Australian Government

Attorney-General's Department

Social Inclusion Division

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Ms Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Dennett

Senate Legal and Constitutional Committee's Inquiry – Native Title Amendment Bill 2012 – Question on Notice

The Attorney-General's Department participated in the Senate Legal and Constitutional Legislation Committee Inquiry into the Native Title Amendment Bill on 6 March 2013. During the hearing, the Department agreed to provide the Government's legal analysis of *FMG Pilbara v Cox* (2009) 175 FCR 141 and other evidence and cases the Government relied on to support the proposed good faith amendments (Schedule 2 of the Bill). The Department's response to the questions from Senator Cash is **Attachment A**.

The Department also takes this opportunity to provide a supplementary submission providing further support for the proposed good faith negotiation criteria. The supplementary submission is **Attachment B**.

Yours sincerely

Margaret Meibusch
A/g Assistant Secretary
Attorney-General's Department

ATTACHMENT A

ANALYSIS OF *FMG PILBARA V COX* (2009) 175 FCR 141

Questions on Notice

1. At the Senate Legal and Constitutional Legislation Committee Inquiry into the Native Title Amendment Bill on 6 March 2013, Senator Cash asked the following questions:

Question 1

Page 32 of Hansard – Senator Cash

> **Senator CASH:** I turn to the Cox case. The three of you were in here for the evidence of the previous witnesses. I do not want you to do this now, because we just do not have the time and I would like to see it in writing. There is clearly a discrepancy in relation to the meaning of the case and the interpretation of it. Are you able to provide the following to the committee so that we can properly understand why the government says the Cox case says a certain thing which you have then used as justification for part of this legislation? Can you give your analysis of the Cox case in writing?
> **Mr Duggan:** Absolutely.

Question 2

Page 32 of Hansard – Senator Cash

> **Senator CASH:** I appreciate that. You alluded to this, and certainly the CME stated that they had asked for this analysis from you but had not been provided with it, but the response they had been given by the Attorney-General's Department was that this is not the only other matter; there are other cases. Can you provide the committee with a list of those cases and the analysis of those cases that goes to the justification for the changes to the principles for negotiation et cetera? The issue I have is in terms of time frames. We are due to table our report on 18 March, so, if it could be provided to us prior to that time so we can consider it properly, that certainly would be appreciated.
> **Mr Duggan:** Indeed. I might just mention a case. Drake Coal Pty Ltd, Byerwen Coal, Grace Smallwood and others in the state of Queensland in 2012 reconfirmed that discussions between parties did not necessarily have to be about the act itself. There are a range of other cases and we are happy to provide the committee with those.

2. The Attorney-General's Department response to these questions is set out below.

Introduction

3. It is important to emphasise at the outset that the Department's concerns in respect of *FMG v Cox* do not relate to the particular conduct of FMG Pilbara and the native title parties in that case. Rather, the Department considers the legal interpretation of the good faith provisions adopted by the Full Federal Court significantly limits the effectiveness of the right to negotiate under the *Native Title Act 1993* (NTA). In summary, *FMG v Cox* interpreted good faith negotiation as not requiring substantive negotiation about the doing of the specific future act. It also effectively narrowed the circumstances where a party could be found not to negotiate in good faith.

Facts

4. The case involved negotiations between a grantee party (FMG), the Puutu Kurnti Kurruma and Pinikura native title claimant group (PKKP) and a second native title party, the Wintawari Guruma prescribed body corporate ('WG'), about a negotiation protocol and a claim wide Land Access Agreement (LAA). Prior to the grantee party's application to the arbitral body under s 35 of the NTA, negotiations on the LAA had not reached a conclusion and a mining lease that was included in the draft LAA was not specifically negotiated about with either of the native title parties.

Arguments

5. The native title parties argued that the grantee party had failed to bring the mining lease to the attention of native title parties, and further, that there had not been negotiation about the effect of the mining lease on registered native title rights and interests. The grantee party argued that s 31(b) of the NTA contains no obligation to negotiate about the doing of the particular act; rather it simply requires negotiation with a view to doing the act. Therefore, general negotiation about obtaining agreement without specific reference to the doing of the act would satisfy s 31 of the NTA.

Initial findings by NNTT

6. The NNTT held that the grantee party did not fulfil its obligation to negotiate in good faith as required by s 31(1)(b) of the NTA.[1] The NNTT noted that while there had been productive negotiations on the LAA, they were still at an early stage when the grantee party made its future act determination application.

7. If the grantee party seeks to rely on those negotiations to support the proposition that it had negotiated in good faith for the doing of the future act, it would

[1] *Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd*, [2008] NNTTA 90

need to establish that those negotiations had reached such an advanced stage that it would be reasonable to infer that there had been dialogue which addressed the requirements of s 31(1)(b), namely discussions about the doing of the future act.

8. For a grantee party to satisfy the obligation to negotiate in good faith, there must be some evidence that there has been at least some substantial discussions about the doing of the future act.

NNTT decision overturned in FMG v Cox

9. The Federal Court dismissed the notion that negotiation must be more than 'embryonic' and noted that the NTA 'makes no reference to the parties reaching any particular stage in their negotiations' before an application can be made under s 35 of the NTA. There was no failure to comply with the good faith requirement even though the negotiations in question 'had reached only a preliminary stage'. Further the manner of negotiations is not defined by s31(1)(b). The only obligation on negotiation parties is to negotiate in good faith with a view to obtaining agreement. The NNTT's findings could not lead to a failure to comply with s31(1)(b) unless there was a failure to negotiate in good faith and the findings demonstrated the grantee party had negotiated in good faith.

Key areas of concern in Full Federal Court decision

10. The purpose the right to negotiate regime under the NTA was set out in the second reading speech on the Native Title Bill:

> Where native title has been established, or where there is a registered claimant in the federal or state systems, the bill provides a process of negotiation and, if necessary, determination by the tribunal on whether a proposed grant should proceed… This emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land. But it is also squarely in line with any principle of fair play. It is not a veto.[2]

11. In *Western Australia v Taylor*,[3] Member Sumner, as he then was, discussed the centrality of the requirement to negotiate in good faith

> The points arising from the Preamble and the second reading speech are reflected in the objects of the Act, especially s.3(b). It could be said that the requirement to negotiate in good faith is part of the setting of a standard in relation to those future dealings.
>
> There is considerable judicial comment supporting the importance which mediation and negotiation play in the resolution of issues which arise under the Act. For instance, Kirby J in the High Court in *North Ganalanja v Queensland* [1996] HCA 2; (1996) 135 ALR 225 said:

[2] Hansard, House of Representatives, 16 November 1993, at 2880
[3] *Western Australia v Taylor* [1996] NNTTA 34.

> 'It is important to emphasise that the purpose of the tribunal is to facilitate negotiation, discussion and agreement, if at all possible.' (at 269)

12. The decision in *FMG v Cox* appears to be at odds with the substantial previous body of law in respect of good faith, such as *Western Australia v Taylor*, and also the specific intention of the right to negotiate provisions as originally conceived.

13. The decision limits the obligation on parties to negotiate in good faith by interpreting good faith negotiation in a way that does not require substantive negotiation about the doing of the specific future act. Indeed there are only two obligations - that is, negotiations be in good faith and be not less than six months since the issuing of the s 29 notice. This means that a party can be found to have negotiated in good faith even where they have focused negotiations on acts unrelated to or broadly relevant to the doing of the act.

14. This decision serves to limit the strength and value of the right to negotiate provisions by allowing for a situation where parties can be held to have satisfied the obligation to negotiate in good faith even though the impact of the act on native title rights and interests were not the substantive content of the negotiations. The proposed amendment aims to counter this by creating an obligation on negotiating parties that negotiations are about the future act and its effects on the registered rights and interests of the native title party or parties.

15. *FMG v Cox* also results in a narrowing of circumstances giving rise to lack of good faith. The Njamal Indicia outlined in *Western Australia v Taylor* were not considered by the Court, demonstrating that there is no requirement that the arbitral body considers the indicia, nor are there criterion in the NTA which must be considered when examining the conduct of the parties in negotiations. Further, the decision seems to suggest that the only circumstance where a party will be found to have failed to negotiate in good faith is where a party has actively engaged in misleading or deceptive behaviour.

16. The aim of the amendment to insert good faith negotiation criteria into the NTA is to provide guidance to arbitral bodies on matters to take into consideration, where relevant, when examining the conduct of parties in good faith negotiations. It is not designed to codify or expressly define the meaning of 'good faith'. Instead it expands on the existing provisions to provide clarity to all parties on expected standards of behaviour in negotiations. The amending provisions are designed to be compatible with the existing Njamal Indicia.

A selection of other cases / evidence in support of Bill's approach to good faith amendment

17. Even prior to *FMG v Cox*, academics had drawn attention to the difficulties facing parties in asserting that another party had failed to comply with the good faith

regime.[4] *FMG v Cox* further restricted the requirement to negotiate in good faith. In *Coalpac Pty Ltd/State of NSW/North Eastern Wiradjuri People,*[5] Member Summner at [55] said:

> I observe that as a result of the Full Federal Court decision in *FMG Pilbara Pty Ltd v Cox and Ors* … requirements of the obligation to negotiate in good faith are significantly more limited than those envisaged by earlier decisions of the Tribunal.

18. The effect of *FMG v Cox* was noted in a paper by Sarah Burnside published by the Australian Institute of Aboriginal and Torres Strait Islander Studies.[6] Similarly, the Australian Human Rights Commission expressed the view that *FMG v Cox* diluted the good faith negotiation requirements under the NTA. The Commissioner said:

> I am concerned that in FMG Pilbara the Act was interpreted in ways which unnecessarily strengthened the position of mining companies over native title interests. For example, s 31(1)(b) requires good faith negotiation towards agreement about 'the doing of the act' and the act here was the grant of the specific tenement. The Court would have been well justified in finding that negotiations addressing a much broader range of issues lacked the specificity required by the precisely chosen language in the Act.[7]

19. In *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland*, the NNTT reconfirmed that position in FMG v Cox that negotiations did not have to be specifically about the doing of the future act.[8] After discussing *FMG v Cox*, Member Sosso noted:

> Accordingly, there is no obligation placed on the parties to have actually negotiated about the doing of the future act. The obligation is to negotiate in good faith with a view to obtaining an agreement on the doing of the future act.

20. The NNTT considered the issue of reasonableness of offers made by grantee parties and noted that the Tribunal is not currently required to consider the reasonableness of offers. The NNTT confirmed that existing good faith requirements start from issuing of the notice and apply to negotiations up until an application to the arbitral body for a future act determination. Negotiations can continue after the application has been made but the good faith requirements do not apply.

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[4] See for example, Tony Corbett and Ciaran O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review*, p 161.
[5] *Coalpac Pty Ltd/State of NSW/North Eastern Wiradjuri People* [2009] NNTTA 133.
[6] Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis', (2009) 4 *Land, Rights, Laws: Issues in Native Title*, 1
[7] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, 34
[8] D*rake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland* [2012] NNTTA 9.

21. The proposed amendments will permit the arbitral body to consider, where relevant, the *reasonableness* of offers in examining the conduct of parties in good faith negotiations and also permit the arbitral body to examine the conduct of parties beyond the minimum eight month negotiation period.

ATTACHMENT B

Correlation between the 'Njamal Indicia' and Fair Work Act

The proposal to base the good faith negotiation requirements on section 228 of the *Fair Work Act 2009* was proposed by Yamatji Marlpa Aboriginal Corporation (YMAC) in 2009, following *FMG v Cox*. This proposal was canvassed in the *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* discussion paper in 2010 and was generally well received by stakeholders, including the Minerals Council of Australia (MCA). In their joint submission with the National Native Title Council to the 2010 public consultation on the discussion paper, the MCA stated that 'the MCA and NNTC support the alignment of the good faith requirements of the *Native Title Act 1993* with s 228 of the *Fair Work Act 2009* - i.e. keeping it as efficient and effective as possible.'

Concerns have been raised that the FWA provisions are not a suitable model as negotiations in an industrial relation context are different to the native title context. It has been argued that it would be more appropriate to model the good faith negotiation requirements on the 'Njamal Indicia', as these are the settled principles that have been tested and have been used by the National Native Title Tribunal (NNTT). However, the 'Njamal Indicia' themselves are drawn from industrial relations statute and case law, including the *Industrial Relations Act 1988* (Cth).

The 'Njamal Indicia' were set out by Member Sumner (as he then was) in *Western Australia/Johnson Taylor on behalf of the Njamal people/Garry Ernest Mullan* [1996] NNTTA 34. In this decision, the Tribunal considered the meaning of 'good faith' in the right to negotiate and looked to case law and statute in the industrial relations context as guidance.

In particular, Member Sumner considered the good faith negotiation provisions in Section 170QK of the *Industrial Relations Act 1988* (Cth), as this was the only Australian statutory provision in relation to negotiating in good faith which had been judicially considered at the time. Member Sumner concluded that 'it is legitimate to look at certain indicia which may point to whether the obligation to negotiate in good faith has been fulfilled. Such a list cannot be prescriptive or exhaustive and the weight given to any item must depend upon the circumstances of the matter. The indicia in s 170QK(3) of the *Industrial Relations Act* … provide some guidance.' He then went on to enunciate the 'Njamal Indicia', making it clear that the indicia were drawn from industrial relations statute, case law and a 'common sense approach to the context and purpose of the right to negotiate provisions of the Act.'

The Bill adopts a similar approach in appropriating s 228 of the FWA. The provisions of the FWA establish an 'interest-based' approach to negotiations. This is an appropriate model for establishing good faith negotiation standards in 'relationship-oriented' contexts like native title as it is aimed at supporting relationships and satisfying all parties' legitimate interests, and ensuring that negotiations are substantive. They are focused on mutual-interest satisfaction and fairness.

Whilst the ‘Njamal Indicia’ have been used for a long period of time, they are not in a format that can be easily transferred into legislation; section 228 of the FWA provides a refined legislative structure, which has a proven effect of establishing negotiation standards. The provisions also set a higher standard for disclosure and conduct than the ‘Njamal Indicia’.

Concerns have been raised that the addition of a new set of principles will create uncertainty and require litigation to test the meaning of the criteria. However, there is a correlation between what has been included in the amendment and the ‘Njamal Indicia’. The ‘Njamal Indicia’ can be used to inform understanding of the meaning of the provisions.

The common ground between the categories included in the amendment and ‘Njamal Indicia’ mean that the risk of judicial testing of the provisions is likely to be minimal. The similarities are noted in the Explanatory Memorandum to the Bill, which draws correlation between the amendment and elements of the ‘Njamal Indicia’, further indicating that what is included in the amendment is not a major deviation from existing indicia.

Use of the term ‘reasonable’ – Criteria not to be considered as an exhaustive checklist

Particular concerns have been raised that the use of the term ‘reasonable’ creates uncertainty for negotiation parties about what this means, and will need to be tested through litigation. However, we note that ‘reasonable’ is both a well understood legal concept, and is also used as a standard in many of the criteria listed in the ‘Njamal Indicia’.

The criteria are not intended to operate as a checklist, and the Bill and the Explanatory Memorandum make it clear that the Tribunal is to have regard to the matters listed in the requirements where relevant, and to consider the conduct of the parties in the context of the particular negotiations. Indeed, in *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 96 FLR 52 Deputy President Sumner noted that consideration of what is reasonable will depend on the circumstances of each case.

Defining in the NTA what is reasonable, will not allow for the appropriate amount of flexibility and discretion to be applied in determining matters. The introduction of the good faith negotiation requirements should not adversely impact parties who already negotiate in good faith, as their conduct would be considered as being in compliance with the provisions. The provisions also do not preclude parties from reaching agreement before the eight month minimum time period ends.