



Native Title and Aboriginal Cultural Heritage

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- it is not necessary for any negotiation process to have reached a certain stage before making an application seeking the relevant grant;
- the negotiations may have only reached an "embryonic" stage before an application for the grant of a tenement was made;
- the negotiations must continue over the minimum statutory period of six months (where applicable);
- while it is anticipated that a proponent may not always be able to reach an agreement with a native title party, the project proponent must genuinely seek to reach an agreement.

Good Grounds for Concluding Native Title Agreements

A recent decision of the High Court of Australia has confirmed the importance of seeking a negotiated outcome with native title groups. The case has clarified some of the procedural requirements for resolving Indigenous rights associated with project approvals. Whilst there still remains some uncertainty regarding dealings with native title groups, a number of recent decisions along with a greater awareness of Indigenous rights is leading to practical and useful outcomes for mining companies, project developers, local authorities and utility service providers.

As with most aspects of commercial life, negotiation is the starting point.

Good Faith Negotiations

Negotiations must be in "good faith" under the right to negotiate procedures of the *Native Title Act 1993* (NTA), but what does this really mean?

Most recently, the High Court effectively re-enforced the previous legal threshold test for what constitutes negotiation in good faith under the NTA, when it refused special leave to appeal from the Federal Court's decision in *FMG Pilbara Pty Ltd v Cox (Cox)*.

A project proponent may progress its *good faith* negotiations with a native title party on the basis that:

- the NTA does not mandate a particular negotiation process;
- any negotiation process may consider a range of properties at the same time;

Background

Several years ago, FMG Pilbara Pty Ltd (FMG) commenced a negotiation process with the Puuti Kunti Kurrama and Pinikura native title claimants (PKKP) which have a registered claim in the Pilbara region of Western Australia. That process focused on the conclusion of a negotiation protocol (which generally sets out the terms of future negotiations). The negotiations had not progressed to any material degree when the proponent sought the grant of the relevant tenure. PKKP objected to the grant on the basis that FMG had not negotiated in good faith.

The High Court confirmed that the embryonic stage of negotiations did not mean negotiations had not been in good faith.

Importance of Relationships

The High Court's decision does not mean that a "minimalist" approach is the best approach for project proponents. A project proponent should carefully consider the possible side effects associated with attempting to obtain the grant of a tenement without the benefit of establishing and maintaining good relationships with native title parties. In particular, project proponents should be mindful that:

1. The native title parties may be well resourced to argue an objection to, what the native title parties consider to be a premature or an unreasonable application for the grant of a tenement. Therefore, the costs and delays associated with overcoming the court processes relating to objections may negatively impact upon project timeframes and budgets.
2. It is possible, perhaps even likely, the ultimate design of any project may need to be altered or revised in the future, particularly after considering the geographical terrain and Aboriginal cultural heritage issues.
 - (a) address any future act requirements to negotiate in good faith;
 - (b) incorporate Aboriginal Cultural Heritage processes such as specifying timeframes for surveys and reports (in Queensland, these agreements may satisfy the duty of care obligations under the *Aboriginal Cultural Heritage Act 2003*);
 - (c) ensure that the underlying native title is not extinguished by the grant of a particular act (such as compulsory acquisition);
 - (d) provide for other consents in respect to entire project or the entire claim area so as to avoid future negotiation processes; and
 - (e) establish a certain and objective compensation regime.

A thoughtfully drafted agreement will overcome the risks of delay and will allow for changes in project plans.

It should be stressed that the requirement for parties to negotiate in good faith is not the only requirement mandated by the NTA. This article does not consider those other provisions of the NTA which may result in additional onerous conditions being imposed upon the grant of a tenement or in a tenement not being granted, as occurred in *Western Desert Land Aboriginal Corporation (Jamukurnu Yapalikunu) Western Australia / Holocene* [2009] NNTTA 49 (27 May 2009).

Way Forward

Based on our experience of successful negotiations, we strongly urge project proponents to reach an agreement with native title holders where at all possible. In some instances, a simple (standard) agreement may be sufficient for the grant of a tenement such as an exploration licence. However, comprehensive land access agreements may provide for broad approvals from a native title party and even provide for the way that a native title party supports other approval processes (e.g. environmental).

For instance, an Indigenous Land Use Agreement (commonly known as an ILUA) under the NTA may:

MacDonnells Law has drafted, negotiated and concluded a range of land access agreements including Cultural Heritage Management Plans (CHMP), Terms of Reference documents for heritage surveys, land access mining agreements and ILUAs.

Conclusion

While the High Court has confirmed a relatively low threshold test for negotiation in good faith, we recommend project proponents carefully consider the long benefits of a negotiated agreement.

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