

## ***Fortescue Metals Group Ltd/Western Australia/Taylor* [2011] NNTTA 66**

Member O'Dea, 15 April 2011

### **Issue**

In these right to negotiate proceedings, the native title party contended the grantee party had not negotiated in good faith as required pursuant to s. 31(1)(b) of the *Native Title Act 1993* (Cwlth) because the grantee party's legal representative had a conflict of interest. The National Native Title Tribunal found that the grantee party had negotiated in good faith.

### **Background**

Yamatji Marlpa Aboriginal Corporation (YMAC), the representative body for the relevant area, was the native title party's legal representative. The native title party was the registered native title claimant for an application made on behalf of the Njamal People. Sukhpal Singh was engaged by Fortescue Metals Group Limited (FMG), the grantee party, as a land access lawyer. However, between November 2005 and September 2008, Mr Singh was employed by YMAC as Senior Legal Officer and then as Deputy Principal Legal Officer. The native title party contended that:

- during his employment at YMAC, Mr Singh acted for the native title party in various matters, including another FMG project;
- Mr Singh's involvement as a negotiator on behalf of FMG in this matter, in circumstances where he had a 'clear' conflict of duty and interest, 'amounted to a failure on the part of the grantee party to negotiate in good faith';
- Mr Singh previously acted for the native title party and as a result possessed confidential and privileged information;
- this prejudiced the Njamal People's ability to engage in negotiation on a fair and reasonable footing.

The Tribunal noted it must focus on whether or not there had been negotiation in good faith and the critical issue therefore was the conduct of the grantee party, not Mr Singh's behaviour. Member O'Dea reviewed the case law on the duty of loyalty and the duty of confidentiality that continues after a legal practitioner-client relationship ceases where a practitioner has obtained confidential information—at [29] and [56] to [65].

### **Decision**

The Tribunal held (among other things) that:

- although there was evidence Mr Singh acted on behalf of Njamal in relation to Pilbara-wide negotiations with another mining company, no evidence was adduced that identified any specific circumstance where Mr Singh was shown to have acted for the native title party in relation to Njamal;
- where confidential information has been identified, the principles discussed in the case law were pertinent to the native title party's contentions;
- however, no confidential materials were identified as being in Mr Singh's possession and nor was any information that was at risk of disclosure by Mr Singh to the grantee party identified;
- it could not be concluded that the grantee party acted unreasonably by involving Mr Singh in the negotiations;

- the indicia often applied by the Tribunal in relation to good faith do not include the question of a breach of a duty of confidentiality of a solicitor to one of the parties participating in the negotiations—at [50], [55], [62], [70] and [75] and [70]. The indicia referred to can be found in *Western Australia v Taylor* (1996) 134 FLR 211; [1996] NNTTA 34.

Therefore, it was found that the grantee party had negotiated in good faith as required s. 31(1)(b).

**Section 169 appeal filed**

The native title party has filed an appeal under s. 169 seeking to have the Tribunal's decision set aside.