

# Good faith negotiation—compensation

## *Griffin Coal Mining Co Pty Ltd/Nyungar People/Western Australia* [2005] NNTTA 100

Deputy President Sumner, 23 December 2005

### Issues

The issues summarised here are:

- does the obligation to negotiate in good faith found in s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA) require the government party to facilitate and actively participate in the negotiation process, in particular to facilitate discussions on matters of compensation with respect to grants of tenements under the *Mining Act 1978* (WA); and
- is the native title party obliged to make submissions about the effect of the future act on registered native title rights and interests?

### Background

This determination relates to the proposed grant of four coal mining licences under the *Mining Act 1978* (WA). The main question dealt with by the Tribunal was whether the grantee party had negotiated in good faith prior to lodging an application under s. 35 for a future act determination under s. 38 of the NTA in relation to the grant of those licences. Negotiation in good faith is one of the pre-conditions to the Tribunal making a determination in relation to such an application. The native party alleged the government and grantee parties did not negotiate in good faith. The Tribunal observed that the role the government played in the negotiations was essentially facilitative, consistent with current practice in Western Australia.

### Good faith obligations of the government party to negotiate on compensation

This contention was withdrawn by the native title party but the Tribunal considered it in the determination both for completeness and because it may be relevant to other good faith negotiation inquiries relating to the government party's obligations—at [16].

The Tribunal was of the view that:

- in the case of a grant of mining tenements, the obligation to negotiate in good faith places an obligation on the grantee party only to negotiate about compensation for the effect of the future act on native title rights and interests;
- its findings in *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation/Western Australia* [2005] NNTTA 88, summarised in *Native Title Hot Spots* Issue 17, applied to the obligations of the government party in negotiations in good faith about mining tenements under the Mining Act;
- overall, the grantee and the government parties had negotiated in good faith—at [28], [36], [56] to [82].

### **Is grantee party obliged to negotiate about s. 33 payments?**

The native title party originally contended that the negotiations were frustrated in that it was not given an opportunity to negotiate payments of the kind contemplated by s. 33(1) of the NTA because of the failure of the grantee party to respond to its requests.

The Tribunal:

- referred to the remarks made by the Federal Court on the scope of the obligation to negotiate about s. 33(1) payments at [48] to [56] in *Brownley v Western Australia* (1999) 95 FCR 152 (*Brownley*);
- noted this decision was made before the 1998 amendments to the NTA, when only the government party had an obligation to negotiate in good faith, and before s. 125A was inserted into the Mining Act, which expressly provides that parties other than the government are liable to pay any compensation to native title holders;
- referred to *Western Australia v Dimer* (2000) 163 FLR 426 at [126], where it was said, in relation to s. 33, that the grantee party may not be obliged to reach an agreement, but it is required to receive and consider a proposal from the native title party;
- pointed to earlier determinations in which, on the facts, it had accepted that the obligation to negotiate in good faith about s. 33(1) payments also extended to the government party—at [40] to [43].

After noting these earlier decisions had not considered whether s. 33(2) affected the authority of *Brownley*, the Tribunal was satisfied that it did not:

However, if a native title party wishes to request the grantee party to satisfy any obligation to pay compensation by s 33(1) payments then it can make a proposal to this effect and the grantee party would be obliged to consider it in the manner explained in *Brownley*. To satisfy the jurisdictional precondition of negotiation in good faith there is no obligation at large on the grantee party to negotiate in good faith about s 33(1) payments but only insofar as they are seen as a means of satisfying the obligation to pay compensation for the effect of the future act on native title. Such negotiations are not excluded by s 31 (2)—at [44].

The Tribunal held that the insertion of s. 125A into the Mining Act relieved the government party of the obligation to pay compensation to native title parties or to negotiate about s. 33(1) payments for the grant of mining tenements. However, the government party may still need to consider, if a proposal is made, whether to impose a s. 33(1) payment as a condition to a mining tenement, where it has been agreed between the native title party and the grantee—at [45].

### **Is the native title party obliged to make submissions?**

The government party invited all the negotiation parties to make submissions and the native title party declined. It was common ground that it was not obliged to do so.

The Tribunal:

- referred to its interpretation of ss. 31(1)(a) and (b) as together laying down a procedural framework which involved the native title party submissions providing a basis upon which the negotiations could proceed;
- noted that the fact that a native title party does not make submissions is a factor that can be taken into account in determining whether the other parties have negotiated in good faith—at [50].

The Tribunal considered it desirable for the native title party to make submissions or at least articulate its concerns about the future act during negotiations. The argument that it was too costly to make submissions in all future act matters was rejected by the Tribunal, with it being said that where there is a proposal for productive mining, it should not be beyond the capacity of the native title party to consider the impact of the proposal on its native title rights and interests and other matters in s. 39(1)(a) of the NTA—at [52] to [54].

### **Decision**

The Tribunal found that the government and grantee parties did negotiate in good faith and it could conduct a further inquiry and make a determination on the s. 35 application.