



Editor: Cynthia Ganesharajah

Volume 4

October 2009

Issue Paper No. 3

Negotiation in Good Faith under the Native Title Act: A Critical Analysis*

Sarah Burnside

Sarah Burnside is a solicitor at the Yamatji Marlpa Aboriginal Corporation ('YMAC') and works with native title claim groups in the Pilbara region of Western Australia.

Abstract

*After briefly exploring the historical and ideological origins of the right to negotiate embodied in s31(1)(b) of the Native Title Act, this paper analyses the relevant case law in which the Tribunal and Court gave substance to the vague and sparse language in s31(1)(b). It is suggested that notwithstanding the body of existing legal authority, the right to negotiate remains inherently difficult to enforce from the perspective of native title claimants and holders. In particular, the paper explores the recent Full Court decision in *FMG Pilbara Pty Ltd v Cox*, which arguably limited the value of the right to negotiate. The paper concludes that while the benefits of a statutory right to negotiate should not be underrated, s31(1)(b) requires amendment if it is to be both substantive and enforceable.*

INTRODUCTION

The future acts regime in the *Native Title Act 1993* (Cth) ('NTA') accords registered native title claimants and determined native title holders limited procedural rights, the strongest of which is the right to negotiate ('RTN') in s31(1)(b). This paper examines the origins of the RTN and considers arguments as to the benefit of such rights for marginalised groups and peoples. It then analyses the ways in which 'good faith negotiations' have been conceptualised by the National Native Title Tribunal ('Tribunal') and Federal Court of Australia ('Court'). In particular, the paper considers the significance of the recent Full Court decision *FMG Pilbara Pty Ltd x Cox*¹ upholding a strictly literal interpretation of s31(1)(b) NTA. The paper argues that decisions such as *Cox* demonstrate that the RTN's potential value is unduly limited by the terms of the NTA and the ways in which they have been interpreted by the Tribunal and the Court. It then concludes with a brief discussion of ways in which s31(1)(b) NTA could be amended.

* The views expressed in this paper are not necessarily those of YMAC. The author thanks Tessa Herrmann, Tess Burton, David Ritter, Carolyn Tan and Penelope Muecke for their thoughtful comments. A shorter version of this paper, titled "'Take it or leave it": How not to negotiate in good faith', was presented at the Native Title Conference held by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in Melbourne on 3 June 2009 and discussed by a panel including Susan Philips and Martin Dore. The author thanks the participants and AIATSIS' anonymous referees.

¹ *FMG Pilbara Pty Ltd x Cox* [2009] FCAFC 49.

I. THE ORIGINS OF GOOD FAITH

In a free market system, private contractual relations are rarely regulated; there is a presumption that contracting parties operate at arms' length and act in their own best interests.² Absent allegations of unconscionability or fraud, the courts generally will not enquire into the circumstances in which a private contract was created. The concept of a statutory obligation to negotiate capable of enforcement is therefore somewhat unusual. The right to bargain originated in American workplace relations law, with the 1935 *National Labor Relations Act* making it an unfair labor practice for an employer to refuse to bargain collectively with employees' representatives.³ The requirement of 'good faith' – a common law concept – was inserted to overcome the problem presented by those employers who were 'tempted to engage in the forms of collective bargaining without the substance'.⁴ The right to bargain and the duty to negotiate in good faith were also included in the former *Industrial Relations Act 1988* (Cth)⁵ and the new *Fair Work Act 2009* (Cth).

The adoption of good faith bargaining in industrial relations law represented both an attempt to address the often substantial power imbalance between the contracting parties and recognition of the public interest in 'industrial peace'.⁶ The latter in particular was viewed as forming part of a 'social contract' of wider relevance than that between employer and employee. Good faith negotiation can, however, be viewed in a more sinister light. In the analysis of critical legal theorists, twentieth-century employment law absorbed the grievances of workers against both individual employers and the broader labour system. By creating a bargaining unit for workers that gave them a stake in the capitalist system, labour law robbed Marxist critiques of their power. Once this sleight of hand had been effected, the law was used to further the goals of management: industrial peace and a disciplined labour force.⁷ Critical legal theorists concluded that progressive movements and individuals had been 'fooled by the promise of rights'.⁸

II. THE 'SPECIAL RIGHT': A CONTROVERSIAL HISTORY

A similar argument can be made about the RTN,⁹ which was created during the policy debates following the decision of *Mabo v Queensland (No. 2)*¹⁰ as to the best means of codifying native title. The RTN applies to certain future acts¹¹ including the grant of mining leases. If s31(1)(b) NTA applies, all parties

must negotiate in good faith with a 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.¹²

² M Harper, 'The Implied Duty of "Good Faith" in Australian Contract Law', *Murdoch University Electronic Journal of Law*, vol.11, no.3, 2004.

³ *National Labor Relations Act 1935*, s.8(5).

⁴ A Cox, 'The Duty to Bargain in Good Faith', *Harvard Law Review*, vol.17, no.8, 1958, p 1413.

⁵ Section 170QK of the *Industrial Relations Act* empowered the Australian Industrial Relations Commission to make orders for the purpose of ensuring that the parties negotiating an agreement acted in good faith. In *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 Industrial Reports 385, the Full Bench ultimately found that the Commission could not make an order requiring a party to negotiate in good faith.

⁶ Cox, above n4, p 1434.

⁷ See G E White, 'The Inevitability of Critical Legal Studies', *Stanford Law Review*, vol.36, no.1/2, 1984, p 650. In a 1941 case, Circuit Judge Kerner noted: 'Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties...to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented'; see *National Labor Relations Board v Boss MFG Co* 29 USCA 157 (1941).

⁸ S Pritchard, 'The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice', *Australian Journal of Human Rights*, vol.2, no.1, 1995.

⁹ The point has also been made regarding the native title system as a whole. Stuart Bradfield of the Australian Institute of Aboriginal and Torres Strait Islander Studies has noted that the effect of land rights and native title regimes has been that from the mid-1970s 'questions about Indigenous relationships to land have been posed more in terms of the (domestic) law of property than constitutional or international law' and 'have been played out within a political context which regards national unity as paramount'; see S Bradfield, 'Separatism or Status-Quo? Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC', *Australian Journal of Politics and History*, vol.52, no.1, 2006, p 84. See also pp 89-94.

¹⁰ (1992) 107 ALR 1 ('*Mabo*').

¹¹ 'Future act' is defined in s233 NTA as, essentially, an act which validly affects native title.

¹² Section 31(1)(b) NTA.

Any party can seek a determination that the future act may be done under s31 NTA provided that six months have elapsed since the notification date. The Tribunal is only empowered to make a determination, however, if it is satisfied that there has been negotiation in good faith.¹³ If a native title party alleges that a grantee or government party has failed to negotiate in good faith, it must provide evidence to satisfy the Tribunal that this is so.¹⁴ Having established that the grantee and government parties have negotiated in good faith, the Tribunal will then make a merits-based determination as to whether the act can be done, done subject to conditions, or not done.¹⁵ In so doing, the Tribunal is not able to impose a condition requiring payment to native title parties calculated by reference to the amount of profits made, any income derived, or any things produced by the grantee.¹⁶ Accordingly, any compensation or other benefits must be won during the negotiation period, which need only take place within a six month period.

The 1993 Commonwealth Discussion Paper on *Mabo* contended that the principle of equality and the *Racial Discrimination Act 1975* (Cth) established an ‘important benchmark for the treatment of native title’, including the treatment of activities taking place on land subject to claims.¹⁷ The Paper then argued that any land management regime needed to give native title equal protection with equivalent interests in land and waters. Accordingly, any legislative response to *Mabo* needed to ‘be aimed at achieving mutually acceptable arrangements under which the interests of those wishing to use the land are reconciled with the interests of the native title holder’.¹⁸ The preamble to the NTA reflects this preoccupation, stating that:

acts that affect native title should only be able to be validly done if...every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.¹⁹

This ‘special right’ can be understood as an expression of the political tradition ascendant in the post-Cold War era and exemplified by Blairism in the UK and the Clinton government in America. The explicitly anti-ideological ‘third way’ narrative saw discrete socio-economic groups as stakeholders rather than as parties with inherently opposed interests. Notwithstanding the changes made to it in 1998,²⁰ the RTN reflects the liberal belief that these stakeholders could readily settle any differences through ‘neutral’ processes. This viewpoint, with its optimistic presumption of a world free of ideological difference or power imbalance, is open to critique – some parties will have bigger or more effective ‘stakes’ than others.²¹ From a critical legal standpoint, the NTA’s future acts regime can be characterised as a means of subverting a post-colonial movement for ‘land justice’ within a bureaucratic process designed to give ‘certainty’ to those who profit from Indigenous land. For their part, native title claimants and holders were given a

¹³ Section 36(2) NTA. In the recent decision of *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (*FMG v Cox*) at [11], the Full Federal Court characterised s36(2) as affecting the ‘power’ of the Tribunal to make a determination, rather than affecting its ‘jurisdiction’ to do so. The Court noted that 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’.

¹⁴ Section 36(2) NTA has the practical effect of placing an ‘evidential burden’ on the party alleging lack of good faith negotiations: *Strategic Minerals Corporation NL/ Allan Kyuna and Ors on behalf of the Woolgar Group/ Queensland* [2003] NNTTA 83 at [7].

¹⁵ Section 38(1) NTA.

¹⁶ Section 38(2)(a)-(c) NTA.

¹⁷ Ministerial Committee on *Mabo*, ‘*Mabo: The High Court Decision on Native Title*’, Ministerial Committee on *Mabo*, Australian Government, June 1993, p 6.

¹⁸ *Ibid* pp 60-61.

¹⁹ Preamble, NTA. In *Sampi v State of Western Australia* [2005] FCA 777 at [942], French J observed that ‘the Preamble stands as a continuing declaration of the moral foundation of the [NTA] and informs its construction’.

²⁰ See *Native Title Amendment Act 1998* (Cth). Among other changes to the NTA, the 1998 amendments reduced the scope of future acts to which the RTN applies. For instance, mining tenements sought for the sole purpose of infrastructure do not trigger the RTN but only the right to be consulted; see s 24MD(6B)(b) NTA.

²¹ The Australian author and public intellectual Clive Hamilton, a critic of the third way narrative, noted that its advocates ‘shied away from discussion of the motive force of political and social change – that is, the sources, forms and distributions of power’. Writing in 2006, Hamilton contended that the ‘Third Way [was] no longer the subject of polite conversation’; see C Hamilton, ‘What’s Left? The Death of Social Democracy’, *Quarterly Essay*, vol.21, 2006, pp 14 and 13. See also pp. 13-19.

‘good faith’ standard which, in its vagueness, exemplifies the argument that rights are ‘indeterminate, incoherent and unstable’.²²

This sceptical view has been challenged with the argument that rights can be of use to oppressed groups who have historically been deprived of them.²³ Indigenous peoples, long denied input into decisions affecting their traditional country, may understandably place more value in the RTN than in critical theory.²⁴ Legal rights also provide a platform within which grievances against the established order can be articulated. Absorption by the mainstream, then, offers at least the possibility of agitating within it.²⁵ The RTN represents a minimal safeguard for native title claimants and holders who wish to fulfil their cultural obligations to protect country and to obtain a share in the profits derived. Engagement with mining companies via the procedural rights in the NTA can also be viewed as a continuation of a claim group’s traditional rights to control access to their country and the use of resources from it.²⁶

While the processes mandated by the NTA may be ‘neutral’, they take place against an inescapably political arena – that of access to lucrative mineral resources. The RTN is problematic not because it is a right *per se*, but because it operates within the context of a political economy in which mineral exploitation has long been ascendant.²⁷ The distance between the theory of s31(1)(b) negotiations and the underlying political and economic reality is beyond the scope of this paper and is inherently unlikely to be resolved through legislative intervention. Taking the existence of the NTA as read, and on the assumption that native title claim groups are unlikely ever to secure a right of veto, a statutory right to negotiate is arguably the best, or the least worst, option for native title claimants. Rather than ‘trashing’,²⁸ the RTN this paper sets out some of its limitations, leading to the conclusion that s31(1)(b) NTA requires amendment to guide the discretion applied by the Tribunal and the Court.

III. REQUIREMENTS OF GOOD FAITH NEGOTIATION UNDER THE NTA

The NTA does not define ‘good faith’. Perhaps as a result of the evidentiary burden falling on parties alleging a failure to comply with s31(1)(b), the understanding that has emerged from Tribunal decisions is generally phrased in the negative: negotiation in good faith is negotiation that is not in bad faith. Previous decisions have provided clarity as to the elements of negotiation²⁹ and a set of overriding principles. Among other things, the Tribunal will ask whether, ‘viewing the negotiations overall...the negotiation parties [acted] honestly and reasonably’.³⁰ At a more specific level, the Tribunal has provided indications (commonly known as the ‘*Njamal* indicia’) of what might be termed ‘bad faith’, such as the adoption of a rigid non-negotiable position, a failure to make counter-proposals, or a tendency to shift position just as an agreement seems within reach.³¹

²² Pritchard, above n8.

²³ African American critical race scholar Patricia Williams noted in 1991 that rights still felt ‘so new in the mouths of most black people’, so ‘deliciously empowering to say’; see P Williams, ‘The Pain of Word Bondage’ in P Williams (ed) *The Alchemy of Race and Rights*, Harvard University Press, Cambridge, 1991, p 153.

²⁴ In the author’s experience, claimants will often allude to the relative novelty of having proponents meet with them, recalling the dismissive attitudes of industry and government in previous years. Although many native title claimants and holders now have considerable negotiating experience, memories of being overlooked by mining companies and government remain fresh in people’s minds. To the indignant question, ‘why didn’t you lot ever come and talk to us before?’ the more honest proponents will respond ‘we didn’t have to’.

²⁵ ‘The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken, or smuggled)’; see Pritchard, above n8.

²⁶ See N Löfgren, ‘Compulsory Acquisition and the Right to Negotiate’, *Land, Rights, Laws: Issues of Native Title*, vol.1, no.25, 1998, p 4.

²⁷ For a discussion of the powerful ‘belief that Australia’s greatest asset is its mineral and energy resources’ and role this belief plays in national politics, see G Pearse, ‘Quarry Vision’, *Quarterly Essay*, vol.33, 2009.

²⁸ ‘Trashing’ involves the deconstruction of legal orthodoxies to expose the internal inconsistencies that lie beneath the ‘neutral’ surface of liberal legal discourse; see K Upston-Hooper, ‘Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi’, *Victoria University of Wellington Law Review*, vol.28, 1998, p 700.

²⁹ Negotiation involves ‘communicating, having discussions or conferring with a view to reaching an agreement’: *Western Australia v Taylor* [1996] NNTTA 34.

³⁰ *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 96 FLR 52 per Deputy President Sumner.

³¹ In *Western Australia v Taylor* (1996) 134 FLR 211 (‘*Taylor*’), the following indicia were set out: unreasonable delay in initiating communications in the first instance; failure to make proposals in the first place; the unexplained failure to communicate

There is only so much that can be expected of grantee and government parties. Unreasonable behaviour by a native title claim group can negate its allegations that another party has not negotiated in good faith.³² In one 1998 case, a native title party was held to have acted unreasonably in refusing to negotiate until the grantee parties signed a 'confidentiality clause'. Member Wilson concluded:

the Tribunal does not accept that Native Title Parties can have it both ways. They cannot adopt a position in relation to the negotiation which effectively precludes any further development in the negotiations and then subsequently claim that good faith negotiations have not proceeded.³³

The good faith standard of 'reasonableness' is applicable to all negotiating parties. Tactics that Indigenous groups have used in the past (with varying success) such as the active obstruction of mining activity, public protest or media campaigns, are likely to be found to constitute a lack of good faith as 'unilateral conduct which harms the negotiating process'.³⁴ If native title claim groups wish to obtain the benefits of the NTA's statutory scheme, they must play by its rules.

Although native title parties have alleged a lack of good faith in nearly 30 cases, in only four instances has the Tribunal found that a grantee or government party has not acted in good faith.³⁵ Further, having found that good faith negotiation and other procedural requirements have been complied with, the Tribunal has only once made a determination that a future act must not be done.³⁶ It must be noted that the Tribunal is restricted by the evidence presented to it and, crucially, by the terms of the NTA.³⁷ The NTA was premised on the continued ability of industry to access and utilise land subject to claims;³⁸ the paucity of decisions in favour of native title parties reflects the Act's focus on speed and the facilitation of development. This fixation seems to have permeated throughout the system. A 'fact sheet' on the Tribunal's website describes the RTN simply as 'a procedure...that is followed to make sure that...future acts can be validly done'.³⁹

with the other parties within a reasonable time; failure to contact one or more of the parties; failure to follow up a lack of response from the other parties; failure to attempt to organise a meeting between the native title and grantee parties; failure to take reasonable steps to facilitate and engage in discussions between the parties; failing to respond to reasonable requests for relevant information within a reasonable time; stalling negotiations by unexplained delays in responding to correspondence or telephone calls; unnecessary postponement of meetings; sending negotiators without authority to do more than argue or listen; refusing to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement; shifting position just as agreement seems in sight; adopting a rigid non-negotiable position; failure to make counter-proposals; unilateral conduct which harms the negotiating process; refusal to sign a written agreement in respect of the negotiation process or otherwise; and failure to do what a reasonable person would do in the circumstances.

³² *Pajingo v Queensland* QF00/2 29 September 2000 at 11 – 27.

³³ *Western Australia/ Strickland and others on behalf of the Maduwongga People; M Forrest and others on behalf of the Karonie People/ D R Crook and G K Edson* [1998] NNTTA 7

³⁴ *Taylor*.

³⁵ See *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211, *Western Australia/Dimer/Equus Limited* [2000] NNTTA 290, *Cox v FMG Pilbara Pty Ltd* [2008] NNTTA 90 and *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35.

³⁶ *Western Desert Lands Aboriginal Corporation/ Western Australia/ Holocene Pty Ltd* [2009] NNTTA 49.

³⁷ For instance, in determining whether an act can be done, the Tribunal is required, *inter alia*, to have regard to 'the economic or other significance of the act to Australia, the State or Territory concerned' (s 39(1)(c) NTA). For a response to criticisms of the Tribunal's role in the future act process, see C Sumner, 'Getting the Most of the Future Act Process', presentation to the National Native Title Conference 2007, Cairns, 7 June 2007, pp 27-36.

³⁸ One of the NTA's 'main objects' is 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings'; see s. 3(b) NTA.

³⁹ National Native Title Tribunal, 'Native Title Facts: The Right to Negotiate', *Native Title Facts*, viewed 12 June 2009,

<<http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Fact%20sheets/Fact%20Sheet%20The%20right%20to%20negotiate%20December%202007.pdf>>.

The Limits of Good Faith

The RTN is burdened by several limitations which stem both from the terms of the NTA and the narrow interpretation of these terms by the Tribunal and the Court. Native title as a set of proprietary rights can generate economic benefit for claimants and holders, who are able to bargain with proponents using the RTN.⁴⁰ Their ability to do so is reduced, however, by the Court's finding that good faith does not require a grantee party to make 'reasonable substantive offers or concessions to reach agreement'.⁴¹ Further, although negotiation can encompass a wide variety of matters,⁴² the entitlement to negotiate is enforceable only with respect to the effect of a future act on the claimant group's registered rights and interests.⁴³ This limitation ignores the survival and adaption of Indigenous cultures in the post-contact era, constructing native title claimants and holders as persons frozen in time whose only legitimate interests are a demarcated set of rights to hunt, fish, gather and camp.

The financial capacity of native title claimants and holders to engage in negotiations is also limited. In the recent Native Title Payments Report, the Government-appointed Working Group noted the 'foundation principle in any significant future act negotiation...that the traditional owners should have available to them advice and representation of a similar quality as the mining company or other proponent'.⁴⁴ This goal of a 'level playing field' is currently unachievable by virtue of the significant under-resourcing of Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs).⁴⁵ The Working Group noted that in some cases, proponents are 'left with no practical choice other than to meet the costs of both parties in the negotiations', with these financial contributions constituting 'an important top-up'.⁴⁶ It is generally accepted good practice within the mining industry for proponents to fund the negotiation process. In a recent decision, the Tribunal indicated that a grantee party which reneged on a commitment to fund negotiations would not be acting in good faith.⁴⁷ Absent an agreement to the contrary, however, good faith negotiation does not require a proponent to fund the negotiating process.⁴⁸ The overall concept of reasonableness 'does not require a grantee party to engage in altruistic behaviour or to make concessions not warranted by standard commercial practices'.⁴⁹

It also seems unlikely that grantee parties are obliged to meet with members of the native title party, as distinct from their lawyers. In one decision the Tribunal considered an NTRB's assertion of the importance of the 'key protocol...that the proponent should meet with the traditional owners and explain their position'.⁵⁰ The Tribunal

⁴⁰ While the native title system can generate financial benefits for registered claim groups, this is not the aim of the NTA. Graeme Neate, the President of the NNTT, notes that 'far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. Native title was never going to provide extensive outcomes for all Indigenous Australians.' G Neate, 'Native Title: Is it a Means of Overcoming Indigenous Disadvantage?', speech delivered at the Rotary District Conference, Phillip Island, Victoria, 24 March 2007, p 22.

⁴¹ *Strickland & Anor v Western Australia* (1998) 85 FCR 303. Nicholson J held that it was not for the Tribunal to assess the reasonableness of offers made during the negotiations. The Tribunal is, however, 'permitted to have regard to the reasonableness or otherwise of [offers] if it assists in the overall assessment of a party's negotiating behaviour': *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 per Deputy President Sumner at [93]-[94].

⁴² See s33 NTA.

⁴³ Section 31(2) NTA.

⁴⁴ Australian Government, *Native Title Payments Report*, Native Title Payments Working Group, Australian Government, Canberra, 2008.

⁴⁵ *Ibid.* It was noted as early as 1993 that 'negotiation is a resource intensive process, and governments would need to be prepared to make resources available'; see Ministerial Committee on Mabo, above n17, p 67.

⁴⁶ Australian Government, above n47. The Working Group also suggested that in the circumstances 'it would be desirable to develop and circulate best-practice conditions attaching to negotiation funding provided by mining companies and other proponents, to ensure that it is applied for its intended purpose'.

⁴⁷ *Holocene Pty Ltd/Western Australia/Western Desert Lands Aboriginal Corporation* [2009] NNTTA 8 at [41]. Deputy President Sumner found at [43] that the native title party had not supplied adequate evidence that the grantee had failed to meet its commitments to the negotiating process. In his view at [47], he could 'only conclude that there was a misunderstanding about this issue'.

⁴⁸ *Western Australia v Daniel* (2002) 172 FLR 168 at [146].

⁴⁹ *Cox v FMG* at [29].

⁵⁰ *Hunter and Others on behalf of the Nyangumarta People* (98/65); *Sebastian and Others on behalf of the Rubibi People* (99/23); *Nangkiriny and Others on behalf of the Karajarri People* (WC00/2)/*Gulliver Productions Pty Ltd; Indigo Oil Pty Ltd; Maneroo Oil Company Limited/Western Australia*, [2003] NNTTA 70 ('Hunter') at [11].

accepted as ‘quite reasonable’⁵¹ the grantee parties’ eventual decision that they ‘saw no purpose in the trip to Broome’ given the distance between the parties’ negotiating positions.⁵² Deputy President Franklyn concluded that the evidence did not ‘provide support for the Native Title Parties’ contention that the grantees refused and failed to meet with them’.⁵³ The fact that ‘until the final breakdown of negotiations’, meetings had been ‘envisaged’ was accepted as evidence that the grantee parties had not refused or failed to meet.⁵⁴ The Deputy President concluded that ‘[w]hether or not face-to-face meetings are necessarily culturally appropriate must...depend on the circumstances of the case and the nature of the meetings’.⁵⁵

Clearly, there is no presumption that a face-to-face negotiation meeting is required. Legal representatives seeking to establish the existence of such a requirement will need to provide evidence to support it. It also seems that requests for a grantee party to meet with a native title party need to be made at the outset of negotiations and not postponed until late in the process. It should also be noted that the Tribunal has previously found that in making an assessment under s35, it is ‘relevant to consider the financial circumstances of the grantee party and [its] overall capacity to engage in negotiations’. Accordingly,

a negotiation party with considerable resources, access to professional advice and the ability to organize and attend meetings will be required to act reasonably having regard to its ability to negotiate. Conversely the conduct of a negotiation party with limited resources, little or no access to professional services and difficulties in attending...meetings, will be evaluated in that context.⁵⁶

It seems likely that a grantee party which reasonably asserts that it cannot afford to attend a meeting (which may involve flying or driving to a remote location) will not be found to have failed to negotiate in good faith.⁵⁷

Negotiating primarily through one’s legal representatives is not uncommon in commercial transactions and it is often the preferred approach of grantee and government parties.⁵⁸ In a future act context, however, this form of negotiation would seem inappropriate.⁵⁹ These are not standard business transactions in which the ‘base facts’ are easily ascertainable: a claim group’s legal representatives may not be aware of sensitive issues surrounding particular areas on country. Further, negotiations that take place exclusively between legal representatives can exacerbate the sense that NTA processes represent no more than ‘business as usual’ whereby traditional owners are excluded from decisions that affect their country.

The expectation that a proponent will come and meet with a claim group can be viewed as a continuation of the commonly accepted cultural protocol that permission should be sought from traditional owners before entering country.⁶⁰ A refusal to meet with the claimant group (absent a genuine reason) also contradicts the sentiment in the NTA’s preamble that ‘every reasonable effort’⁶¹ ought to be made to secure agreement to a future act. Further, it is

⁵¹ *Hunter* at [36].

⁵² *Hunter* at [12].

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Doxford/Janice Barnes, Jessie Diver, Owen McEvoy, Deree King, Patrick Fisher (Wangan and Jagalingou)/State of Queensland* [2008] NNTTA 54 per Deputy President Sosso at [37]

⁵⁷ *Ibid.*

⁵⁸ It has previously been observed that ‘senior decision makers’ within industry and government have a tendency to regard ‘meetings with claimants as a costly and time-consuming extra that should be avoided in favour of a reliance on lawyers meeting with bureaucrats somewhere, far away, in a capital city’; see D Ritter, ‘Doing the Business: A Few Observations on the Working Group Model for the Provision of Native Title Legal Services’, *Indigenous Law Bulletin*, vol.5, no.28, 2003.

⁵⁹ In another context, the Tribunal has previously observed that negotiations relating to the doing of a future act do not constitute ‘normal private commercial litigation where tactical gamesmanship may be acceptable’: *Minister for Lands, State of Western Australia/Strickland/Champion/Dimer* [1997] NNTTA 31 at p 16.

⁶⁰ In the author’s experience, claimants in the Pilbara region of Western Australia invariably maintain that parties wishing to carry out an activity on country must speak to them directly.

⁶¹ Preamble, NTA. It should be noted, however, that the interpretive use of the preamble is limited. However, it is notable that in *Strickland & Anor v Western Australia*, the Court said the reference to ‘every reasonable effort’ being made to secure the agreement of the native title parties was no grounds for reading down the express words of s 31(1)(b) itself. Accordingly, it held

debatable whether meaningful negotiations regarding the effect of a specific future act on native title rights and interests can take place without the direct involvement of the holders of those rights and interests.

Bad Faith, Window-Dressing and Pettifoggery

The RTN has historically been viewed with suspicion by industry and government.⁶² The former West Australian Government in particular was criticised for treating its requirements under the RTN as ‘mere window-dressing on the procedure for the granting of mining tenements’.⁶³ Western Australia is the only government party to date which has been found not to have negotiated in good faith in the test case of *Western Australia v Taylor*,⁶⁴ with the result that the Government ‘could not proceed with a large number of future act determination applications that had already been lodged until it had established a protocol for negotiation in good faith and complied with its obligation’.⁶⁵

The Tribunal has also considered token adherence to the NTA by grantee parties. In *Western Australia/ Dimer/ Equus Limited*⁶⁶ the Tribunal found that bare compliance with ‘formal steps’ in the s31 process, absent a ‘genuine attempt to reach agreement’, will not satisfy the duty to negotiate in good faith.⁶⁷

In *Dimer*, the Tribunal concluded that the grantee party:

came close to adopting a rigid or preconceived position that it would not enter an agreement containing conditions that extended the obligations of the grantee party to any significant degree beyond the conditions...likely to be imposed by the Tribunal if it made a favourable determination about doing the act.⁶⁸

Further, Member Lane observed that it was ‘hard to avoid the conclusion that [the grantee party’s] main objective was to participate in the process so as to enable it to invoke the jurisdiction of the Tribunal as soon as reasonably practicable after the period of 6 months had elapsed’.⁶⁹ This objective was manifested in the company’s failure to supply sufficient information or to make counterproposals and its repeated emphasis on its right to apply for a determination.⁷⁰ Member Lane concluded that if ‘a party engages with the process, but not the substance of

that it was not for the Tribunal to assess the reasonableness of offers made during the negotiations – see Neate, above n42. See also Sumner, above n40, p19.

⁶² Addressing a group of pastoralists following the 1996 *Wik* decision, former Prime Minister John Howard characterised the RTN as ‘a licence for people to come from nowhere and make a claim on your property’ which was ‘un-Australian and unacceptable’: Hon. John Howard MP, ‘Address to Participants at the Longreach Community Meeting to Discuss the Wik 10 Point Plan, Longreach, Queensland’. Reproduced in Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia’s international obligations under the Convention on the Elimination of all Forms of Racial Discrimination (CERD)*, Canberra, 2000, p 278.

⁶³ R Bartlett and A Sheehan, ‘The Duty to Negotiate’, *Aboriginal Law Bulletin*, vol.3, no.78, 1996.

⁶⁴ Deputy President Sumner’s initial conclusion was that the Tribunal was not empowered to dismiss an application under s35 for non-compliance with the requirement to negotiate in good faith: *Minister for Mines (WA)/Taylor/Mullan* [1996] NNTTA 10. In *Walley v Western Australia, Western Mining Corporation Limited and National Native Title Tribunal* [1996] FCA 1564, the Federal Court found that the Tribunal had erred in law in deciding that it did not have the power to dismiss an application on the grounds that the government party had negotiated in good faith. The matter was referred back to the Tribunal, which found in *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211 that the government party had failed to negotiate in good faith. Subsequently, s36(2) was inserted into the NTA as part of the 1998 amendments, stating that a determination under s35 must not be made ‘if any negotiation party satisfies the arbitral body that any other negotiation party (other than a native title party) did not negotiate in good faith’.

⁶⁵ Sumner, above n40, p 19.

⁶⁶ [2000] NNTTA 290.

⁶⁷ *Western Australia/Dimer/Equus Limited* [2000] NNTTA 290 (‘*Dimer*’). Similarly, the former Australian Industrial Relations Commission has ruled that if ‘a party is only participating in negotiations in a formal sense, but not bargaining as such, then they may not be “negotiating in good faith”’: *Public Sector, Professional Scientific, Research Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1995) 36 AILR 372 at p 421.

⁶⁸ *Dimer* at p 39.

⁶⁹ *Dimer* at p 43.

⁷⁰ *Dimer* at p 40.

negotiations, it risks a finding that it has done so only as a prelude to making an application under s35 rather than with a view to reaching agreement, and consequently, that it has not discharged its obligation under s31(1)(b).⁷¹

Notwithstanding the Tribunal's decision in *Dimer*, it is arguable that the vague and limited language of s31(1)(b) NTA effectively imposes a requirement *to be seen to be* negotiating in good faith. It is thus in the interest of all parties to create a paper trail in support of their bona fides. A grantee party will generate and store information – letters, emails, and other communications with a native title party or its representatives – to support a determination in the event that an agreement is not reached. Native title parties will in turn accumulate evidence with which to oppose an application, anxious to put 'on record' any perceived flaws in a proponent's conduct. Even in an atmosphere of seeming openness and goodwill, parties are constantly aware of the potential for an application under s35 NTA.⁷²

IV. GOOD FAITH AND BAD FAITH: SOME RECENT DECISIONS

The requirements of good faith being both limited and now fairly well established, only an unusually careless proponent risks being found to have failed to meet the threshold. The Working Group on Native Title Payments noted recently that 'there are still companies (and governments) who aim towards minimal compliance with the "right to negotiate" and other future act provisions and processes of the NTA'.⁷³ The cynical observer may conclude that, provided such entities actively engage in discussions, refrain from repeated threats to lodge applications under s35, and provide information to other parties,⁷⁴ they will not fall foul of the good faith test. The possibility of a kind of veneer of good faith was addressed a decade ago in *Brownley v Western Australia*, in which Lee J stated that if a party

purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith. Delay, obfuscation, intransigence and pettifoggery would be indicia of such conduct.⁷⁵

The possibility of an 'ulterior purpose' is obvious: the avoidance of contractual obligations to any native title claim groups.⁷⁶ The determination process in s35 was clearly intended to constitute a 'last resort' to a negotiated agreement.⁷⁷ However, as the anthropologist Diane Smith has noted, 'the strategic nature of the future act arena means that the parties may be disinclined to negotiate in good faith'.⁷⁸ Such a party could take the approach of sending letters, attending meetings, making insubstantial offers and purporting to consider counter-offers within a six month period. It could then declare that negotiation has failed, make an application under s35 NTA and ultimately succeed in having its tenement granted absent any written agreement with a native title claim group. Establishing the existence of such a purpose, though, would be extremely difficult. A finding of what might be termed 'active' bad faith would require the presentation of substantial evidence as well as effectively obliging the arbitral body to impugn a government or grantee party.⁷⁹

⁷¹ *Dimer* at p 43.

⁷² Diane Smith notes that 'the right to negotiate exists...within a wider political economy of native title which directly influences the strategic behaviour of parties to the negotiating process'; see D Smith, 'From humbug to good faith? The politics of negotiating the right to negotiate' in D Smith and J Finlayson (eds.) *Fighting over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, 1997, p 93.

⁷³ Australian Government, above n47.

⁷⁴ The good faith requirement to provide relevant information was considered in *Strategic Minerals Corporation NL/ Kynuna on behalf of the Woolgar Group/ Queensland* [2003] NNTA 83. At [179], Deputy President Sumner characterised the grantee party's failure to provide a relevant document to the native title party as a 'lapse in ideal negotiating behaviour' which was insufficient to constitute a lack of good faith. Sumner noted that the document was publicly available and that it was 'not unreasonable to expect representatives acting for native title parties involved in negotiations with a public company to research information about it which is publicly available'.

⁷⁵ *Brownley v Western Australia* [1999] FCA 1139 ('*Brownley*') per Lee J at [25].

⁷⁶ Contractual obligations on proponents set out in agreements negotiated under the NTA may include the payment of compensation, the involvement of the native title claim group in heritage and environment protection, and employment and training opportunities.

⁷⁷ Bartlett and Sheehan, above n65.

⁷⁸ See Smith, above n75, p 99.

⁷⁹ This underlying problem was tacitly addressed when the Tribunal emphasised that even a grantee party which was not deliberately acting disingenuously can still fail to negotiate in good faith; see *Cox v FMG* at [74-75] and [55].

Cosmos v Mineralogy: Failure to Negotiate

In a welcome move, however, the Tribunal has again recently demonstrated its willingness to look beyond the surface of purported negotiations when provided with evidence. *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd*⁸⁰ concerned a grantee party which had failed to negotiate with two overlapping claim groups. There had been no negotiation whatsoever with the first native title party, the Yaburara & Mardudhunera claim group ('YM'); the grantee party simply sent two letters to the wrong address. Having (unsurprisingly) received no response, the grantee party did not seek to make contact by other means. Subsequently, the grantee party received a Notice of Change of Solicitor of the YM. Its failure to then make contact with the YM's new legal representative was held to be 'fatal to its contention that it was negotiating in good faith'.⁸¹

Negotiations *prima facie* progressed much further with the second native title party, the Kuruma Marthudunera claim group ('KM'). The grantee party attended four mediation meetings facilitated by the Tribunal in Perth and a meeting of the Working Group established by the KM to negotiate on its behalf. The Tribunal noted, however, that:

In reality, there were never any real negotiations, simply set piece meetings, almost none of which were initiated by the grantee party, where each party articulated its bargaining position without any real compromise or attempt at engagement.⁸²

The Tribunal found that the representatives of the grantee party who attended the Working Group meeting 'only gave a presentation and made no efforts to either engage with the representatives of the [KM] or negotiate with them'.⁸³ The grantee party's failure to make any counter-proposals and its 'take it or leave it' approach⁸⁴ led the Tribunal to the conclusion that it had 'made no serious attempts to reach an accord with the second native title party'.⁸⁵ Indeed, it had adopted an 'unduly confrontational...aggressive approach which was doomed to fail'.⁸⁶

Cosmos concerned an application for an exploration licence under the *Mining Act 1978* (WA) ('MA'). Exploration licences under the MA are regarded as 'low impact' future acts; the State advertises them with a statement that they attract the NTA's expedited procedure provided that the grantee party offers to sign a standard heritage agreement with the relevant registered native title claim group.⁸⁷ The Tribunal in *Cosmos* noted that the greater the possible impact of the future act on registered native title rights and interests, 'the greater the obligation imposed on the non-native title parties to negotiate about those possible impacts'.⁸⁸ This proportionate analysis does not 'take place in a vacuum'. The Tribunal considered that a negotiation party may 'exhibit such unsatisfactory behaviour that irrespective of the possible impact of the proposed future act, the party has negotiated in bad faith'.⁸⁹ By implication parties do not necessarily have to meet a 'lesser standard' in the case of exploration tenements. Despite the relatively 'low impact' nature of the proposed future act in this instance, the grantee party's failure to engage with the KM's 'legitimate and long-held concerns' regarding cultural heritage were so unreasonable in the context that it had failed to negotiate in good faith.⁹⁰

⁸⁰ [2009] NNTTA 35

⁸¹ *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 ('*Cosmos*') at [66]. Member Lane had observed in *Dimer* that if 'parties do not negotiate because they fail to communicate at all, it is impossible to conclude that they have negotiated in good faith'; see *Dimer* at p. 31. Member Sosso agreed with this statement in *Cosmos*, with one caveat: 'a failure to actually communicate is not an indication of lack of good faith if the party who is the subject of the allegation of bad faith has used their best endeavours to engage'; see *Cosmos* at [60].

⁸² *Cosmos* at [91].

⁸³ *Cosmos* at [84].

⁸⁴ In this particular instance, the grantee party refused even to read a written heritage agreement provided by the KM and its only 'offer' was compliance with existing legislation; see *Cosmos* at [14] and [83].

⁸⁵ *Cosmos* at [84].

⁸⁶ *Cosmos* at [84] and [91].

⁸⁷ Department of Mines and Petroleum, *Native Title Act Process*, Western Australian Government, viewed 12 June 2009, <<http://www.dmp.wa.gov.au/4327.aspx>>.

⁸⁸ *Cosmos* at [32].

⁸⁹ *Cosmos* at [33].

⁹⁰ *Cosmos* at [91]. See also [88]-[90].

The decision in *Cosmos* is to be welcomed for its acknowledgement that a grantee party cannot satisfy the good faith test by passively going ‘through the motions’.⁹¹ The mere provision of information and attendance at a meeting will not be sufficient. It suggests, however, that only extreme behaviour – such as the failure even to read and consider a written agreement – will be found to fall short of negotiation in good faith under the NTA.

Cox v FMG: Substantive Negotiations

The proposition that s31(1)(b) NTA, as interpreted by the Court and Tribunal, will be satisfied by all but the most extreme negotiation tactics is supported by the recent Full Federal Court decision of *FMG Pilbara Pty Ltd x Cox*.⁹² This case concerned both the first native title party, the Puutu Kurnti Kurruma and Pinikura (‘PKKP’) native title claim group and the second native title party, the Wintawari Guruma prescribed body corporate (‘WG’). The grantee party was involved in discussions with both PKKP and WG about a Negotiation Protocol and claim-wide Land Access Agreement (‘LAA’).⁹³ Negotiations on the LAA had not reached a satisfactory conclusion at the time of the grantee party’s s35 application regarding M47/4104 (‘Mining Lease’). The Mining Lease was included in the draft LAA but the grantee party did not specifically negotiate about it with either of the native title parties prior to making its s35 application.⁹⁴ Further, negotiations that took place with PKKP were predominantly focused on finalising the terms of a negotiation protocol rather than a comprehensive agreement. Negotiations with WG had progressed further but had largely focused on one issue, that of financial compensation, and ‘had not been productive’.⁹⁵

PKKP in particular argued that the grantee had failed even to identify the Mining Lease as a ‘priority tenement’ as it had done in the case of other tenements sought to be included in the LAA.⁹⁶ There had been no negotiation about the effects of the Mining Lease on the registered native title rights and interests of either PKKP or WG. The grantee party argued that the wording in s31(1)(b) did not oblige it to negotiate ‘*about* the grant of the proposed tenement’ [emphasis added].⁹⁷ Rather, it could simply negotiate *with a view* to having its tenement granted, so negotiation about a general agreement, with no specific reference to a particular tenement, would still satisfy s31 NTA.⁹⁸

At first instance, Deputy President Sosso rejected the grantee party’s interpretation, confirming that the requirement to negotiate about the doing of the act in the context of its effects on native title cannot be avoided absent an explicit agreement to that effect.⁹⁹ With respect to WG, Sosso also found that ‘there was an obligation placed on the grantee party if it believed that the broader LAA process was stalled or incapable of being resolved, to then revive the negotiations about the proposed tenement’, concluding that it ‘would be unreasonable and contrary to the requirements of s31(1)(b) for the grantee party to claim that it had fulfilled its duty to negotiate in good faith to obtain the doing of the future act, when it relied upon failed general negotiations which never even substantively addressed the proposed tenement’.¹⁰⁰ Sosso also noted that while ‘the duty to negotiate in good faith does not require that an agreement must be reached, it does require...negotiations aimed at reaching an agreement’.¹⁰¹

Sosso confirmed that even a grantee party not deliberately acting disingenuously could fail to negotiate in good faith.¹⁰² The language he employed in his rejection of PKKP’s contention that the grantee had ‘engaged in

⁹¹ *Cosmos* at [91].

⁹² [2009] FCAFC 49.

⁹³ *Cox v FMG* at [12], [16] and [17].

⁹⁴ *Cox v FMG* at [18] and [25].

⁹⁵ *Cox v FMG* at [81].

⁹⁶ *Cox v FMG* at [32], [60] and [61].

⁹⁷ *Cox v FMG* at [52].

⁹⁸ It has been noted in the context of other areas of law that the phrase ‘with a view to’ has ‘a subjective element’, which could undermine the objectivity of the good faith test; see *Phillips v William Felton and Co Pty Ltd* (Federal Court of Australia, unreported, 17 November 1992) per Beaumont, Einfield and Lee JJ.

⁹⁹ *Cox v FMG* at [52].

¹⁰⁰ *Cox v FMG* at [82].

¹⁰¹ *Cox v FMG* at [92].

¹⁰² See *Cox v FMG* at [74-75] and [55].

disingenuous conduct amounting to obfuscation and pettifoggery’,¹⁰³ however, was to prove problematic on appeal. Briefly, the grounds for PKKP’s contention were as follows:

- the grantee made representations to the effect that the Mining Lease would be negotiated at a later time but then applied for a determination without informing PKKP of its intention to do so, thus avoiding meaningful negotiations regarding the Mining Lease;
- the grantee claimed that the promise to negotiate in respect of the granting of the Mining Lease at a future time was in itself a negotiation in respect of the granting of the Mining Lease and hence a fulfilment of its obligation to negotiate under s 31(1)(b) NTA;
- the grantee remained silent when it was aware that the false representation that negotiations about Mining Lease would occur in the future was being relied upon by the PKKP to their detriment; and
- the grantee wrote to the government party stating that it was negotiating with PKKP in respect of the grant of the Mining Lease while assuring PKKP that the negotiations would be deferred to future negotiations over a whole of claim agreement.¹⁰⁴

Sosso rejected these arguments, stating that ‘the proper inference to be drawn from the evidence [was] that the grantee party discharged its duty fairly and conscientiously... There is no evidence that the grantee party deliberately avoided negotiating about the proposed tenement and engaged in deliberately misleading behaviour...designed to avoid engaging in meaningful negotiations with [PKKP]’.¹⁰⁵ The language employed by Sosso was notable for its tact. The Deputy President inferred that the grantee ‘had from the outset a genuine desire to reach accord with the native title parties’,¹⁰⁶ and ‘genuinely and honestly attempted to progress negotiations’,¹⁰⁷ in ‘a professional and honest manner’,¹⁰⁸ but simply ‘acted too quickly in lodging its future act determination application’.¹⁰⁹ In rejecting PKKP’s contentions, Sosso seemed to characterise them as arising out of a ‘more sinister interpretation’ of the negotiations.¹¹⁰ Sosso’s conclusion – that the cause of the grantee party’s ‘precipitate action’ was ‘unclear, other than a mistake as to the legal entitlements of the grantee party’¹¹¹ – sits uneasily with the obvious ‘ulterior purpose’ of obtaining a tenement with no contractual obligations attached.¹¹²

FMG v Cox: Negotiating With a View to Obtaining Agreement

Sosso’s decision was overturned by the Full Federal Court, setting a precedent that arguably limits the value of the RTN. The Court dismissed Sosso’s findings with regard to PKKP that negotiations must be more than ‘embryonic’,¹¹³ arguing that the NTA ‘makes no reference to the parties reaching any particular stage in their negotiations’ prior to making an application under s35 NTA.¹¹⁴ The fact that the negotiations ‘had reached only a preliminary stage’ at the time the grantee party lodged its application under s35, and had not concerned the specific future act in respect of which the application was made, was found not to constitute a failure to negotiate in good faith.¹¹⁵ The Court gave little weight to the fact that much of the six month period involved the finalisation of a negotiation protocol, rather

¹⁰³ *Cox v FMG* at [71].

¹⁰⁴ *Cox v FMG* at [71].

¹⁰⁵ *Cox v FMG* at [74].

¹⁰⁶ *Cox v FMG* at [74].

¹⁰⁷ *Cox v FMG* at [74].

¹⁰⁸ *Cox v FMG* at [76].

¹⁰⁹ *Cox v FMG* at [75].

¹¹⁰ *Cox v FMG* at [76].

¹¹¹ *Cox v FMG* at [77].

¹¹² See page 15 above.

¹¹³ *Cox v FMG* at [91] and [92].

¹¹⁴ *FMG v Cox* per Spender, Sundberg and McKerracher JJ at [23]. For his part, Sosso had found that there was ‘a “status” which must be reached before any negotiation party seeks arbitration, and that “status” is that the non-native title parties have negotiated in good faith. Such “status” is not easy to determine, but if the jurisdiction of the Tribunal is challenged, the Act itself mandates that an assessment must be carried out to determine if either the government or grantee parties have not negotiated in good faith’; see *Cox v FMG* at [54].

¹¹⁵ *FMG v Cox* at [30].

than the LAA itself. The passage of the statutory time period was all that was required.¹¹⁶ PKKP's argument that negotiations ought to be substantive, and be directed to the relevant future act, was characterised by the Court as 'a gloss on the statutory provisions' which placed 'a fetter on a negotiation party's entitlement to make an application under s35'.¹¹⁷

This finding sits at odds with the obligation imposed on grantee and government parties sincerely to attempt to reach agreement.¹¹⁸ It is difficult to see how such an intention can be manifested by unilaterally ending negotiations while they remain at a preliminary stage. The Court also failed to engage with Sosso's reasoning that good faith negotiation required 'substantive negotiations on the relevant future act'.¹¹⁹ Negotiation protocols are not uncommon in s31(1)(b) negotiations; one of the *Njama* indicia for a lack of good faith set out in *WA v Taylor* was 'refusal to sign a written agreement in respect of the negotiation process or otherwise'.¹²⁰ The Court's conclusion seemed to elide the distinction between substantive and preliminary negotiation, overlooking the differences between issues canvassed in discussions over a negotiation protocol and those incorporated into a comprehensive agreement. Indeed, the requirement that there be negotiation *per se* was the subject of only brief consideration in *FMG v Cox*. The Court concluded that the NTA 'spelt out' two obligations: 'The first is that the negotiations which are directed to reaching an agreement are to be carried out in good faith and the second is that a period of not less than six months has passed since the date on which the s 29 notice is given'.¹²¹ Logically, there are in fact four interconnected obligations:

- there must be negotiations;
- the negotiations must relate to the doing of the future act;
- the negotiations must be conducted in good faith; and
- the negotiations must take place within a six-month period.

The first obligation is of crucial importance; the mere fact that a party has acted in 'good faith' (in the sense of not displaying active bad faith) does not necessarily mean that it has negotiated. Consultation in good faith about a future act, for instance, clearly could not satisfy s31(1)(b) NTA.¹²² Further, even if a party has negotiated in good faith, it may have done so on a matter unrelated or tangential to the doing of the relevant future act.

The Court seemingly did not engage with previous Tribunal and Court decisions concerning the need to attempt to reach agreement, preferring to focus on 'the quality of [the grantee's] conduct'.¹²³ The Court's statement that there was 'no reason to think that the ordinary meaning of 'good faith' should not apply',¹²⁴ overlooked the meaning of this concept developed in the native title context. The *Njama* indicia, which relevantly include shifting position just as agreement seems in sight and unilateral conduct which harms the negotiating process,¹²⁵ were not cited. While the Court noted that it 'may be accepted...that it is not sufficient for good faith negotiations to merely "go through the motions" with a closed mind', it cited Sosso's emphatic finding that the grantee party had not taken this attitude. The Court seemed to suggest that only a party which actively engages in misleading behaviour will be found not to have negotiated in good faith.¹²⁶ In the circumstances, the Court held that there

¹¹⁶ For the Court, the 'period of six months provided for in s35...ensures that there is reasonable time to enable...negotiations to be conducted'; see *FMG v Cox* at [21].

¹¹⁷ *FMG v Cox* at [23].

¹¹⁸ *FMG v Cox* at [24].

¹¹⁹ *Cox v FMG* at [86].

¹²⁰ *Taylor*.

¹²¹ *FMG v Cox* at [22].

¹²² For a discussion of the requirements of 'consultation' under s24MD(6B) NTA, see *Kuruma Marthudunera/ State of Western Australia/ Mineralogy Pty Ltd* Referral 1/2004.

¹²³ *FMG v Cox* at [20].

¹²⁴ *FMG v Cox* at [27].

¹²⁵ *Taylor*.

¹²⁶ *Cox v FMG* at [24-27].

could only be a conclusion of a lack of good faith...where the fact that negotiations had not passed an “embryonic” stage was, in turn, caused by some breach of absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.¹²⁷

The Court’s conclusion on this point was rather odd in the statutory context. Although the concept of good faith is occasionally elided with considerations of morality¹²⁸ the NTA does not on its face impose a penalty on parties whose conduct is ‘unsatisfactory’. It simply requires that negotiations must take place and must be in good faith. Whether a grantee party simply forgets to negotiate or takes great pains deliberately to avoid doing so, the end result is the same: the native title party will not have been accorded its procedural rights under the NTA. The seeming distinction between what could be termed ‘passive’ and ‘active’ failure to negotiate in good faith is illusory. A requirement for ‘active’ bad faith would seem, in the words of the Court cited above, to impose an additional ‘gloss on the statutory provisions’.¹²⁹

The Court also emphasised that the draft LAA offered by the grantee party provided that PKKP would agree to future activities conducted by the grantee party within its claim area.¹³⁰ These activities ‘could not be specifically identified in advance’.¹³¹ In response to the argument that the grantee party had failed to negotiate specifically about the mining lease the subject of its s35 application, the Court stated simply that it had ‘not been suggested...that the native title parties were unaware that the negotiations in relation to each of the LAAs contemplated the grant of mining tenements’, including the relevant mining lease.¹³² Further, the native title parties had not objected ‘to the negotiations proceeding on a whole of claim or project wide basis pursuant to the LAA’.¹³³ By agreeing to negotiate a claim-wide LAA, the native title parties were in effect taken to have waived their right to negotiate about the impact of any specific future acts on their rights and interests.

The Court further opined that the matters the Tribunal must consider in making a determination under s35 – including the way of life, culture and traditions of any native title parties¹³⁴ – would best be ventilated by ‘considering the series of related [future] acts taken together’¹³⁵ as in the draft LAA. This approach ignores the need to negotiate about the effects of a future act on specific areas of land and waters the subject of native title rights and interests.¹³⁶ A generic approach may well be administratively convenient for all parties and assist the Tribunal in making a determination under s35 NTA. The question, however, is whether there can be good faith negotiation regarding a specific future act if the impact of that future act on a claim group’s native title rights and interests are not the subject of negotiations. The Court arguably did not engage with this question. In its analysis, the absence of any negotiation regarding the relevant mining lease was irrelevant;¹³⁷ the grantee party had negotiated ‘with a view to’ reaching a LAA and there was ‘nothing more under the [NTA] that it was required to do’.¹³⁸

¹²⁷ *FMG v Cox* at [27].

¹²⁸ Lee J has previously described negotiation under s31 NTA as ‘a moral duty to properly engage in a process of negotiation with a native title claimant’: *Brownley* at 161. The Commonwealth Attorney-General made a speech last year in which he stated ‘Anecdotally, it seems all too often negotiations are characterised by the absence - rather than the presence - of ‘good faith’. The speech seems to invoke a deeper concept of good faith drawn from a moral or ethical standard. R McClelland, presentation to the Negotiating Native Title Forum, Brisbane, 29 February 2008, [13].

¹²⁹ *FMG v Cox* at [23].

¹³⁰ *FMG v Cox* at [4].

¹³¹ *FMG v Cox* at [5].

¹³² *FMG v Cox* at [36].

¹³³ *FMG v Cox* at [36].

¹³⁴ Section 39(1)(ii) NTA.

¹³⁵ *FMG v Cox* at [37].

¹³⁶ The Tribunal is also required to take into account the effect of the future act on ‘the enjoyment by the native title parties of their registered native title rights and interests’; see s30(1)(a)(i) NTA.

¹³⁷ The Court found that the NTA ‘does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters’; see *FMG v Cox* at [38]. It seems, then, that a Grantee Party is not obliged to negotiate *about* a tenement.

¹³⁸ *FMG v Cox* at [28].

V. CLOSING THE GAPS

An application for special leave to appeal *FMG v Cox* was refused by the High Court on 14 October 2009; it seems that a political solution is required. Specific policy positions or amendments are beyond the scope and expertise of this paper, but it should be noted that proposals have previously been made to improve the operation of the RTN.

One option would be a clear statement in the NTA that negotiation need not merely occur *within* a period of six months from the notification date, but for *at least* six calendar months. The Act could also incorporate the language of the preamble by specifically requiring parties to make ‘all reasonable efforts’ to negotiate. Alternatively, a longer minimum time period for negotiations could be set. A period of perhaps eight to twelve months would give grantee parties an incentive to reach agreement rather than relying on an application under s35 to secure tenements.¹³⁹ Parties willing to ‘wait out’ for six months may not be able to do so for longer periods. Such an amendment is, however, extremely unlikely. Given the emphasis of the NTA on speed and efficiency and the place of the resources industry to the national economy, any legislative amendments with the effect of ‘slowing down’ industry is unlikely to be in the realm of the politically possible.¹⁴⁰

Other areas of law may provide an avenue for strengthening statutory rights such as the RTN. The *Fair Work Act* sets out a list of ‘good faith bargaining requirements’ which must be met by bargaining representatives for a proposed enterprise agreement, including ‘giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals’.¹⁴¹ The NTA could be amended with the addition of similar requirements to close of some of the ‘gaps’ in the vague wording of s31(1)(b) NTA. Overly prescriptive legislation can unduly fetter the ability of the courts in making decisions. However, it is cautiously suggested that some mandatory elements of good faith negotiation, drawn from the *Njamal* indicia, could be included in the NTA. Broad elements such as making and responding to proposals and counter-proposals, actively negotiating (rather than merely setting out one’s position) and making reasonable efforts to meet with members of the native title party if requested to do so would flesh out the sparsely-worded s31(1)(b) NTA. In light of the decision in *Cox*, the phrase ‘with a view to’ could also be replaced with the clear statement that negotiation must be substantive, and must concern the doing of the future act. For the avoidance of doubt, the NTA could also state that actively misleading, deceptive or unsatisfactory conduct on behalf of a party is not a requirement for a finding that the party has failed to negotiate in good faith.

VI. CONCLUSION

The RTN was ‘a compromise position secured by an Aboriginal leadership in exchange for not gaining a veto over mining and for agreeing to the validation of past acts by government... itself a product of strategic Aboriginal negotiation’.¹⁴² This paper does not argue that these negotiators were simply fooled by the lure of rights. Rather, it suggests that a statutory right to negotiate is the ‘least worst option’ for native title claim groups in Australia, because it mandates their involvement in decisions about activities proposed to take place on traditional land and waters. Despite the theoretical benefits of a right to bargain, it is clear that the RTN is burdened by many limitations, most obviously the difficulty of enforcing compliance on the part of government and grantee parties. This paper concludes with the suggestion that amendments of the nature discussed above be explored with a view to giving a ‘special right’ the teeth it needs.

¹³⁹ The above amendment was suggested by Martin Dore and briefly discussed by the panel at the AIATSIS Native Title Conference on 3 June 2009.

¹⁴⁰ In the Western Australian context, it has been argued that industry ‘perpetually pleads for more expedition in government-decision making. Boom or bust, it would seem that Government is always too slow for the mining industry’: see C Davies, ‘Iron Filings’, *The New Critic*, no.1, 2006.

¹⁴¹ Section 228 FWA. See also sections 229, 230 and 231. It should be noted that the ‘good faith’ requirement of the new legislation has been subjected to some critique in the press; see for instance A Wood, ‘Power put in unions’ hands’, *The Australian* 10 September 2009.

¹⁴² Smith, above n75, p 105.

ISBN 9780855757069

ISSN 12360316

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553
Canberra ACT 2601
Telephone: 02 6246 1161
Facsimile: 02 6249 7714
Email: ntru@aiatsis.gov.au
Website: www.aiatsis.gov.au

Views expressed in this series are not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

