

# Negotiation in good faith — allegation of dishonesty, obligation to supply information

## *Strategic Minerals Corporation NL/Kynuna/Queensland* [2003] NNTTA 83

Deputy President Sumner, 9 July 2003.

### Issues

The main issues before the National Native Title Tribunal were:

- what approach should the Tribunal take if a native title party asserts that the grantee party has not been honest or reasonable in negotiations conducted pursuant to s. 31(1)(b) of the *Native Title Act 1993* and has, in fact, negotiated with the intention to induce the native title party to accept its offer by deceiving that party?
- what obligations do the grantee party have in relation to supplying information about the proposed future act to the native title party during the negotiations?

### Allegations of dishonesty

Dishonest or deceitful conduct, if established, would amount to bad faith in the subjective sense, in that the grantee party would not have conducted itself in an open and honest way during the negotiations as required—at [39].

Where an allegation of this kind is made, the Tribunal is of the view that the onus of establishing it would normally rest with the party making the allegation. It was noted that, when considering an allegation of dishonesty, the standard of proof is the civil standard (i.e. on the balance of probabilities). However, in applying that standard, the Tribunal must be conscious of the gravity of the allegations—at [40].

### Provision of information to the native title party

The Tribunal was of the view that, if the information provided by the grantee party is insufficient to assess any impact on native title rights and interests, then this may impact on whether negotiations in good faith can occur. However, every case must be considered on its merits. The Tribunal noted that:

- it is 'desirable and indicative of good faith in negotiations' for a grantee party to keep a native title party up-to-date on relevant developments during the course of the negotiations and to disclose any relevant new information to the native title party, such as the company's annual reports or reports to the Australian Stock Exchange;
- a failure to disclose relevant information or documents may amount to a failure to negotiate in good faith. For example, deliberately or inadvertently failing to disclose information that is in the sole possession of the grantee may provide such an indication;

- where the relevant information is publicly available, it is not unreasonable to expect representatives acting for the native title parties to search for that information—at [178] to [182].

**Decision**

Among other things, the Tribunal was not satisfied that the allegations of dishonesty or deceit had been established. Nor was it determined that the failure to provide certain publicly available information relevant to the proposed mine indicated a lack of bad faith.