NATIONAL NATIVE TITLE TRIBUNAL

Bradford and Julie Young v Kariyarra and Another **[2014] NNTTA 103 (23 October 2014)**

Application Nos: WF2014/0011 & WF2014/0012

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Bradford John Young and Julie Lynne Young (grantee party)

- and -

TR (dec) and Others on behalf of Kariyarra (WC1999/003) (native title party)

- and -

The State of Western Australia (Government party)

DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CONDUCT AN INQUIRY

Tribunal:	Helen Shurven, Member
Place:	Perth
Hearing Date:	9 October 2014
Decision Date:	23 October 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 negotiated in good faith – Tribunal has power to proceed with future act determination inquiry.

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 30A, 31, 35, 36(2), 38, 39, 109(3) 142

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

FMG Pilbara Pty Ltd v Cox 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*’)

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia, [2010] NNTTA 211 (‘*Magnesium v PKKP*’)

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

Western Australia v Daniel (2002) FLR 168; [2002] NNTTA 230 (‘*Western Australia v Daniel*’)

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*’)

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

Representative of the grantee party:	Mr Ken Green, Green Legal
Representative of the native title party:	Ms Kylie Chalmers, Yamatji Marlpa Aboriginal Corporation
Representatives of the Government party:	Ms Christine Weetman, Department of Mines and Petroleum Ms Sarah Power, State Solicitor’s Office

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

[1] On 31 January 2007 and 14 November 2012, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice ('s 29 notice') under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of two future acts ('proposed leases'), namely the grant of mining lease application M45/800 to Bradford John Young and M45/1228 to Bradford John Young and Julie Lynne Young respectively ('grantee parties'/'grantee party').

[2] Any person who, four months after the notification day, is a native title party (that is, a 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 31 May 2007 and 14 March 2013 respectively, the native title claim of Kariyarra (WC1999/003) – registered from 22 April 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 Port Hedland Town. The location and size of each lease (according to the National Native Title Tribunal ('the Tribunal') spatial analysis) is outlined in the table below:

Proposed lease	*Approximate size of proposed lease (km^2)*	*Location*
M45/800	1.0197	13km South of Port Hedland
M45/1228	4.0951	14km South of Port Hedland

[5] The rights which would be conferred by the proposed leases (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 parties 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.

The future act determination application

[7] On 16 June 2014, the grantee parties 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 each of the proposed leases. The applications were made on the basis that the 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 17 June 2014, I was appointed as Member to conduct the inquiry into the future act determination applications.

[8] A preliminary conference was convened on 10 July 2014. At the conference, the native title party representative stated 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, I set directions 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 parties, however, did not intend to make such allegations against the Government party.

[9] On 22 August 2014, the native title party lodged its submissions on the question of good faith ('good faith submissions'). As no good faith allegation was raised concerning the Government party, it chose not to make any good faith response. On 8 September 2014, the grantee parties lodged their good faith submissions, being three

calendar days later than the date specified in the directions. On 12 September 2014, directions were amended to allow the native title party adequate opportunity to file a reply to the grantee parties' good faith submissions and to extend the submission dates for the substantive issue. On 3 October 2014, the native title party lodged its reply to the grantee parties' good faith submissions.

[10] As part of the directions, a good faith hearing had been scheduled for 9 October 2014, and on 6 October 2014, parties' views were sought via email on whether the good faith inquiry should be decided on the papers or whether the hearing should take place. The native title party confirmed consent to proceed on the papers. The grantee parties submitted the native title party's reply raised issues not previously raised by the native title party and sought an opportunity to address those issues either at a hearing or via a written response ('Grantee parties' email submission'). In the circumstances, I considered it appropriate to hold the hearing to ensure all parties had sufficiently ventilated their case (as per s 142 of the Act). Parties were advised the hearing would proceed for the purpose of seeking parties' oral submissions on the specific aspects of the native title party's reply which had not previously been raised.

[11] In attendance at the good faith hearing were the representatives for the native title party, the grantee parties and the Government party. The representative for the Government party attended the hearing as an observer, given the Government party had previously advised it would not make any good faith submissions. At the hearing, I confirmed my view, as outlined in an email to parties dated 8 October 2014, that I had reviewed the native title party's reply and the grantee parties' email submission, and considered paragraph 15 of the native title party's reply was the particular paragraph which included material not previously raised. I gave both parties the opportunity to make statements on paragraph 15 of the native title party's reply.

[12] During the course of the hearing, I gave the grantee party leave to make oral submissions, and the native title party to orally reply, on the issue of whether amendments to clauses made by the grantee parties amounted to lack of good faith, and in relation to the grantee parties allegation that the native title party had acted with a lack of good faith. I advised parties that leave was given on the basis that I would proceed to make a determination and would consider in my written decision what weight to give these oral submissions. As noted later in this determination, the

issue of amendments to clauses was not a new one so I give little weight to what was said in the oral hearing on that point. In relation to the allegation that the native title party had not acted in good faith, this was raised in the grantee parties submission and responded to in the native title party reply, so again, little weight was given to the oral submissions on this point. As noted in *Western Australia v Taylor,* the conduct of the other parties to a negotiation process is relevant to deciding whether a party has negotiated in good faith. A lesser standard may be required if the other parties behave unreasonably, or in a manner not conducive to constructive negotiations. In this present matter, whether or not the native title party acted in good faith is explored, as relevant, in this decision.

The obligation to negotiate in good faith

[13] 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.

[14] The 'negotiation parties' are the Government party, the grantee parties 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 parties 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 a 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.

[15] 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]).

[16] 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])).

[17] 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.

[18] 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,* the Tribunal 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.

[19] In *Western Australia v Taylor*, the Tribunal provided a series of indicia of conduct to be taken into consideration when assessing good faith, which has 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.

[20] In *Western Australia v Dimer*, the Tribunal 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).

[21] I adopt the above principles (at [15]-[19]) for the purpose of this decision.

Good Faith Contentions and Evidence

[22] On 22 August 2014, the native title party lodged its good faith contentions ('NTP GF Contentions'), and a document titled Affidavit of Ms Kylie Chalmers, which is in fact a signed statement, dated 21 August 2014 and supporting evidence ('NTP GF 1-14'). On 8 September 2014, the grantee parties' good faith contentions ('GP GF Contentions'), statement of facts ('GP GF Fact 1-27') and supporting evidence ('GP GF 1-22) were received. On 3 October 2014, the native title party submitted a reply to the grantee parties' submissions ('NTP GF Reply').

[23] A hearing was also held, as outlined at [11]. For ease of reference, a list of all evidence relied upon in making this determination can be found as Attachment A to this decision.

[24] The NTP GF Contentions assert the grantee parties failed to negotiate in good faith, as demonstrated by the following conduct/indicia:

- 'Any suggestion of an offer having been made by the Grantee Party as at 21 January 2014 can only be considered illusory in the circumstances given that such an offer was non-existent'(at 10-13);
- 'The Grantee Party was unwilling to recognise the elected working group as the legitimate representatives of the Native Title Party in these negotiations' (at 14-26);
- 'The Grantee Party adopted a rigid non-negotiable position with respect to the agreement with the Native Title Party' (at 27-30);
- 'The Grantee Party fostered a false sense of urgency with respect to negotiations on the agreement with the Native Title Party' (at 31-34);
- 'Unexplained change of position by the Grantee Party just as a meeting with the Native Title Party...was in sight' (at 35-40); and
- 'The Grantee Party failed to make a reasonable offer to the Native Title Party' (at 41-48);

[25] The GP GF Contentions provide a useful summary of Tribunal decisions regarding

good faith (at 4) and state the grantee parties have negotiated in good faith with reference to its statement of facts generally and specifically:

- 'the provision by the GP to the NTP of detailed information concerning the Inquiry Tenements' (GP GF Fact 4 and GP GF 11);
- 'the expression of support by the GP of the GVP's proposal for the grant of M45/1228' (GP GF Fact 11 and GP GF 9);
- 'the commissioning by the GP of an Aboriginal Heritage survey over an area which included the Inquiry Tenements' (GP GF 6);
- 'the agreement by the GP to many of the NTP's proposed amendments to the First Draft (GP GF 16 and 19);
- 'the GP made a further, alternate, proposal which was in addition to the proposal...above' (GP GF 19);
- 'the GP's attendance at three [Tribunal] mediation conferences'

Background to negotiations

[26] Based on the evidence submitted by the grantee parties and native title party, and mapping provided by the Government party on 8 July 2014 ('Govt mapping'), I accept the following events occurred after the s 29 notice was issued for proposed lease M45/800 (which was the first of the two proposed leases to be issued), and up to the day on which the s 35 applications were made:

DATE	EVENT
31 January 2007	s 29 notice issued for M45/800.
2 February 2007	Department of Mines and Petroleum's (DMP) initial negotiation letter, requesting; a) the grantee party (GP) provide submissions to the native title party (NTP) and DMP on M45/800 within 14 days; and b) the native title party to make its s 31(1)(a) submissions on M45/800 by 22 March 2007.

15 February 2007	GP submissions on M45/800 provided to DMP and NTP.
5 September 2012	Anthropos Australis issue final Aboriginal Heritage Survey Report of an area south of Port Hedland town site which includes the areas of the proposed leases (verified by Government mapping). The report was commissioned by the grantee parties. Three of the nine Indigenous consultants who participated in the survey are listed on the Register of Native Title Claims as persons claiming to hold native title for the native title party – Mr Kerry Robinson, Ms Diana Robinson and Mr Thomas Monaghan. No sites are identified within the proposed leases. Part of the Survey area intersected with a Tributary of South Creek which was connected to a large ethnographic site, however, DMP confirmed this intersection was not within the proposed leases.
9 November 2012	s 29 notice issued for M45/1228.
14 January 2013	Department of Mines and Petroleum's (DMP) initial negotiation letter, requesting; a) the grantee party (GP) provide submissions to the native title party (NTP) and DMP on M45/1228 within 14 days; and b) the native title party to make its s 31(1)(a) submissions on M45/1228 by 4 March 2013.
1 May 2013	GP submissions on M45/800 and M45/1228 provided to DMP and NTP.
20 May 3013	NTP s 31(1)(a) submissions on M45/800 and M45/1228 provided to DMP and GP.
21 January 2014	First Tribunal s 31(3) mediation conference held.
17 March 2014	Second Tribunal s 31(3) mediation conference held.
12 May 2014	Third Tribunal s 31(3) mediation conference held.
16 June 2014	GP lodged s 35 applications.

[27] Tribunal records indicate the Tribunal s 31(3) mediations for the proposed leases were terminated by the mediator (Member Valerie Cooms) on 17 June 2014, following the lodgement of the s 35 applications.

Native title party's assertions regarding good faith

Assertion 1: 'Any suggestion of an offer having been made by the Grantee Party as at 21 January 2014 can only be considered illusory in the circumstances given that such an offer was non-existent' (NTP GF Contentions at 10-13, GP GF Contentions at 6.4-6.15)

[28] The native title party alleges that at the first Tribunal mediation conference held on 21 January 2014, the grantee parties asserted they had made an initial offer to the native title party. It contends the offer was 'spurious' given it was made by the Government party and not the grantee party via the Government party's initial negotiation letters (at (10)). The native title party relies on the Tribunal's synopsis and outcomes of the mediation conference (NTP GF 7) to support its contention. The grantee parties contend the native title party's 'assertion is without foundation' (at 6.8) as the Tribunal's synopsis and outcomes correctly records what was asserted by Mr Ken Green, the grantee parties' representative, at the mediation conference (6.6):

> Mr Green said the Government party's negotiation letter had included an offer to the native title party, which the grantee party supported in its subsequent letter to the native title party.

[29] The grantee parties also rely upon the letter described in the table above, dated 1 May 2013 (GP GF 9). The letter notes the grantee parties 'support the Government party's proposal to the Native Title Party' and requests the native title party:

> 1) identify the manner in which the Proposal does not fully address the relevant Native Title Party's concerns; and
> 2) propose (including in the alternate) how the Native Title Party's concerns might be addressed.

[30] The letter also advises the native title party that an Aboriginal heritage survey over the area of the proposed leases had been completed and the report forwarded to the native title party on 11 December 2012 (GP GF 5).

[31] The native title party contends the grantee parties 'failed to initiate any negotiations with the Native Title Party prior to the matter being referred to [Tribunal] mediation' (at 13). As a counter, the grantee parties contend the native title party's s 31(1)(a) submission (GP GF 10) to the Government party (and copied to the grantee parties) 'appeared to be *pro-forma*' and did not acknowledge or address the grantee parties' letter (GP GF 9) or the Government party's proposal. The grantee parties contend '[i]n those circumstances, there was nothing unreasonable in allowing the NTP time to address those matters' (at 6.9-6.13). In its reply to the grantee parties, the native title party contends its s 31(1)(a) submission:

> ...had in fact highlighted the inadequacy of that proposal, especially its failure to effectively address the manner in which the impact of the Grantee Party's proposed activities on the Native Title Party's rights and interests would be minimised. Given these circumstances, The Grantee Party's continued endorsement of that proposal as a substantive offer demonstrates the lack of good faith on the Grantee Party's part...and constitutes a disingenuous attempt by the Grantee Party to deliberately avoid engaging in substantive negotiations with the native title party (NTP GF Reply at 7-8).

[32] On the evidence provided, it appears that neither party provided the other with material which could reasonably be characterised as an offer, prior to the series of mediations in 2014. The Government party's letter to the native title party was the template letter sent to commence all such negotiations, encouraging parties to commence negotiations. Similarly, the native title party's s 31(1)(a) submission does not specifically tailor information in relation to the two proposed leases. The grantee party did forward the heritage survey report to the native title party on 11 December 2012, but there appeared to be no specific response to that document prior to the mediations. As such, it appears there was some exchange of very basic information on these matter prior to the mediations, but nothing that could be considered an offer for the purposes of a s 31(1)(b) agreement. However, the fact that offers and draft agreements were not exchanged until the mediation commenced is not in itself evidence of a lack of good faith.

Assertion 2: 'The Grantee Party was unwilling to recognise the elected working group as the legitimate representatives of the Native Title Party in these negotiations' (NTP GF Contentions at 14-26, GP GF Contentions at 6.16-6.33)

[33] To support the above contention, the native title party relies upon the Tribunal synopsis and outcomes of the first mediation conference held on 21 January 2014 (NTP GF 7), the second mediation conference held on 17 March 2014 (NTP GF 8) and the letter from the grantee parties' representative dated 7 April 2014 (NTP GF 11 and GP GF 19). The grantee parties rely upon the same documents and the notes taken during the second Tribunal mediation conference by the assistant of the grantee parties' representative (GP GF 22).

[34] The native title party contends at the first Tribunal mediation conference held on 21 January 2014 the grantee parties' representative:

> ...queried the legitimacy and authority of the Working Group and when informed that the Working Group had the authority of the Kariyarra applicants, refused to entertain this position, suggesting that the Native Title Party should adopt a different decision-making procedure and authorise a single person to attend the [next mediation] conference (at 24).

[35] The Tribunal synopsis and outcomes note the native title party representative, Ms Kylie Chalmers, advised 'the claim group is currently engaged in law business, which is likely to run until the end of February. The working group is not expected to meet until March, at which point Ms Chalmers would obtain instructions':

> ...Member Cooms asked when parties can reconvene for a further mediation. Ms Chalmers suggested the second week of March, by which point she hoped to have instructions. Mr Green asked whether Ms Chalmers would be attending the proposed mediation with authorised representatives of the native title party. Ms Chalmers said that instructions would be taken on the grantee party's proposal, and she will try to progress the matter in the meantime. Ms Chalmers said that, from a practical point of view, it may not be possible to have the working group attend the conference. Mr Green maintained that the party obliged to negotiate is the native title party, namely the applicant in the claimant application. Ms Chalmers said the applicant represents the claim group, who have elected the working group to represent them in the negotiations. Mr Green argued that, if the applicant can authorise the working group, then it can also authorise persons to attend the mediation and undertake negotiations with a view to finalising an agreement. Ms Chalmers said that Mr Green's suggestion was not feasible or economical for the native title party, and suggested that the grantee party could fund a meeting if it wished to do so. Mr Green stated that (in the circumstances) the grantee party had explored every avenue with a view to expediting the negotiation of an agreement with the native title party. Ms Chalmers did not agree with that proposition.
>
> Mr Green stated that the grantee party expects the matters will be substantially progressed by the next mediation conference. Mr Green said that the grantee party is willing to expeditiously provide an agreement in final form and await the native title party's response. Ms Chalmers queried Mr Green's reference to an agreement 'in final form.' Mr Green clarified that the agreement will be a fully drafted document capable of being signed. It will not leave any matter undrafted, but is open for discussion. Ms Chalmers said she would consider the document.
>
> Mr Green agreed to provide the agreement within the next seven days, and Ms Chalmers agreed to review the agreement, seek instructions on the proposal and endeavour to provide a response by 10 March 2014. Member Cooms proposed that parties reconvene for a further conference on 17 March 2014. All agreed (NTP GF 7).

[36] The grantee parties contend 'there was nothing improper in seeking to discuss how negotiations may proceed more expeditiously' (at 6.21) by proposing alternate ways to progress the negotiations.

[37] As agreed at the first Tribunal mediation conference, the grantee parties' representative provided a draft agreement to the native title party representative on 28 January 2014 (GP GF 14). The native title party representative responded via email on

4 March 2014:

> I attach a further draft Agreement with proposed changes for consideration by the GP... Please note that the draft Agreement is provided subject to obtaining final instructions from my client and to the final authorisation by the a [sic] Kariyarra community.
>
> The next Kariyarra Working Group meeting will be help [*sic* – held] on 25 March 2014, which is proponent funded. By way of this email, I invite the GP to attend this meeting. (GP GF 16).

[38] A further email sent on the morning of 17 March 2014 on behalf of the native title party representative attached a budget estimate for the Working Group meeting advising the grantee parties' share would be $6.605.98 for a one hour meeting. On the afternoon of 17 March 2014, a second Tribunal mediation conference was held. The Tribunal synopsis and outcomes note:

> Mr Green advised that the grantee party could not fund a working group meeting, as requested by the native title party. Ms Chalmers advised that the grantee party would then need to wait for the next government-funded meeting to meet with the native title party, but a date for this has not yet been set (NTP GF 8).

[39] The notes taken during the second Tribunal mediation conference by the assistant of the grantee parties' representative indicate:

> Ken noted that the email attaching the YMAC Draft had invited the GP to a Kariyarra Working Group Meeting to be held on 25 March 2014, which is to be "proponent funded". Kylie acknowledged the invitation was only if the GP paid its share of the cost of the meeting... Ken said the GP declined that offer... Ken said the GP was happy to meet with the NTP on the basis that each paid their own costs (GP GF 22 at 7).

[40] The notes also indicate 'a lengthy discussion ensued about whether the NTP was the registered native title claimants or the native title claim group' (GP GF 22 at 2.4).

[41] The Tribunal synopsis and outcomes note:

> - Mr Green to provide a further amended agreement to Ms Chalmers by 7 April 2014.
> - Ms Chalmers to review the further amended agreement, seek instructions and revert to Mr Green by 5 May 2014....
>
> The next mediation conference is scheduled on Monday 12 May at 2.00pm (WST)
>
> (NTP GF 8)

[42] On 7 April 2014, the grantee parties' representative provided the further amended agreement, as well as a second alternate agreement and an accompanying letter to the native title party representative (NTP GF 11 and GP GF 19). Besides providing a brief explanation of two attached agreements, the letter also refers to the discussions between them at the second mediation conference regarding who constituted the native title party for the purpose of the negotiations mandated by s 31(1)(b) of the

Act:

> The view held by Ms Chalmers [was] that the "*native title party*"...was the Kariyarra native title claim group. In support of this view, Ms Chalmers referred to section 251B of the NTA. The contrary view put by myself was that the "*native title party*"...was the *registered native title claimant* for the Kariyarra native title claim. The issue was relevant to a number of amendments inherent in the NTP draft 2, including proposed deletion of any requirement for a Deed of Claimant Assumption to be signed. Ultimately, it was accepted between the negotiation parties that a fundamental difference of opinion existed between the Grantee Party and the Native Title Party. That course was appropriate in the circumstances because it allowed the Mediation Conference to proceed and in particular ensured time was available for the NTP draft 2 to be fully discussed.
>
> As part of the discussion, Ms Chalmers offered to subsequently provide reference to the relevant sections of the NTA and to relevant authorities, which offer I accepted. I would be grateful to receive those references. I assume the task is made easier by the subsequent email from Mr Edwards on 21 March 2014 which contained an overview of various sections of the NTA relevant to the point (NTP GF 11 and GP GF 19).

[43] The response from the native title party dated 6 May 2014 replied to the agreements offered by the grantee parties, and to the above:

> The NTP has previously advised the GP of the native title claimant's valid and authorised negotiation process for all Future Act matters; which is that negotiations take place with the duly authorised and elected working group, once an agreement is settled it is authorised at a properly notified and convened meeting of all Kariyarra native title claimants, which enables the Applicant to validly sign and bind all the Kariyarra native title claimants to the agreement.
>
> Further to the direction given by the NNTT on 21 March, the NTP submits that any further questioning or discussion regarding who constitutes the native title claimant, or of the Kariyarra native title claimant's authorised negation [*sic*- negotiation] process, by the GP does not satisfy the requirements of s 31(1)(b) to negotiate in good faith (GP GF 20).

[44] On the evidence provided, it appears that somewhat robust discussions occurred between the grantee and native title parties' representatives at the first and second mediation conferences. Despite such, at the first mediation conference, the grantee parties agreed to forward a proposed agreement and the native title party representative agreed to review the proposed agreement and seek instructions at the native title party's working group meeting in March (GP GF 12). Further, at the second mediation conference, the grantee parties agreed to meet with the native title party working group in March, provided each met their own costs, although that offer was declined by the native title party representative. From the evidence provided, it is unclear whether the native title party representative did seek instructions from the working group meeting held in March, despite agreeing to do so at the first mediation meeting. The grantee parties still pursued negotiations, forwarding further offers on 7 April 2014 (GP GF 19). The grantee parties also agreed to attend a third Tribunal

mediation conference on 12 May 2014, at which the native title party representative invited the grantee parties to contribute to a second working group meeting 'proposed for late May which is to be funded by various proponents. The meeting will only go ahead if sufficient funding is received' (GP GF 21). The grantee parties again declined to contribute financially and the native title party representative:

> ...informed parties there are no funds for a Government funded meeting this financial year. Once budgets have been allocated for the new financial year, Ms Chalmers will be attempting to arrange a meeting as soon as possible to discuss this matter as well as a number of others. Ms Chalmers is not able to seek instructions on the GP proposed agreements until she is able to meet with the group.

[45] The native title party contends it 'accepts as a matter of law that a refusal by the Grantee Party to fund the negotiation process is not of itself indicative of a failure to negotiate in good faith' and contends it 'did not insist that the Grantee Party fund negotiation meetings and it was not insisted that negotiations about the funding be a precondition to entering into negotiations' (at 21-23, citing *Gulliver v Western Desert Aboriginal Lands Corporation* (at [90]-[94]) and *Magnesium v PKKP* at ([56]-[65])). In considering the Tribunal's synopsis and outcomes from the three mediation conferences, this appears to be the case. However, it also appears from the synopsis and outcomes and the emails from the native title party representative (GP GF 16 and 20), that unless the grantee party contributed to one of the working group meetings proposed for 25 March and 28 May, the native title party representative could not proceed to seek instructions from the native title party working group at those meetings. It was not clear why instructions could not be sought - for example, whether this was a standing instruction from the native title party to their representative, or a policy decision of the representative body of the native title party. It appears that if the grantee parties wished to seek a negotiated outcome without contributing towards a 'proponent funded' working group meeting, they had to wait until the working group met in the 2014-2015 financial year at a Government funded meeting, and following that, await the scheduling of a wider claim group meeting for the group to consider endorsement of any agreement. Furthermore, it appears no final date for the Government funded working group meeting or the wider claim group meeting was communicated to the grantee parties.

[46] Section 31(1)(b) negotiations can be complex. The native title party decision making process itself is often a multi staged process, with negotiations taking place with a

working group, agreement being reached, the agreement being authorized at a wider claim group meeting, and the Applicant (those listed on the Register of Native Title Claims) signing the agreement and binding the claim group. In this process, the native title party legal representative has a complex task, which can take time and lead to delays and frustrations in negotiations. In relation to this present matter, it is possible that the native title party decision making process, and the step by step process of taking instructions, could have been more clearly articulated to the grantee parties in terms of the timing of meetings and the extent of any instructions which had been taken or were to be taken. However, I see no evidence that the native title party was failing to attempt to negotiate in good faith, or that the grantee party was unwilling ultimately to recognise the working group decision making process as a step in the negotiation process.

Assertion 3: 'The Grantee Party adopted a rigid non-negotiable position with respect to the agreement with the Native Title Party' (NTP GF Contentions at 27-30, GP GF Contentions at 6.34-6.37)

[47] The native title party contends the grantee parties' provision of agreements in 'final form' 'without providing any explanation for the necessity for those terms to be included...demonstrated an unwillingness to negotiate, or receive any input from the Native Title Party, on matters of substance' (at 27). As a counter to these contentions the grantee parties contend 'the provision of a proposed agreement in "*final form*" or "*signing form*" is best practice' (at 6.36) and that:

> 1) The NTP was welcome to request such an explanation; and
>
> 2) The NTP was welcome to suggest, as it did, substitute provisions
>
> In matters where the NTP is legally represented, it is reasonable to assume that the NTP has some awareness as to legal and commercial matters (at 6.34).

[48] The native title party contends the grantee parties 'ignored or refused most of the revisions to the agreement proposed by the Native Title Party' (at 28). However, the grantee parties contend it agreed 'to many of the NTP's proposed amendments to the First Draft', increased its initial royalty offer (at 5.3), participated in Tribunal mediation conferences and complied with the outcomes of those mediation conferences. A summary of the various offers and proposed agreements between the grantee parties and the native title party is compiled under 'Assertion 6' below.

[49] At paragraph 15 of its reply to the grantee parties, the native title party made a new submission, drawing to the Tribunals' attention a number of 'revisions' to the proposed agreement which were not adopted by the grantee parties in its counter offer of 7 April 2014 (GP GF 19), and contending the grantee parties 'appeared unwilling to offer any explanation or compromise on these matters'. At the good faith hearing on 9 October 2014, I allowed parties the opportunity to make oral submissions on this issue. The grantee parties' representative questioned whether the exclusion of a proposed clause or clauses in a counter offer was evidence of a lack of good faith and requested the Tribunal have regard to the letter attaching the counter offer (GP GF 19). The grantee parties' representative contended there was nothing in the letter that stated the grantee party was unwilling to consider the native title party's revisions, and furthermore, the native title party did not provide a response to the grantee parties' letter. While the hearing provided some further detail on various clauses exchanged in proposed agreements, I conclude there was nothing in those oral submissions which had not already been aired broadly by parties written submissions.

[50] I have reviewed the evidence provided by the parties, including the Tribunal synopsis and outcomes of the mediation conferences, draft agreements and proposed amendments, and find that parties did exchange proposed agreements, where various clauses were suggested and amendments made as per a usual negotiation process, and there was no evidence of lack of good faith by either party.

Assertion 4: 'The Grantee Party fostered a false sense of urgency with respect to negotiations on the agreement with the Native Title Party' (NTP GF Contentions at 31-34, GP GF Contentions at 6.38-6.44)

[51] Following the referral to Tribunal mediation, the native title party contends the 'putative need for urgency insisted upon by the Grantee Party is suspect and inexplicable in light of the lengthy periods of inaction by the Grantee Party'. Notably, it refers to the five year 'period of inaction' in respect of M45/800 between 2007 and 2012, the four month delay in supplying its submissions on M45/1228 to DMP and the native title party, and the six month 'inaction' following the native title party's s 31(1)(a) letter of 21 May 2013 up until the referral to Tribunal mediation on 4 December 2013 (at 31-34).

[52] The grantee parties contend the native title party does not explain how the alleged 'periods of inaction' disadvantaged the native title party and correctly contends this 'is a different question to whether actual negotiations were sufficient for the GP to have satisfied the threshold of having negotiated in good faith' (at 6.44).

[53] The grantee parties contend it was the Government party, not the grantee parties who requested mediation assistance 'without reference to the circumstances of the GP (and possibly the NTP)' (at 6.42). Following the request, the grantee parties funded a legal representative to participate in the mediation process, which the grantee parties contend 'was proper, including because the NTP is legally represented. Indeed the GP should be commended. Legal representation (arguably) facilitates more efficient negotiations.' However, the grantee parties contend 'there is an economic interest to the GP in having the matter resolved expeditiously and legal costs being minimised' (at 6.43). Furthermore, they contend the native title party 'does not explain how any "*insistence for urgency*" actually affected the NTP. All of the outcomes of the Mediation conferences were agreed to by the NTP. The time periods were not short' (at 6.41).

[54] The grantee parties contend their participation in Tribunal mediation conferences for approximately six months 'is a reasonable period for negotiations to be undertaken' (at 6.38) and that 'it was unclear when the Kariyarra Working Group might meet to consider the GP's proposal...If the GP had not lodged each S35 Application, it is unclear how quickly negotiations might have otherwise progressed' (at 6.38). In its reply, the native title party contends 'if the Grantee Party had been genuine about achieving a negotiated outcome... it is reasonable to expect the Grantee Party to have sought this clarification from the Native Title Party before simply terminating negotiations' (at 18). It contends 'the Grantee Party was simply "running through the motions" of the statutorily prescribed negotiation period without any genuine intention to negotiate in good faith with the Native Title Party' (at 20).

[55] I have reviewed the evidence provided by the parties, including the Tribunal synopsis and outcomes of the mediation conferences. Certainly very little appears to have happened between the grantee parties and the native title party between the s 31(1)(a) letters in May 2013, and the mediation which commenced in January 2014. Nevertheless, the grantee parties exchanged proposed agreements with the native title

party during the mediation process, and sought from the native title party a likely timeframe for any agreement to be finalised. As this did not appear to be likely to occur until sometime in the first half of 2015, with no date specified, it is reasonable for the grantee party to proceed to commence an arbitral process, to facilitate a commercially certain time period for his clients. Negotiations were free to be continued between parties. As such, I do not find lack of good faith on the part of the grantee parties in relation to this assertion.

Assertion 5: 'Unexplained change of position by the Grantee Party just as a meeting with the Native Title Party ... was in sight' (NTP GF Contentions at 35-40, GP GF Contentions at 6.45-6.49)

[56] The native title party contends the grantee parties:

> ...unreasonably and inexplicably changed its position by withdrawing its offer of an agreement with the Native Title Party... when it simultaneously applied for a s 35 determination, despite the advances which had been made in drafting an agreement for presentation to the Kariyarra Working Group (35).

[57] The grantee parties contend it is commonly accepted by the Tribunal that the making of a s 35 application, or referring to an intention to make such an application, once the statutory period has passed, cannot be relied upon to demonstrate lack of good faith (at 6.45 citing *Western Australia v Daniel* (at [95]) and cases therein). They also contend that whether or not their offer remained valid following the lodgement of the s 35 applications, the grantee parties 'made clear at the Directions Hearing held 10 July 2014 that it would reasonably consider any proposal from the NTP'. They contend 'That is a relevant consideration. The proposed directions were cast on that basis, with additional time granted to the NTP to make such proposal' (at 6.45). At the directions hearing on 10 July 2014, the native title party indicated they would present the grantee parties draft agreement to a 7 August meeting with the native title party working group. The grantee parties' representative indicated it was no longer an offer now the s 35 process was in place but they would still consider agreement with the native title party. The additional time granted was a further two weeks, with all other directions extended accordingly. The grantee parties indicated they would oppose any request for a s 150 conference due to time constraints.

[58] In relation to the native title party's contention (at 35) the grantee parties also

contend:

> it is unclear as to what "*advances*" the NTP is referring to. The GP is unaware of any drafting "*advances*" after 7 April 2014, being the date the GP provided revised proposed agreements... The S35 Applications were lodged on 16 June 2014, over two months following that date. The first Directions Hearing was held on 10 July 2014, over three months following that date. Nothing was provided by the NTP prior to those dates (at 6.45).

[59] The native title party contends:

> Furthermore, the Native Title Party had advised that it would be able to organise a meeting between the Kariyarra Working Group and the Grantee Party, at no expense to the Grantee Party, in the 2014-2015 financial year (at 37).

[60] The grantee parties contend:

> ...for approximately (if not in excess of) six months. The negotiations were subject to mediation by the Tribunal. That is a reasonable period for negotiations to be undertaken. Further, it was unclear when the Kariyarra Working Group might meet to consider the GP's proposal. The NTP Contentions suggest it was sometime prior 30 June 2015 [their emphasis]. If the GP had not lodged each S35 Application, it is unclear how quickly negotiations might have otherwise progressed. The NTP Contentions do not address that point (at 6.38)
>
> ...the GP does not understand the significance of the "2014-2015" financial year. There is nothing before the Tribunal which supports the assertion that funding was immediately available on 1 July 2014. Further, it is not clear who is being funded (at 6.49).

[61] It is reasonable the grantee parties did not view a meeting with the native title party to finalise any agreement was 'in sight', given the complexity of the native title party decision making process and given the native title party was unable to give a firm date for such a meeting. With reference to my considerations under 'Assertion 2' at [43]-[44] above, I find there is no basis for the native title party's Assertion 5 that this amounted to lack of good faith on the part of the grantee parties.

Assertion 6: 'The Grantee Party failed to make a reasonable offer to the Native Title Party' (NTP GF Contentions at 41-48, GP GF Contentions at 6.50-6.54)

[62] A summary of the various offers, proposed agreements and points of difference between the grantee parties and the native title party is as follows:

- 28 January 2014: Grantee parties' proposed agreement for the proposed leases offers a royalty of 20 cents per tonne (including CPI) of any mineral mined, and the agreement represents 'full and final satisfaction of all liabilities...claims or demands' for future Native Title compensation against the grantee parties (GP GF

14 at B3 and B8)

- 4 March 2014: Native title party counter offers with amendments to agreement which includes: all future adjacent or ancillary tenure; a counter offer of $1 per tonne (including CPI) of sand mined; a $5000 per annum (CPI increased) education allowance per tenement; $5000 per ancillary tenure grants; provisions for heritage surveys; a requirement for the grantee parties to negotiate in good faith to reach an agreement if it wishes to commence mining operations on a tenement for minerals other than sand; and accepts 'full and final satisfaction' clauses (GP GF 16 at B2, B7, H17-19)

- 18 March 2014: Tribunal synopsis and outcomes from the second mediation conference (held 17 March 2014) notes:

> Mr Green and Ms Chalmers discussed the amendments that Ms Chalmers had made to the draft agreement sent to her by Mr Green, and initially directed their discussion towards the inclusion or exclusion of a Deed of Assumption clause.
>
> Mr Green and Ms Chalmers then discussed the scope of the draft agreement and Mr Green confirmed that the grantee party wished for the agreement to only encompass the current two mining leases. They then discussed whether a heritage survey conducted over the tenement areas was adequate as this affected the inclusion of heritage clauses in the agreement. Ms Chalmers advised that she would need to possibly seek further anthropological advice as to the survey's adequacy but that there may be an issue of obtaining funding to do that.
>
> Mr Green and Ms Chalmers then turned to the issue of whether the agreement should survive if the native title party's native title claim is dismissed. Mr Green expressed the grantee party's view that it should not, while Ms Chalmers provided reasons why the native title party say that it should. They then also discussed the issue of compensation and advised that they were quite far apart in their proposals for compensation. Ms Chalmers advised that the native title party were unlikely to agree to the grantee party's proposal for compensation.

- 7 April 2014: Grantee parties' counter offer with two alternate agreements for the proposed leases only. The first agreement offers: 25 cents per tonne (including CPI) of sand; equivalent royalty paid to Government party for any other minerals; and 'full and final satisfaction' clauses. The second agreement offers: no royalty but removes 'full and final satisfaction' clauses, enabling the native title party to make future claims for Native Title compensation against the grantee parties (GP GF 19).

[63] The native title party contends:

> In response to the marked-up agreement from the Native Title Party the Grantee Party

> accepted little of the Native Title Party's suggestions and instead made two counter-offers. These offers were generally:
>
> (a) the Royalty Offer; and
> (b) the Non-Royalty Offer (at 43)
>
> The two alternate offers made by the Grantee Party were so unreasonable in the circumstances and permit the inference to be drawn that the Grantee Party was not engaging in a genuine attempt to negotiate an agreement (at 46).
>
> It is submitted that the Grantee Party's attempts to pressure the Native Title Party into choosing between two wholly unsatisfactory and unreasonable offers represents underhanded conduct on the Grantee Party's part and strongly demonstrates the Grantee Party's unwillingness to negotiate a genuine agreement (at 47).

[64] The grantee parties contend:

> As to [43] of the NTP Contentions, the GP says it acted reasonably in adopting certain portions of the NTP's proposed agreement provided on 4 March 2014. That document dealt with matters to which s 31(2) NTA applied, including unspecified future acts. It further sought to impose upon the GP an Aboriginal Heritage regime when an Aboriginal Heritage survey had shown there were no *Aboriginal sites* or *sites of particular significance* within the Inquiry Tenements. The exclusion of much of the NTP's proposed agreement was accepted by Ms Chalmers during the mediation conference on 17 March 2014 (at 6.52).

[65] As to paragraph 46 of the native title party's contentions, the grantee parties contend they were 'previously unaware that the two proposals were unacceptable to the NTP' (at 6.53):

> As to [47] of the NTP Contentions, the GP says it is unclear how the GP attempted to "*pressure the Native Title Party*". The GP simply made two alternate proposals. It did so on the basis of discussions at a Mediation Conference. It further did so to increase the likelihood of securing the NTP's agreement... It is unfortunate that the NTP did not respond to either of those offers (at 6.54).

[66] In its reply, the native title party contends 'the Grantee Party attempted to pressure the Native Title Party with the unenviable choice of either accepting one of the two wholly unreasonable and unsatisfactory offers... or proceeding to a costly arbitral determination before the NNTT' (at 30). I have considered these contentions and concluded it is reasonable for a grantee party to seek an agreement that is final, lasting and binding on both parties. I do note the counter proposal from the native title party (GP GF 16) included the same release from any further claim to compensation.

[67] I have reviewed the evidence provided by the parties and find there is no basis for the native title party's assertion 6 that this amounted to a lack of good faith on the part of the grantee parties.

Grantee parties' contentions regarding the failure of the native title party to negotiate in good faith (GP GF Contentions at 6.33, 6.4, 7.1-7.4, NTP GF Reply at 32-33)

[68] The grantee parties refer to *Placer v Western Australia* (at page 9), in which the Tribunal found that if a native title party fails to negotiate in good faith, that failure may impose a lesser standard on the Government party and the grantee party (GP GF Contentions at 4.9):

> In circumstances where the question of whether a grantee party or government party has negotiated in good faith is uncertain, the need to address the conduct of the native title party in detail may arise. The GP contends this inquiry is not one of those circumstances.
>
> However, the GP highlights in this matter that there is no evidence that the NTP during the period of negotiations, ether itself or by its agent the Kariyarra Working Group, at any time considered any request or proposal from the GVP or the GP. The only proposal put purportedly on behalf of the NTP was:
>
> > *provided subject to obtaining instructions...and to the final authorisation by the a [sic] Kariyarra community.* [GP GF 16]
>
> Further, there was great uncertainty when the NTP, either itself or by its agent the Kariyarra Working Group, might have been able to do so.
>
> Those matters are relevant considerations. In those circumstances, the GP says its conduct well exceeds that required to meet the requirements of s 35(1)(b) NTA (GP GF Contentions 7.1-7.4).

[69] In its reply, the native title party contends 'Ms Chalmers, as the legal representative of the Native Title Party, was fully engaged in these negotiations on behalf of the Native Title Party, as evidenced by her attendance at the various mediation conferences and extensive communications with the Grantee Party's legal representative in relation to the drafting of the agreements' (at 33).

[70] It is clear from the evidence that the grantee parties and the native title party had differing viewpoints and expectations regarding the length and format of negotiations which created a difficult relationship. The Tribunal is aware of the difficulties experienced by native title party legal representatives who, in order to achieve negotiated outcomes for their clients, must often navigate complex decision making and authorisation processes, insecure and transient funding, and competing negotiations with other grantee parties. However, the Tribunal is also aware how these difficulties can be costly to grantee parties in terms of timeframes, finances and

ultimately their relationships with both native title parties and their representatives. I do not find any evidence that the native title party failed to act in good faith in relation to the negotiations for this matter.

Determination

[71] I am satisfied the grantee parties negotiated in the manner required by s 31(1)(b) in this matter. According to s 36(2) of the Act, the Tribunal has the power to proceed to make a determination on the future act determination applications brought by the grantee parties in respect of mining lease applications M45/800 and M45/1228.

Helen Shurven
Member
23 October 2014

Attachment A

Good Faith submissions

Government party submission, received 8 July 2014:

- Mapping showing the location of M45/800 and M45/1228 in relation to the survey areas the subject of Aboriginal Heritage Survey Report, Anthropos Australis, dated September 2012 (see GP GF 5 below)('Govt mapping')

Native title party good faith submissions, received on 22 August 2014:

- Statement of contentions ('NTP GF Contentions')
- Affidavit [signed statement] of Ms Kylie Chalmers, native title party representative, signed 21August 2014
- s 29 notice for M45/800 ('NTP GF 1')
- Government party's initial negotiation letter for M45/800, dated 2 February 2007 ('NTP GF 2')
- s 29 notice for M45/1228 ('NTP GF 3')
- Government party's initial negotiation letter for M45/1228, dated 14 January 2013 ('NTP GF 4')
- Grantee parties submissions regarding M45/800 and M45/1228, dated 1 May 2013 ('NTP GF 5')
- Native title party s 31(1)(a) submissions to Government party regarding M45/800 and M45/1228, received 21 May 2013 ('NTP GF 6')
- First mediation outcomes and synopsis, dated 21 January 2014 ('NTP GF 7')
- Second mediation outcomes and synopsis, dated 18 March 2014 ('NTP GF 8')
- Third mediation outcomes and synopsis, dated 12 May 2014 ('NTP GF 9')
- Native title party email and attached amendments to draft agreement proposed by grantee parties, dated 4 March 2014 ('NTP GF 10')
- Grantee parties letter regarding proposed agreements dated 7 April 2014 ('NTP GF 11')
- Grantee parties' proposed agreement, dated 3 April 2014 ('NTP GF 12')
- Grantee parties' proposed agreement, dated 3 April 2014 ('NTP GF 13')

- Native title party email in response to grantee parties' 7 April 2014 letter, dated 6 May 2014 ('NTP GF 14')

Grantee party good faith submissions, received on 8 September 2014

- Statement of contentions ('GP GF Contentions')
- Statement of facts ('GP GF Facts')
- Application for M45/800, dated 13 March 1998 ('GP GF 1')
- Government party's initial negotiation letter to native title party for M45/800, dated 2 February 2007 ('GP GF 2')
- Government party's initial negotiation letter to grantee parties for M45/800, dated 2 February 2007 ('GP GF 3')
- Grantee parties' letter in response to Government party's initial negotiation letter, dated 15 February 2007 ('GP GF 4')
- Aboriginal Heritage Survey Report, Anthropos Australis, dated September 2012 ('GP GF 5')
- Grantee parties' letter to native title party and Government party regarding L45/213, L45/259, L45/311 and L45/312 and attachments, dated 11 December 2012 ('GP GF 6')
- Government party's initial negotiation letter to grantee parties for M45/1228 dated 14 January 2013 ('GP GF 7')
- Government party letter to grantee parties regarding request for referral to Independent Person for L45/213, L45/259, L45/311 and L45/312, dated 25 January 2013 ('GP GF 8')
- Grantee parties submissions regarding M45/800 and M45/1228, dated 1 May 2013 ('GP GF 9')
- Native title party s 31(1)(a) submissions to Government party regarding M45/800 and M45/1228, emailed 20 May 2013 ('GP GF 10')
- Tribunal email to negotiation parties, dated 17 December 2013 ('GP GF 11')
- Tribunal email to negotiation parties attaching first mediation outcomes and synopsis, dated 21 January 2014 ('GP GF 12')
- Grantee parties email to negotiation parties proposing amendment to first mediation outcomes and synopsis, dated 22 January 2014 ('GP GF 13')

- Grantee parties email to negotiation parties attaching proposing agreement, dated 28 January 2014 ('GP GF 14')
- Tribunal email to negotiation parties attaching amended first mediation outcomes and synopsis, dated 3 February 2014 ('GP GF 15')
- Native title party email and attached amendments to draft agreement proposed by grantee parties, dated 4 March 2014 ('GP GF 16')
- Native title party email to negotiation parties, dated 17 March 2014 ('GP GF 17')
- Tribunal email to negotiation parties attaching second mediation outcomes and synopsis, dated 18 March 2014 ('GP GF 18')
- Grantee parties letter attaching proposed agreements, dated 7 April 2014 ('GP GF 19')
- Native title party email in response to grantee parties' 7 April 2014 letter, dated 6 May 2014 ('GP GF 20')
- Tribunal email to negotiation parties attaching third mediation outcomes and synopsis, dated 15 May 2014 ('GP GF 21')
- Affidavit of Robert John McKenzie, assistant to grantee parties' representative, affirmed 8 September 2014, attaching notes from the second mediation conference ('GP GF 22')

<u>Native title party good faith submissions in reply, received on 3 October 2014</u>

- Contentions in reply ('NTP GF REPLY')