an exhaustive list and each item does not need to necessarily be present; they rather represent factors to consider, when the Tribunal is assessing the overall conduct in all of the circumstances (see *Western Australia v Dimer* at [85] and *Adani Mining v Diver* at [34]). With this in mind, the indicia in *Western Australia v Taylor* are as follows (at 224-225):

(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 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 party and grantee parties;

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

(viii) Failure 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, refusal to incorporate statutory provisions into an agreement;

(xiii) Shifting position just as an 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, issuing inappropriate press releases;

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

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

[24] In *Western Australia v Dimer*, Member Lane endorsed the indicia and sought to categorise them into the following overarching obligations:

(i) An obligation to communicate and respond with other parties within a reasonable time;

(ii) An obligation to make proposals to other parties and respond to those proposals (by making counter-proposals or by way of comment or suggestion about the original proposal) with a view to achieving agreement;

(iii) An obligation to make inquiry of other parties if there is insufficient information available to proceed in negotiations, and a reciprocal expectation that relevant information be provided by those other parties within a reasonable time;

(iv) An obligation to seek from other parties appropriate commitments to the process of negotiation or subject matter of negotiation, and a reciprocal

obligation to make either appropriate commitments to process, or appropriate concessions as the case may be;

(v) An obligation to avoid unilateral conduct which harms the negotiation process and to act honestly and reasonably in the circumstances, with a view to reaching agreement (for example, make necessary inquiries of the other party).

[25] I adopt the above principles for the purpose of this decision.

Good Faith Contentions and Evidence

[26] Native title party contentions ('NTP Contentions') and evidence ('NTP1-13') were received on 28 February 2014 and grantee party contentions ('GP Contentions') were received on 7 March 2014. On 14 March 2014, the native title party submitted a response ('NTP Reply') to the grantee party contentions. On 19 March 2014, the grantee party wrote to the Tribunal requesting the right to reply to previous submissions by the native title party in order to address what they saw as 'factual errors' contained in those submissions. The grantee party stated that leave to file this response would allow the matter to be considered 'on the papers', and the decision to be based on the facts. As such, leave was granted for the grantee party to provide 'a statement that clarifies factual errors only' relating to the native title party's submissions. This statement ('GP Reply') was received on 2 April 2014. The native title party did not challenge the good faith of the Government party. Consequently, on 11 March 2014, a representative of the Government party wrote to the Tribunal and other parties confirming the Government party did not wish to submit any material on the good faith issue.

[27] For ease of reference, a list of submissions and supporting documents can be found as Attachment A to this decision.

[28] The NTP contentions state that the grantee party failed to negotiate in good faith, as demonstrated by the following conduct/indicia:

- The grantee party failed to provide any information in relation to the proposed future act or proposed mining activity, meaning it was not possible for the

native title party to obtain instructions or provide a draft agreement (NTP Contentions paragraph 3-6);

- The grantee party's unexplained change of position during mediation in relation to M45/1163 (NTP Contentions paragraph 7-8);

- Any possibility of an offer in relation to contracting and employment being available could only be considered illusory in the circumstances given that no information in relation to the doing of an act was ever provided (NTP Contentions paragraph 9-13);

- The grantee party adopted a rigid non-negotiable position in relation to meeting with the native title party, offering to meet with the native title party on the site of the tenement only and refusing to contribute any funding towards the cost of any meeting (14-26);

- The overall context of the grantee party's conduct (NTP Contentions paragraph 27-29).

[29] GP Contentions cite the indicia outlined in *Western Australia v Dimer* (see [24] above), and state the application of these indicia to the facts of this matter show the grantee party has negotiated in good faith.

Background to negotiations

[30] Based on the evidence submitted by the grantee party and native title party, I accept that the following events occurred after the s 29 notice was issued and up to the day on which the s 35 application was made:

DATE	EVENT
10 September 2008	s 29 notice issued
2 December 2011	M & M Walter Consulting confirmed representation of the grantee party (GP).
15 February 2012	Department of Mines and Petroleum's (DMP) initial negotiation letter, requesting GP provide submissions to the native title party (NTP) and DMP on the proposed act.

20 February 2012	GP requested an extension of time for providing submissions.
24 February 2012	DMP granted GP extension of time for lodgement of submissions.
27 March 2012	GP submissions to DMP provided outlining the "proposed exploration programme".
17 April 2012	NTP submissions to DMP in relation to the proposed act.
13 July 2012	GP letter to NTP requesting preferred negotiation protocol and draft agreement.
11 January 2013	DMP referred matter to Tribunal for s 31(3) mediation assistance
28 March 2013	First Tribunal mediation conference held.
23 May 2013	Second Tribunal mediation conference held.
12 June 2013	Third Tribunal mediation conference held, mediation terminated.
16 December 2013	GP lodged s 35 application.

Issues regarding good faith:

Grantee party's failure to provide information in relation to the future act

[31] The native title party contends that the grantee party provided little information in relation to the nature and content of the actual, proposed or intended activities of the proposed future act, and no information to enable the native title party to consider the possible impact of the future act on its rights and interests. The native title party state that this lack of information regarding any proposed activities effectively prevented the negotiations from proceeding in any meaningful way (NTP Contentions at paragraph 3-4).

[32] DMP's initial negotiation letter to the grantee party (annexure NTP2) requested the grantee party provide to the native title party:

a. An outline of the proposed work programme for the tenement areas, if available;

b. Copies of the company's last annual report, if available;

c. Advice as to whether Aboriginal heritage surveys within the tenement area are proposed or have been completed;

d. Any company policies or information which might be relevant to native title claimants; and

e. A suitable map of the project area (if applicable).

[33] Annexed to this letter were several documents, including: a copy of the tenement applications; Tengraph plans of the tenements; topographical plans of the tenements; search results from the Register of Aboriginal Sites; and, an extract of s 39(1) of the Act. The letter requested the grantee party provide this information by 1 March 2012, however following a request for extension by the grantee party, this date was extended to 30 March 2012.

[34] On 27 March 2012, the grantee party representative Mr Greg Abbott provided a letter (annexure NTP4) outlining 'the proposed exploration programme as supplied to me by our client'. This letter states:

> **M45/1160, M45/1161 & M45/1162**
>
> These are 3 contiguous MLA's over the old shay gap area.
>
> For this area, a forward work programme would include:
>
> Interrogation of google earth reveals that the area is dominated by colluviums and the Cretaceous Callawa Formation. It is most likely that there is a thin cover of Callawa Formation over Archaean basement.
>
> Field inspection and geological mapping in conjunction with systematic rock chip sampling is warranted initially.
>
> Following a review of the mapping and rock chip sampling, drilling may be the only way to assess the Archaean bedrock due to the Cretaceous and recent cover.
>
> **M45/1163**
>
> This MLA approx 50 kms south.
>
> This area is well exposed with Fortescue Mount Roe Basalt lithologies overlying the Muccan Granitoid Complex.
>
> The area is fairly well incised and geological mapping in conjunction with detailed stream sediment and rock sampling will be an effective means to explore the area initially. Following a review of the mapping and sampling, RC drilling may be warranted.

[35] Mr Abbott's letter notes that although the grantee party included the tenement application M45/1161 in this description, this was not requested by DMP as native title has been extinguished over that area.

[36] In addition to the above correspondence, on 13 July 2012, Mr Abbott sent a letter to the native title party (annexure NTP6) stating the grantee party had instructed him to engage the native title party in good faith negotiations: 'with the intention to finalise a heritage protection agreement to allow for the grant of the (above) tenements'. This letter included a map and Tengraph quick appraisal relating to the proposed leases.

[37] The native title party state that no further information was received from the grantee party regarding the other documents requested by the Government party and there was no further explanation of the grantee party's proposed activities by the required date (NTP Contentions at paragraph 4(f)).

[38] The native title party considers the documents provided by the grantee party to be of no assistance in ascertaining the impact of the future act and they did not satisfy the Government party's request for information. They contend that the information provided was vague, jargonistic and seemingly based on the 'interrogation of Google Earth'. It appears that, aside from these two letters, no further information in relation to the proposed acts has been provided by the grantee party (NTP Contentions at paragraph 4(f)).

[39] The native title party state that this failure to supply sufficient relevant information hindered the native title party's ability to properly consider the impacts of the proposed activities on its native title interests, particularly those interests under s 39 of the Act, which would reasonably be expected to form part of the negotiations (as per *Brownley v Western Australia* at [24]-[25]). The native title party contend that, if the grantee party is unable to provide further information and conduct further exploration prior to entering negotiations, then good faith negotiations would have to cater for this fact. The native title party state that given these circumstances, a request for the native title party to provide a draft heritage agreement is unrealistic and unfair given they would need to consider all of the rights granted under a mining lease, including potential mining of radioactive material, open pit iron ore operations and blasting (NTP Reply at paragraph 12 and 14).

[40] GP Contentions address this point by stating that DMP had requested a proposed work programme and copies of the company's latest annual report *if available*. As such, the grantee party had provided the information that was available to them at that time. The grantee party states that the tenement had not yet been explored for target minerals and therefore no further information was available to be provided in relation to a programme of work and that the jargon used was a description of the geological facts as best as they could be ascertained at the time. Further, they state that the grantee party is a private company and does not produce annual reports as required by publicly listed companies, therefore this was unable to be provided. In relation to

providing advice on proposed or completed Aboriginal heritage surveys for the tenement areas, the grantee party stated: DMP's initial negotiation letter included copies of tengraph and topographical plans, as well as the search results from the Register of Aboriginal Sites, which indicated there were no sites, therefore, there was no need for the grantee party to provide this information again; the grantee party subsequently requested a draft heritage protection agreement which, to date, has not been provided; and, the grantee party wished to discuss these issues with the native title party at an on-site meeting. In relation to the request for company policies or information which could be relevant to native title claimants, the grantee party states that, as they are a private company, the grantee party does not publicise policies and procedures, and that each tenement is treated on an individual basis according to its particular location, history, relevant native title claimants, geology, etc (see GP Contentions at paragraph 35).

[41] Finally, the GP Reply makes the point of distinguishing the information mining lease applicants are required to submit to DMP at the time of application under current *Mining Act* legislation compared to requirements applicable some eight years ago, when these applications were made (documentation submitted by parties indicates that the mining leases were lodged with DMP on 6 February 2006). The grantee states that, unlike current Mining Act legislation, the grantee party was under no obligation to provide a mining proposal, a statement about the mining operations that are likely to be carried out or a mineralisation report to DMP (GP Reply at paragraph 6). Further, mining lease applicants were not required to have undertaken any exploration activity over the proposed lease area. The grantee party states that upon grant of the proposed leases, and prior to any mining operations, they would be required to lodge and obtain approval for a mining proposal (see *Mining Act*, s 82A(2)) (GP Reply at paragraph 7).

[42] In *Koara 1* the Tribunal outlined the nature of mining leases such that they may be used as a mechanism to continue exploration activities. It was noted that:

> In Western Australia mining leases are not only applied for where a mineable ore body has been identified as a result of prospecting or exploration activities but also at the expiry of the term of a prospecting or exploration licence when there is sufficient encouragement to convert to a mining lease to continue exploration. It can be seen therefore that a Western Australian mining lease is not what its name suggests. The grant of a mining lease under the Mining Act 1978 (WA) is the creation of a single right to mine for the purposes of the Native Title Act but for the purposes of the Mining Act it is the creation of two sets of rights with very different

> consequences. The first are rights to explore over more limited areas than apply to exploration licences and at higher rentals and with more onerous expenditure conditions than apply to either exploration licences or prospecting licences. The second are rights to carry out actual mining operations.

[43] In this same decision, the Tribunal notes the difficulties that arise in considering s 39 criteria, both in a negotiation context and the Tribunal's s 35 arbitral functions, in situations where an actual mining operation may never occur and about which little or nothing is presently known. In a negotiation context, parties are required to negotiate without any real opportunity to consider key effects of the proposed grants, such as the impact of actual mining operations on registered native title rights and interest.

[44] The Tribunal has considered this difficulty on a number of occasions within the context of considering s 39 criteria for a substantive inquiry (for example *Koara 1; WMC Resources v Evans; Townson Holdings v Harrington-Smith*). While s 39 criteria are relevant in both scenarios, the manifestation of their relevance is substantially different. In considering the substantive issue, the Tribunal undertakes an analysis of the effect of the act on the s 39 criteria should the tenement be granted. Further, in considering this issue, the Tribunal has relatively wide discretion to make the determination subject to conditions to be complied with by any of the parties (s 38(1)(c)), and these conditions must be exercised by reference to the criteria set out in s 39 (*Koara 2* at [6]). The *Koara 1* and *Koara 2* decisions saw the Tribunal use this discretion as a way in which to address the difficulties that occur when little is known about future mining activity, and therefore mitigate the possibility of deleterious effects of the act on certain rights and interests.

[45] In a determination on the issue of good faith negotiations, the Tribunal must consider the historical facts of the matter and consider overall the negotiations that have taken place. The Tribunal and the Federal Court has found on a number of occasions that parties are statutorily mandated to negotiate in good faith about the possible effect of the proposed future act on the registered native title rights and interests of the native title party. If a party ignores this requirement and seeks to proceed without considering, and responding to, any submissions put to it by the native title party, relevant to s 39 criteria, it will not be negotiating in good faith (*Brownley v Western Australia* at [24]-[25]).

[46] In *Wutha v Contact* the Tribunal considered whether the grantee party's failure to

provide information regarding the type of work they intended to undertake constituted a lack of good faith. In this matter the Tribunal considered both the behaviour of the grantee party and also whether, as a result of this omission, the native title party were so disadvantaged and the negotiation process so skewed that, of itself or in conjunction with other behaviour, it demonstrated a lack of good faith by the grantee party.

[47] Deputy President Sosso found that this lapse on the grantee party's part was not due to *mala fides*, but rather flowed from confusion on the part of the grantee party's tenement service managers, leading to duplication of effort, mishandling of information, failure to meet time requirements and innocent omissions (*Wutha v Contact* at [36]). He also found that, while the native title party was not assisted by the failure of the grantee party to supply the information, taking the totality of evidence into consideration, including all of the negotiations that occurred from the outset until the time that the s 35 application was lodged, the omission did not impede the capacity of the native title party to negotiate (*Wutha v Contact* at [43]).

[48] The Tribunal's task in determining good faith negotiations must involve an assessment of the negotiations in their entirety. In *Wutha v Contact* Deputy President Sosso found that, given the sum of the negotiations, the grantee party had fulfilled their obligation to negotiate in good faith. However, he did note that, had the Tribunal assessed whether the grantee party negotiated in good faith at earlier stages of the process, it may have found that they did not meet the standards required by s 31(1)(b) (at [43]). In considering the negotiations as a whole there are a number of key points which differentiates this matter from *Wutha v Contact*. Of particular importance in this matter is that it contemplates the grant of mining leases, as opposed to 'low impact' tenements such as the prospecting licences which were considered in *Wutha v Contact.* In *Cosmos v Mineralogy*, Deputy President Sosso found that when assessing whether parties have complied with obligations under s 31(1)(b) to negotiate in good faith, parties' conduct should be judged in the context of the matters related to or connected with the doing of the future act. He further found (at [32]):

> The greater the possible impact of the "*doing of the particular future act*" on registered native title rights and interests, the greater the obligation imposed on the non-native title parties to negotiate about those possible impacts. If "*the doing of the particular future act*" may result in

> deleterious impacts on registered native title rights and interests, a non-native title party negotiating in good faith would be keen to minimise or remedy the deleterious impacts and bring to the negotiating table an offer or a package of proposals designed to address the concerns of the native title party.

[49] The possible impact of the doing of these proposed future acts is more significant than just prospecting or exploration as the grants allow for rights that include exploration right through to production with no further obligation for the grantee party to negotiate with the native title party. As such, there is a greater obligation on the grantee party to provide information that enables parties to negotiate in such a way as to address the concerns of the native title party.

[50] The information the grantee party has provided to the native title party in order for them to consider the effect of the grant on their registered native title rights and interests only contemplates exploration and not mining. The grantee party has provided no indication of what, where or how production activities might be undertaken, nor even what they might be looking to mine. As such, the native title party's ability to assess the scale or impact of the act on their registered rights and interests has been hampered. The grantee party's stated reason for not supplying this information to the native title party, being that it was not information they were required to produce under the *Mining Act*, is not a particularly compelling argument as it does not negate the fact that it is relevant information to the negotiation process under the NTA.

[51] The further difference between this matter and *Wutha v Contact* is that no draft agreements or proposals appear to have been exchanged by parties. This point is explored in more detail below, but it is important to note that in *Wutha v Contact*, although ultimately unsuccessful, negotiations did take place around a draft agreement put forward by the grantee party. This contributed to the Tribunal's findings that the lack of information regarding the proposed future act was not ideal but also not so deleterious as to impede the capacity of the native title party to negotiate.

[52] In the present matter, parties discussed the possibility of a deferred production agreement during the course of mediation and the native title party representative suggested that the grantee party put forward a proposal to the native title party's working group. However, negotiations did not materially progress from this point as

parties were not able to overcome the issue of where the grantee party would meet the working group in order to present this proposal. Again, the issue of meeting the working group is discussed in greater detail later in this decision. However, the question that must be considered at this point is whether the grantee party has sufficiently mitigated the deleterious effects of providing little useful information about the proposed future act so as the native title party can adequately participate in negotiations? Based on the circumstances of this particular matter I believe that the grantee party's failure to provide this information did inhibit the native title party's ability to participate in the negotiations to some extent. This fact on its own does not amount to a lack of good faith but does affect the position of the grantee party in relation to their good faith obligations.

Unexplained change of position during mediation in relation to M45/1163

[53] The native title party contends that the grantee party changed their position in relation to M45/1163 between the first and second Tribunal mediation. Specifically, had the position raised in the first mediation been adopted the impact on the native title party's rights and interests could have been avoided. The native title party state that this is a small instance of misleading behaviour which should put the Tribunal on notice of the possibility that the grantee party had no intention of negotiating in this matter (NTP Contentions at paragraph 7).

[54] Tribunal synopsis from the first mediation, held on 28 March 2013, states that the Grantee party representative indicated, in relation to the largest tenement (M45/1163), that conversion to five prospecting licences could be an option for this area of land. An outcome of the mediation was for Mr Abbott to discuss this option with the grantee party.

[55] Tribunal synopsis from the second mediation, held on 23 May 2013, states that Mr Abbott had sought instructions from the grantee party and had been advised the proposed conversion to a prospecting licence was no longer being considered and the grantee now wished to progress the mining lease applications. There is no further elaboration on the reasons for this decision recorded in the synopsis.

[56] Tribunal synopsis from the third mediation, held on 12 June 2013, indicates that there had been minimal progress since the previous mediation and the convenor, Member Shurven, noted that there did not appear to be much of a further role for the Tribunal in the circumstances. Prior to terminating the mediation, Member Shurven explored possible options to progress the matter including asking Mr Abbott whether conversion of the applications to prospecting licences was an option, as discussed at the first mediation. The synopsis records Mr Abbott stating that this 'option is no longer open as an exploration licence had been granted.' The synopsis notes that at this point the Government party representative clarified that the option is still available, although the grantee party would not be able to incorporate the prospecting licences into the area covered by the exploration licence.

[57] The statements by representatives recorded in the mediation synopses and the contentions made by the grantee party do not seem to entirely align, and it is possible they are referring to two different scenarios. Grantee party contentions state, in defence of the position they took in the negotiations, that for a mining lease application to be reverted to prospecting licences, the mining lease application had to be preceded by prospecting licences (*Mining Act* s 56B). However, in this case the mining lease application was preceded by an exploration licence, thereby precluding the grantee party from exercising the option of reversion (GP Contentions at paragraph 41(ii)).

[58] The discussion recorded in the synopsis from the third mediation appears to show parties talking about a different scenario. The Government party representative's statement that "this option is still available to the grantee party, though the grantee party would not be able to incorporate the prospecting licences into the area covered by the exploration licence" I presume is not talking about reversion but rather suggesting the grantee party is at liberty to apply for prospecting licences at any time as an alternative to pursuing their mining lease application. However, as noted by Mr Abbott during the mediation and confirmed by the native title party's submissions (NTP7-8), there is an exploration licence already granted over the proposed tenement area. Again I must presume that this is referring to the fact that, were the grantee party to withdraw their mining lease application and lodge prospecting licence applications instead, the pre-existing exploration licence over the proposed tenement area would

preclude the grantee party from priority for grant of a mining lease (*Mining Act* s 67).

[59] As stated above, it seems there are two different scenarios referred to by parties. However, in either case I would not characterise the grantee party's behaviour as lacking good faith in stating that this option is not available. One option is statutorily unavailable and the other would seem to have significant negative commercial consequences for the grantee party. At the second mediation, Mr Abbott indicated that conversion 'could be an option' and that he would seek instructions. Mr Abbott appears to have done that and subsequently advised parties that it was not an option. While this may not have been the desired outcome for the native title party, I would not characterise this behaviour as dishonest or unreasonable.

[60] The native title party have provided DMP documentation showing that the exploration licence which overlaps M45/1163, being E45/3724, was granted to Whim Creek Mining Pty Ltd. Evidence from both parties indicates there is a relationship between Whim Creek Mining Pty Ltd and the grantee party in this matter through the involvement of Mr Mark Creasy, however the nature of this relationship is not clear. The native title party contends that, as per a document titled 'Novo Resources Corp. Management Discussion and Analysis of Financial Condition and Results of Operations July 31, 2013' ('NTP12') ('Novo Resources Document'), Whim Creek Mining Pty Ltd is a company 'Mr Creasy has at least one affiliation with via a Joint Venture Agreement' (NTP Contentions at paragraph (7(d)). The native title party further contends that this exploration licence was granted some 19 months prior to the third Tribunal mediation, and therefore the grantee party's explanation for their change in position was very likely to have been a misrepresentation, whether inadvertent or deliberate.

[61] This contention by the native title party appears to suggest that, due to this relationship, the grantee party representative either should have been aware of the ownership of E45/3724 by Whim Creek Mining Pty Ltd from the outset or that it should not have prevented the grantee party from pursuing the option of a prospecting licence application/s as an alternative.

[62] In *Western Australia v Dimer*, Member Lane notes that the Tribunal may have regard to the individual circumstances of parties when determining whether the appropriate

negotiation standard has been reached, for example the financial and operational pressures on the grantee party. I find it reasonable for the grantee party to cite commercial reasons behind a decision not to pursue a prospecting licence when that option would have a range of flow on consequences in terms of *Mining Act* provisions. I also find it reasonable that the grantee party representative may not have been aware of the ownership or even the existence of underlying tenements at the initial mediation when the suggestion was first made to explore a prospecting licence application. The fact that there is an affiliation between the two companies does not necessarily mean their commercial interests are one and the same. A common interest holder does not make Mr Abbott's explanation of the grantee party's position any less reasonable. Therefore, I am not prepared to make an inference that the position taken by the grantee party on this point or the comments made by Mr Abbott in the course of the mediations amounts to bad faith.

Illusory offer in relation to contracting and employment

[63] At the first mediation, Mr Abbott stated the grantee party was prepared to offer employment and training but not payment to the native title party. He later stated, in the course of the mediation, that a deferred production agreement might appeal to his client as payment would be made after production commenced.

[64] The native title party contends that the grantee party's offer could only be considered illusory given:

- it was made during a mediation conference on a without prejudice basis;
- this offer, or any other communication in relation to an offer, was never communicated to the native title party outside of mediation;
- no detail as to the content of any possible employment or training opportunities has ever been provided; and
- due to insufficient information being provided regarding possible plans for the proposed leases, the native title party were unable to even speculate on what opportunities may arise from the proposed acts (NTP Contentions at paragraph

10).

[65] In light of the above, the native title party characterise the grantee party's behaviour as failing to meaningfully engage in the negotiations and a case of simply 'going through the motions' of negotiations (*Cosmos v Mineralogy* at [91]). They also contend that these considerations apply equally to other statements made by the grantee party during mediation, which were never substantiated by any actions or communications intending to reach agreement (NTP Contentions at paragraph 13).

[66] The grantee party contends that, although the native title party representative requested a proposal be put forward to the native title party Working Group, her subsequent comment that "an offer that included employment and training but did not include payment would be frowned upon" had the practical effect of saying "the proposal would not be considered unless it was accompanied by money" (GP Contentions at paragraph 38(i)). As the grantee party notes in their contentions (at paragraph 38), there is an obligation on parties to make proposals to other parties with a view to achieving agreement, and a reciprocal obligation on other parties to respond, either by way of a counter-proposal or by way of comment or suggestion on the original proposal (*Western Australia v Taylor*). The grantee party contends that this obligation was fulfilled by them through suggesting the option of converting one of the mining lease applications to five prospecting licences, suggesting to meet on site at the proposed leases, committing to consider a deferred production agreement and committing to consider meeting in Port Hedland (GP Contentions at paragraph 38(iii)).

[67] The grantee party also make reference to their request for the native title party to provide their preferred negotiation protocol and draft heritage protection agreement made on 13 July 2012. The grantee party contends that, had these documents been provided, negotiations could have continued on the basis of the protocols set down within them (GP Contentions at paragraph 40(i)). The grantee party state that these documents are 'the key to ongoing negotiations' however were never provided by the native title party (GP Contentions at paragraph 37).

[68] A notable characteristic of this matter is the paucity of communication that appears to have taken place between parties outside of mediation. The native title party contends

that all offers by the grantee party were made within the confines of mediation, therefore on a without prejudice basis, and that the grantee party never substantiated statements or offers made in mediation through any actions or communications outside of mediation. While there is no obligation for the Tribunal to decide if offers made by a grantee party are reasonable (*Strickland v Minister for Lands*), it may be relevant for the Tribunal to consider whether the grantee party's conduct in making these offers was reasonable and whether what was said in the mediation could be deemed a valid offer, particularly given it was said on a without prejudice basis.

[69] I do not agree with the grantee party's characterisation of the words attributed to the NTP representative that "an offer that included employment and training but did not include payment would be frowned upon" as tantamount to saying the proposal would not be accepted unless it was accompanied by money. As part of honest and frank negotiations, it could be expected that legal representatives may 'flag' with other parties issues that have the potential of being contentious, if it is within their experience and knowledge to do so. The comment was made within the context of explaining to the grantee party representative that "previous agreements that had made provision for employment and training had failed to deliver on those undertakings to the native title group" (mediation synopsis and outcomes, see NTP7). The Tribunal first mediation outcomes record that the native title party representative requested a proposal in relation to training and employment be made, however, to date it seems this was never actioned by the grantee party.

[70] I note that the evidence suggests the native title party never communicated with the grantee party the reasons why the preferred negotiation protocol and draft heritage protection agreement were not provided. As part of good faith negotiations, all parties have a responsibility to communicate with the other parties, respond to communication and request further information when it is required. As such I find this somewhat of a lapse in ideal negotiation behaviour on the native title party's behalf. However, from the first Tribunal mediation parties were discussing the prospect of the grantee party "agreeing to consider" a deferred production agreement proposal. As such it could be inferred that all parties supported this course of action and the provision of a draft agreement and negotiation protocol by the native title party was not at that time a contentious issue. I agree with the grantee party that documents such

as these can be important to the negotiation process. However, the contention that they should have been provided by the native title party because they are the 'key to ongoing negotiations' seems to be unilaterally devolving responsibility for these documents to the native title party which is not supported by the obligations outlined in s 31 of the Act.

[71] The fact that an offer is made within the context of Tribunal mediation, and therefore on a without prejudice basis, does not necessarily negate its status as a valid offer. However, I do agree that there is a distinction between an offer and more general discussions between parties regarding options. The Tribunal may have regard to the reasonableness or otherwise of offers if it assists in the overall assessment of a party's negotiating behaviour (*Placer v Western Australia*). In this particular matter, the mediation outcomes clearly record the grantee party representative mentioning employment and training. However, it appears this option is never defined or quantified in any substantial way and as such, would not appear to be an offer that could be considered by the native title party in any meaningful way.

[72] As outlined above, given the inherent difficulties that arise from a lack of information about the proposed future act, the circumstances of this particular matter call for the grantee party to be proactive in their negotiation stance rather than reactive. This includes putting forward genuine offers and displaying reasonable and honest behaviour. As discussed above, I don't see the failure or inability of the grantee party to convert the mining leases into prospecting licences as evidence of bad faith, and I believe in suggesting it as an option Mr Abbott was displaying positive negotiating behaviour. However, in considering the grantee party's intent rather than Mr Abbott's behaviour, I cannot place much weight on this option as a meaningful offer given it does not appear to have ever been an option that could be pursued.

[73] I also hold some reservations about the weight that can be given to the grantee party's offer to meet on the site of the proposed licences, given the evident financial and logistical challenges this posed for the native title party and the lack of clear explanation why this was a position the grantee party was holding to. The grantee party contends that they committed to consider meeting in Port Hedland, yet Tribunal mediation outcomes suggest this option was rejected outright by the grantee party with little explanation why. The grantee party's contention that they fulfilled good

faith obligations through committing to consider a deferred production agreement also lacks strength given that details of the offer or a firm proposal were never provided. Again I would characterise this as a discussion of options rather than a proposal or offer that could be put to the native title party.

[74] Given the particular circumstances of this matter I believe there was a greater than normal obligation on the grantee party to facilitate negotiations and try to address the native title party's concerns through providing offers or proposals. Based on the evidence before me, I believe the grantee party's actions have fallen short of this obligation.

Grantee party adopting a rigid non-negotiable position in relation to meeting with the native title party

[75] The issue of parties meeting face to face to discuss the proposed acts was raised and discussed at all three mediation meetings. The proposal to meet with the native title party was initially proposed by the native title party representative, Ms Shillingford, who stated that the working group liked to meet proponents to develop an understanding and build a relationship before making an agreement. Ms Shillingford stated that meetings are held in Port Hedland as most of the working group members are local to this area, and that a full day meeting was estimated at approximately $25 000, although she would endeavour to arrange for this cost to be shared with other proponents and/or the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA'), meaning the cost could be in the range of $3000 to $6000. The grantee party representative, Mr Abbott, confirmed he would seek instructions on this request.

[76] At the second mediation, Mr Abbott stated that his client was prepared to meet with the working group on the site of the tenements to discuss the deferred production agreement, heritage and compensation. However, Mr Abbott advised, the grantee party was not prepared to fund a meeting. Ms Shillingford then suggested the option of 'piggy backing' this meeting onto another meeting scheduled for 16 July 2013 in Port Hedland, and requested the grantee party contribute a lower amount of approximately $3000. Ms Shillingford said she would email through a budget to the

grantee party by the end of the following week. It is unclear if this document was ever provided.

[77] At the third and final mediation, Tribunal outcomes state that Mr Abbott reported that his client wished to meet onsite to explain the proposal and address heritage matters but is still not prepared to fund a meeting. Ms Shillingford voiced concerns that she did not think FaHCSIA funding would cover costs of an onsite meeting as opposed to the proposed meeting in Port Hedland.

[78] At this point the Tribunal's synopsis records Mr Abbott stating "it is not that his client is unwilling to negotiate, but that he wants to negotiate on his terms" (NTP9, paragraph 3). In response to the Member querying why the grantee party wanted to meet onsite, Mr Abbott stated "his client has not made his reasons exactly clear, but believes that more would be achieved if the meeting were held onsite."

[79] The grantee party contentions state that an onsite meeting would have been an opportunity to "explain standard exploration techniques undertaken on a mining lease which would have clarified the proposed work programme" (GP Contentions at paragraph 36).

[80] The grantee party's contentions refute the interpretation of comments made at the third mediation that the grantee party was only willing to "negotiate on his terms", and contend that Mr Abbott has been misreported and misquoted (GP Contentions at paragraph 44). The grantee party does not provide an alternative interpretation of events but states that the grantee party's representative has many years experience in native title matters and does not wish his reputation to be tainted by such inaccurate minute taking.

[81] The grantee party also contends that the facts of this matter do not support the native title party's claims that they did not insist on grantee party funding for a meeting and that negotiations were not preconditioned on this funding (GP Contentions at paragraph 45). In support of this position, they cite the fact that the native title party never provided a negotiation protocol to the grantee party, and the native title party did not commit to attending a meeting, irrespective of location, without a payment of funds. The grantee party contends that the native title party representative pushed the issue of the grantee party paying costs "in the amount of $25 000" and that the native

title party representative "pushed the costs issue so strongly, that she committed to providing further information about a meeting in Port Hedland including an estimate of costs and timing" (GP Contentions as paragraph 38(iii)). The grantee party contends that "it is difficult during negotiations to be continually confronted with requests for money" (GP Contentions at paragraph 41(vii)), and that such a determined request for funds does not constitute negotiating in good faith. The grantee party also contends that if the native title party were not insistent on funding then they would have proposed a meeting with the grantee party at a location not requiring payment from the grantee party (GP Contentions at paragraph 45).

[82] Both parties acknowledge and accept as a matter of law that the obligation to negotiate in good faith does not extend to providing financial assistance to a native title party to conduct negotiations (*Gulliver v Western Desert Lands Aboriginal Corporation* at [62]-[97] (and earlier cases cited therein).

[83] The grantee party's characterisation of the costs issue, and the proposals put to them by the native title party, does not seem to reflect the discussions recorded in the Tribunal's mediation outcomes or the native title party's contentions. The grantee party's contentions dwell on the figure of $25 000 as the estimated meeting cost that was put to them. However, Tribunal mediation outcomes record this amount being the approximate cost cited for a full day meeting, with the native title party representative stating they would work to reduce this cost through sharing with other proponents and utilising FaCHSIA funding. Therefore, Tribunal outcomes indicate the original estimate given to the grantee party was 'in the range of $3000-$6000'.

[84] The grantee party's refutation of the statement that the grantee party was only willing to "negotiate on his terms" recorded in the Tribunal outcomes is somewhat of a moot point. What is not contested is the statement by Mr Abbott regarding the location of the meeting, that "his client has not made his reasons exactly clear, but believes that more would be achieved if the meeting were held onsite."

[85] On the face of it, the grantee party's request to meet onsite is a reasonable position. However, if the cost and logistical difficulties that this position posed for the native title party were reasonably known by the grantee party then this undermines the intent behind their suggestion. Presumably if a full day meeting at Port Hedland, where

many of the working group reside, was going to cost in the vicinity of $25 000, then an onsite meeting would cost considerably more. The native title party explained that FaHCSIA funding would likely not extend to an onsite meeting, and therefore was not affordable for them, but funding could be utilised for a Port Hedland meeting. The native title party appear to make genuine attempts to reduce the costs they were requesting from the grantee party and, given the comment that FaHCSIA funding is available for a Port Hedland meeting, it seems that cost to the grantee party might have been reduced to catering costs only of $3000 or less. Presumably catering would have to be provided wherever the meeting was held in any case. The grantee party's option was always going to cost the NTP in the order of $25 000 and it was apparent that this was a cost that the native title party could not afford.

[86] The explanation provided by the grantee party in their contentions as to why an onsite meeting was being sought does not appear to have been provided during the course of negotiations. Rather, Tribunal outcomes record the far more ambiguous statement that the grantee party "believes more would be achieved". I believe it is reasonable to characterise the grantee party's approach as rigid and non-negotiable. Again looking to *Wutha v Contact*, Deputy President Sosso stated (at [40]):

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

[87] As stated earlier in this decision, the Tribunal may have regard to the individual circumstances of parties when determining whether the appropriate negotiation standard has been reached and this can include resources constraints on native title parties and representative bodies (*Western Australia v Dimer*). The significant financial burden that an onsite meeting placed on the native title party coupled with a lack of reasonable justification as to why this was being sought in my opinion amounts to unreasonable behaviour on the grantee party's part in these particular circumstances.

Drilling on E45/2385 prior to a heritage survey being conducted

[88] From the evidence supplied to the Tribunal, it appears that the grantee party held exploration licences that are overlapped by the proposed leases. E45/2383 is overlapped by M45/1160 and M45/1162, while E45/2385 is wholly overlapped by M45/1163. A register search of the Department of Mines and Petroleum indicates that the grantee party applied to convert the exploration licences into the proposed leases pursuant to s 79 of the *Mining Act* 1978 (WA).

[89] The native title party submitted contentions in the substantive inquiry on 30 June 2014 ('NTP substantive inquiry contentions'). In those contentions the native title submits that a Regional Standard Heritage Agreement ('RSHA') was executed by the parties in respect of E45/2385 (at 20). The NTP substantive inquiry contentions allege (at 22-23) that the grantee party drilled 13 holes as part of their exploration activities on E45/2385 without notification to the native title party or conducting a heritage survey to clear the areas where the drilling was to be conducted, and the following were consequences of this conduct (at 24):

- the grantee party acted in breach of the terms of the RSHA;
- the grantee party acted with disregard for the impact of its actions on the rights and interests of the native title party; and
- the grantee party conducted its exploration activities with an unacceptable risk of breaching the *Aboriginal Heritage Act 1972* (WA), or at least in non-compliance with the guidelines set out by the Department of Mines and Petroleum for consultation with Indigenous people.

[90] On 10 July 2014, the Government party requested an extension to directions to enable the Government party and grantee party to file their substantive contentions after the preliminary good faith decision had been made, rather than prior to that decision. The directions on foot at the time required the Government party and grantee party to submit substantive contentions on or before 14 July 2014. On 11 July 2014, the grantee party wrote to the Tribunal to indicate that the parties had collaborated to agree on a request for the directions to be vacated, rather than extended, pending the good faith decision. Parties also requested further directions to allow for the native

title party and grantee party to address the heritage survey issue outlined at [12]. On 11 July 2014 parties were advised the directions would not be enforced, pending review, and that amended directions would be made on 15 July 2014. On 15 July 2014, I made the directions in the terms sought by parties on 11 July 2014. Pursuant to these directions, the grantee party provided a response to the heritage survey allegation by the native title party on 18 July 2014 ('grantee party heritage response') and the native title party provided a reply to the grantee party's response on 22 July 2014 ('native title party heritage reply').

[91] The grantee party responded in the grantee party heritage response as follows:

- it has been unable to determine whether a heritage survey was conducted over E45/2385 prior to the drilling of the 13 holes (at 2);
- it has been unable to determine whether the native title party contacted the grantee party either at the time of the drilling work or since then to discuss the drilling program or any associated heritage surveys (at 3);
- the Tribunal should not take account of this issue in respect of determining whether the grantee party has negotiated in good faith as E45/2385 is a dead tenement, the activities of the grantee party on a tenement different to M45/1163 are irrelevant to the issue of good faith in relation to M45/1163, and the amount of time (7 years) between the work being carried out and the issue being raised by the native title party (at 4); and
- it would be a denial of procedural fairness and contrary to principles of natural justice for the Tribunal to draw adverse inferences from unproven and speculative contentions as to whether a heritage survey was conducted over E45/2385 (at 6).

[92] The native title party in the native title party heritage reply says:

- the native title party has put forward uncontested supporting evidence that there have been no surveys over the area of M45/1163 and the grantee party has not provided any information to support a heritage survey being conducted over the area (at 1);
- as the native title party has put forward all information reasonably available to it and the ultimate knowledge of whether a heritage survey was conducted

rests with the grantee party, it is open to the Tribunal to find an adverse inference against the grantee party (at 3);

- the grantee party's past conduct is directly relevant in the context of whether there were negotiations in good faith as (at 6):
    - E45/2385 directly overlaps M45/1163 and was live for three years while the application for M45/1163 was on foot;
    - the grantee party only has current plans to explore on M45/1163, the same activities it undertook on E45/2385;
    - the drilling on E45/2385 commenced in 2006/2007 and was likely going on when the grantee party was applying for M45/1183 and should have been in the mind of the grantee party when the obligation to negotiate in good faith commenced in 2008;
    - despite the obligation to negotiate in good faith commencing in 2008 the grantee party did not communicate with the native title party until 2012;
    - the grantee party failed to provide information to the Department of Mines and Petroleum regarding whether surveys had been carried out on the proposed leases;
    - the grantee party was likely in breach of the terms of the RSHA;
    - if a heritage survey had been conducted then there would have been no need to conduct a meeting with the native title party on the proposed licences as the grantee party would have already had access to a heritage survey report;
- the grantee party's behaviour and failure to provide information in this issue evinces a state of mind inconsistent with an obligation to negotiate in good faith (at 16).

[93] It is my view that this issue is largely peripheral to the question of whether the grantee party negotiated in good faith with the native title party. It is an issue which seems to have a greater impact in the context of the substantive inquiry as to whether the future act may be done, as it goes more to the question of the impact of the grant of the proposed leases on the rights and interests of the native title party. I do not feel that it has much impact in answering the question of whether the grantee party negotiated in good faith with the native title party, and does not change my conclusions in the

previous sections of this determination regarding the central arguments as to the good faith of the grantee party in the negotiations.

Conclusion

[94] As discussed at [45], the Tribunal's task in determining good faith must involve an assessment of the negotiations in their entirety and the parties' conduct should be judged in the context of the matters related to or connected with the doing of the future act. As highlighted at [49], the possible doing of the proposed future act in this case is more significant than just prospecting or exploration. As such there was a greater obligation on the grantee party to provide information that would enable parties' to negotiate in such a way as to address the concerns of the native title party. The information provided was insufficient and this inhibited the native title party's ability to participate in the negotiations.

[95] I have noted the arguments raised by the native title party regarding the grantee party's alleged unexplained change in position during mediation concerning M45/1163. As explained at [59], I find that the grantee party did not act unreasonably in citing commercial reasons as to why it would not pursue reversion to prospecting licences, despite considering this option. As such, I am not prepared to make the inference that the position taken by the grantee party on this point, or the comments made by Mr Abbott in the course of the mediations (outlined at [53]-[62] above), amount to bad faith.

[96] The failure of the native title party to provide their preferred negotiation protocol and draft heritage protection agreement was a lapse in ideal negotiation behaviour on the native title party's behalf (see [70]). Importantly though, the request for those documents was made in the 13 July 2012 correspondence from Mr Abbott which seems to mischaracterise the purpose of negotiations and perhaps the context of the request for a negotiating protocol and draft heritage protection agreement. Mr Abbott writes that the intention of the negotiations was 'to finalise a heritage protection agreement to allow for the grant of the tenements'. Negotiations are in fact to be conducted with a view to obtaining the agreement of the native title party to the doing

of the particular future act/s, in this case the grant of mining leases. After the letter of 13 July 2012 there was seemingly no communication between the parties before the matter was referred to the Tribunal by DMP for s 31(3) mediation assistance. Mediation conferences were held in April, May and June 2013. The grantee party lodged the s 35 application on 16 December 2013.

[97] In the course of mediation, employment and training was raised as possible outcomes of negotiation however it appears that this option was never defined or quantified sufficient to constitute an offer which could be considered by the native title party in any meaningful way (see [71]). The suggestion of a deferred production agreement was raised by the grantee party representative in mediation as an alternative to 'payments'. This suggestion though was never developed and never discussed between the grantee party and the native title party. The native title party representative suggested that a proposal be put to the native title party working group. The native title party representative advised that working group meetings are held in Port Hedland as most members are local to that area. The working group process can be both practical and pragmatic – particularly when costs are borne by government, or shared. On country meetings are highly desirable but for a number of reasons can present logistical challenges. At the second mediation meeting Mr Abbott advised that the grantee party wanted to meet on site but was not prepared to fund a meeting. The grantee party was informed by the native title party representative that it would be very difficult to arrange a meeting in those circumstances and options were presented to reduce the cost of meeting in Port Hedland to around $3000 to cover catering. At the third mediation, the grantee party's position was restated and Mr Abbott was informed that an on country meeting was unaffordable. My conclusion at [87] is that the grantee party's approach to this issue was rigid and non-negotiable and in the circumstances, unreasonable.

[98] My conclusion is that the grantee party has not fulfilled its requirement to negotiate in good faith with the native title party, particularly as the future acts concerned involve the grant of mining leases. It failed to do so because it failed to adequately communicate; it failed to define or develop options arising in mediation; and, adopted a rigid non-negotiable position when issues critical to the matter needed to be

discussed.

Determination

[99] I am not satisfied that the grantee party negotiated in the manner required by s 31(1)(b) in this matter. According to s 36(2) of the Act, the Tribunal does not have the power to proceed to make a determination on this future act determination application brought by the grantee party in respect of mining lease applications M45/1160, M45/1162 and M45/1163.

James McNamara
Member
29 July 2014

Attachment A

Good Faith submissions

Native title party submissions, received on 28 February 2014:

- Statement of contentions
- s 29 notice ('NTP1')
- Government party's initial negotiation letter, dated 15 February 2012 ('NTP2')
- Notification of extension of submission date for grantee party, dated 24 February 2012 ('NTP3')
- First letter from grantee party, dated 27 March 2012 ('NTP4')
- Native title party submissions to Government party, not dated ('NTP5')
- Second letter from grantee party, dated 13 July 2013 ('NTP6')
- Mediation 1 outcomes and synopsis, dated 10 April 2013 ('NTP7')
- Mediation 2 outcomes and synopsis, dated 23 May 2013 ('NTP8')
- Mediation 3 outcomes and synopsis, dated 13 June 2013 ('NTP9')
- Tengraph plot ('NTP10')
- Tengraph quick appraisal – E45/3724 ('NTP11')
- Novo Resources Corp. Management discussion document, dated 31 July 2013 ('NTP12')
- Affidavit of Marcus Fort, affirmed 28 February 2014 ('NTP13')

Grantee party submissions, received on 7 March 2014

- Statement of contentions
- Letter from grantee party to DMP regarding representation, dated 2 December 2011 ('GP1')
- Government party's initial negotiation letter and attachments, dated 15 February 2012 ('GP2')
- Grantee party's letter to Government party requesting extension of submission date for providing grantee party information, dated 20 February ('GP3')
- Grantee party's letter in response to Government party's initial negotiation letter, dated 27 March 2012 ('GP4')

- Native title party submissions to Government party, not dated ('GP5')
- Letter from grantee party to native title party, dated 13 July 2013 ('GP6')
- Grantee party's letter to Government party requesting cessation of refusal action, dated 13 July 2012 ('GP7')
- Government party's letter advising referral to Tribunal mediation, dated 10 January 2013 ('GP8')
- Mediation 1 outcomes and synopsis, dated 10 April 2013 ('GP9')
- Mediation 2 outcomes and synopsis, dated 23 May 2013 ('GP10')
- Mediation 3 outcomes and synopsis, dated 13 June 2013 ('GP11')
- DAA Aboriginal Heritage Inquiry System search results ('GP12')

Native title party submissions in reply, received on 14 March 2014

- Contentions in reply
- Business Review Weekly article, published 22 May 2013

Grantee party submissions in reply, received on 2 April 2014

- Statement clarifying factual errors

Native title party heritage response, received on 18 July 2014

Grantee party heritage reply, received on 22 July 2014