

# Future act - negotiation in good faith

## *Australian Manganese Pty Ltd/Western Australia/Stock* [2010] NNTTA 53

DP Sumner, 16 April 2010

### Issue

The issue was whether Australian Manganese Pty Ltd (the grantee party) had negotiated in good faith as required by the *Native Title Act 1993* (Cwlth) (the NTA) before making a future act determination application (FADA) under s. 35 of the NTA to the National Native Title Tribunal.

### Background

The grantee party lodged a FADA on the basis that negotiation parties had been unable to reach agreement. The native title party (the registered native title claimant for the Nyiyaparli People's claimant application) contended the grantee party had not negotiated 'in good faith with a view to obtaining the agreement' of the native title party to the grant of a mining lease (the lease) as required under ss. 31(1)(b) and 36(2) of the NTA.

The lease area is in the eastern Pilbara in Western Australia. It is situated wholly within the area covered by the Nyiyaparli People's registered native title claim. The lease area is part of the grantee party's Davidson Creek Iron Ore Project. Some of the members of the Nyiyaparli People's native title claim group are also members of the Jigalong Community based at Reserve 41265 for the use and benefit of Aborigines (the Jigalong reserve). Earlier negotiations between the parties leading to an agreement about the related Robertson Range Iron Ore Project provided the background to the dispute between the parties in this case. Those negotiations, and the agreement reached, involved dealing with the government party's requirement that the grantee party reach agreement with the Jigalong Community to access the Jigalong reserve—see *Australian Manganese Pty Ltd/Western Australia/ Stock* [2008] NNTTA 38 and *Australian Manganese Pty Ltd/Western Australia/ Stock* [2008] NNTTA 163. However, the lease involved in this case was not on the area subject to the Jigalong reserve.

The grantee asserted the agreement reached in the earlier negotiations applied to all future acts in the native title party's claim area. The native title party contended:

- the agreement was confined to tenements on the Jigalong Reserve;
- the grantee adopted a rigid non-negotiable position for a whole of project or tripartite agreement and would not negotiate specifically about the lease;
- because the lease area was outside the Jigalong reserve, negotiations should not have involved the Jigalong community.

The Tribunal held:

- earlier negotiations demonstrated that the grantee party made genuine efforts to negotiate with the native title party to obtain agreement on other tenements in the grantee's projects;
- the evidence supported the grantee party having negotiated for a land access agreement (LAA) that included the lease;
- the fact that the grantee party was prepared to consider a separate agreement on the lease was indicative of negotiating in good faith;
- the LAA terms, and correspondence related to it, were evidence the grantee party proposed a substantial agreement in the negotiations, the lease was a subject of those negotiations and the grantee party was prepared to reach agreement about the lease once a counter proposal was received from the native title party;
- there was no impediment to making a finding that negotiation in good faith had occurred in relation to a particular tenement where negotiations about it were conducted in the context of a broader project;
- there was no breach, or absence, of good faith 'such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct' by grantee party;
- therefore, the requirements of s. 31(1) had been met and the Tribunal had power to conduct an inquiry and make a future act determination—at [31], [33] to [40], [44] to [47] and [50], referring to *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141; [2009] FCAFC 49 (summarised in *Native Title Hot Spots Issue 30*) at [27] and [49].

The Tribunal noted that the records of the meeting in which the earlier agreement was made were ambiguous and that, if the Tribunal had not found there was subsequent evidence to satisfy good faith negotiation obligations, oral evidence would have been required to clarify the intentions of the parties.

### **Decision**

While there was some dispute over the scope of the earlier agreement, the Tribunal held the grantee party negotiated in good faith in the subsequent negotiations and during Tribunal mediation over the proposed grant.