

## **Attachment A - Right to Negotiate Statistics (Provided by Ashurst Australia)**

### **1. SUMMARY OF THE STATISTICAL FINDINGS**

The statistics demonstrate that during the last 12 years of operation:

- **(Notifications)** A total of 7140 mining tenements or land acquisitions were notified under section 29 of the Act (including expedited procedure notifications).
- **(FADAs)** A total of 1084 future act determinations was made. Even allowing for the existence of applications relating to the expedited procedure, only 15% of the total applications notified were the subject of a future act determination application.
- **(WA)** The vast majority of tenements and land acquisitions notified under s29 (75%) and future act determination applications (87%) occurred in Western Australia.
- **(Average negotiation period)** The average time between a s29 notice and a future act determination application was considerably longer than 6 months. The minimum State average was 8 months. The total average was 39 months.
- **(Total determinations)** There was a total of 746 tenements or land acquisitions, or slightly more than 10% of total applications where the Tribunal determined whether they could be done, be done subject to conditions or could not be done.
- **(Contested determinations)** However, only 105 tenements or 1.5% of these tenements were contested determinations. Most of the 10% of tenements that were determined (636 tenements), were determined by consent. That is, where agreement had been reached by the parties.
- **(98.5% of applications = agreement)** This means that 98.5% of tenements and land acquisitions notified under the full right to negotiate have either been granted via agreement or are continuing in the negotiation process (or are no longer being pursued).
- **(Good faith)** It has only been necessary to determine the question of whether a party negotiated in good faith 31 times since 2001. 28 determinations found that the parties had negotiated in good faith. 3 determinations found that the grantee party had failed to negotiate in good faith. Those determinations covered four tenements. This represents minor proportion of both tenements notified and even future act determination applications where parties were unable to reach agreement.

### **2. CONTEXT**

These statistics have been derived from a combination of detailed statistics provided by the NNTT between the period of 1 January 2000 – 11 October 2012 and the statistics available on the NNTT's website relating to future act determination applications and determinations. The source of the information is noted.

It should be noted that the period between 1 January 2000 and the present was chosen as a reasonable representation (almost 12 years) of the operation of the current right to negotiate regime. This is because amendments were passed at the end of 1998 that created significant change. 1 January 2000 was chosen as a starting point to take some account of a transitional period while the NNTT dealt with extant applications.

There are some potential inaccuracies with the information because it required some interrogation in order to summarise the position. These potential inaccuracies are noted.

### 3. **NUMBER OF SECTION 29 NOTICES AND FADAS ISSUED<sup>3</sup>**

This table shows the number of total tenements and acquisitions notified under the right to negotiate for the period 1 January 2000 – 11 October 2012. It includes notices that include a statement that the expedited procedure applies. This inclusion inflates the overall number of future act determination applications.

In summary:

- The average time between a s29 notice and a future act determination application was considerably longer than 6 months.
- Even allowing for the existence of applications relating to the expedited procedure, only 15% of the total applications notified were the subject of a future act determination application.
- The statistics below provide further detail around the 15% and indicate that the actual percentage of tenements the subject of an agreement (or still pending and therefore the subject of negotiation processes) is likely to be much higher due to the high number of consent determinations.
- The vast majority of notices and tenement applications occurred in Western Australia.

| <b>State</b> | <b>No. of mineral tenements notified under s29</b> | <b>No. of land acquisitions notified under s29</b> | <b>No. of FADAs</b> | <b>Average time between notice and FADA (months)</b> |
|--------------|--|--|---------------------|--|
| NSW          | 279  | 8  | 3                   | 8.33   |
| NT           | 406  | 8  | 2                   | 22.74  |
| QLD          | 601  | 0  | 126                 | 13.77  |
| SA           | 34   | 0  | 1                   | 8.71   |
| VIC          | 443  | 0  | 13                  | 20.04  |
| WA           | 5219   | 142  | 939                 | 42.82  |
| <b>Total</b> | <b>6982</b>  | <b>158</b>   | <b>1084</b>         | <b>39.01</b>   |

### 4. **WESTERN AUSTRALIAN BREAKDOWN**

This table shows a manual breakdown of the mining tenements notified in Western Australia. It is based on the same statistics in the first table but the statistics required manual addition based on a judgement as to whether a particular form of tenement was

<sup>3</sup> As per statistics provided in tabular form upon request by the NNTT.

advertised under the full right to negotiate or included a statement that the expedited procedure applies. That judgement is explained.

In summary:

- Of the tenements to which the full right to negotiate applied, only 10% were the subject of a future act determination application.
- This means that 90% of tenements advertised under the right to negotiate in Western Australia are either granted as the result of an agreement, are still pending and therefore the subject of negotiation processes (or were not pursued to grant).
- The statistics below provide further detail around the 10% and indicate that the actual percentage of tenements the subject of an agreement is likely to be much higher due to the high number of consent determinations.

|                             | <b>No. of tenements notified under s29</b> | <b>No. of FADAs</b> |
|-----------------------------|--|---------------------|
| RTN applies <sup>4</sup>    | 4169                                       | 454                 |
| Expedited Procedure applies | 1050                                       | 485                 |
| <b>Total</b>                | 5219                                       | 939                 |

## 5. **OUTCOME OF FADAS**

The following statistics were provided by the NNTT. They breakdown the number of right to negotiate future act determinations (with some application related figures such as withdrawn applications). The figures count the number of tenements or land acquisitions in each category. These statistics were provided direct from the NNTT and are therefore reliable.

In summary:

- Extracting the applications that did not, or have not yet, progressed there were a total of 746 tenements or land acquisitions where the Tribunal determined whether they could be done, be done subject to conditions or could not be done.
- 746 tenements of a total 7140 means a total of slightly more than 10% is determined by the Tribunal.
- However, only 105 tenements or 1.5% of these tenements were contested determinations. Most of the 10% of tenements that were determined (636 tenements), were determined by consent. That is, where agreement had been reached by the parties.

<sup>4</sup> The following types of tenements were included: mining leases (M), coal mining leases (CML), petroleum exploration permits (EP), general purpose leases (G) and state agreement mineral leases (MLSA and MLSAAML).

- This means that 98.5% of tenements and land acquisitions notified under the full right to negotiate are granted via agreement (or continuing in the negotiation process or not pursued).
- The table does not clearly isolate statistics on the good faith issue. This is because good faith is a jurisdictional precondition to a determination. Those statistics are extracted below from an alternative source.

|  | NSW        | NT         | QLD        | SA        | VIC        | WA          | Total       |
|--|------------|------------|------------|-----------|------------|-------------|-------------|
| Application not accepted   | 0          | 0          | 1          | 0         | 0          | 11          | 12          |
| Application withdrawn  | 0          | 1          | 53         | 0         | 0          | 217         | 271         |
| Consent determination –act can be done                                   | 0          | 1          | 12         | 0         | 9          | 521         | 543         |
| Consent determination – act can be done subject to conditions            | 0          | 0          | 31         | 1         | 2          | 64          | 98          |
| Determination - act can be done  | 2          | 0          | 11         | 0         | 1          | 39          | 53          |
| Determinations - act can be done subject to conditions                   | 1          | 0          | 15         | 0         | 1          | 29          | 46          |
| Determinations - act cannot be done                                      | 0          | 0          | 0          | 0         | 0          | 6           | 6           |
| Dismissed (s148(a) no jurisdiction)                                      | 0          | 0          | 0          | 0         | 0          | 44          | 44          |
| FA terminated  | 0          | 0          | 1          | 0         | 0          | 1           | 2           |
| Tenement withdrawn   | 0          | 0          | 0          | 0         | 0          | 1           | 1           |
| No outcome (pending)   | 0          | 0          | 2          | 0         | 0          | 6           | 8           |
| <b>TOTAL</b>   | <b>3</b>   | <b>2</b>   | <b>126</b> | <b>1</b>  | <b>13</b>  | <b>939</b>  | <b>1084</b> |
| <b>TOTAL TENEMENTS AND LAND ACQUISITIONS S29 NOTIFIED (FROM TABLE 1)</b> | <b>287</b> | <b>414</b> | <b>601</b> | <b>34</b> | <b>443</b> | <b>5361</b> | <b>7140</b> |

## 6. BREAKDOWN OF FADAS AND DETERMINATIONS – ALTERNATIVE SOURCE

These statistics were obtained by interrogating the NNTT online database of future act determination applications and determinations.

In summary:

- It has only been necessary to determine the question of whether a party negotiated in good faith 31 times since 2001.
- 28 determinations found that the parties had negotiated in good faith.
- 3 determinations found that the grantee party had failed to negotiate in good faith. Those determinations covered four tenements.<sup>5</sup>

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Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd, [2009] NNTTA 35 (17 April 2009) – covered exploration licence

It should be noted that:

- These statistics count the number of determinations. They are not a true reflection of the total number of tenements or acts the subject of a particular decision because some decisions will cover more than one tenement.
- There is a discrepancy between the number of applications and the number of determinations. While it is not possible to verify this discrepancy, it is likely to be the number of applications that are withdrawn. Applications can be withdrawn because agreement continues to be pursued during the determination process and/or because a tenement application is withdrawn.
- Generally speaking, the statistics are consistent with the table above and provided by way of verification because they are available online.

| <b>Applications</b>  |               |
|--|---------------|
| Future act applications  | 491           |
| Objection applications   | 14,763        |
| <b>Total</b>   | <b>15,254</b> |
| <b>Determinations – Expedited Procedure</b>  |               |
| Consent determination: expedited procedure applies   | 5             |
| Consent determination: expedited procedure does not apply                                  | 432           |
| Objection – expedited procedure applies  | 183           |
| Objection – expedited procedure does not apply   | 86            |
| Objection – expedited procedure applies and Objection – expedited procedure does not apply | 5             |
| Objection - dismissed  | 1106          |
| Objection – dismissed (not all applications dismissed please refer to decision)            | 8             |
| Objection – application not accepted   | 6             |
| Objection - reinstated   | 1             |

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Angelina Cox & Ors on behalf of the Puutu Kuntj Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd, [2008] NNTTA 90 (11 July 2008) – covered 1 mining lease

Western Australia/Arthur Dimer, Ollan Dimer, John Walter Graham, Sonny Graham, Katie Ray, Maureen Young, Georgina Schultz, Mabel Wilson, Jack Schultz, Betty Bullen, Graeme Pellew (Ngadju People, WC95/17); Cyril Barnes, Merle Forrest, Mercy O'Loughlin, Stevie Sinclair, Judy Slater, Elvis Stokes & Victor Willis (Central East Goldfields People, WC99/30)/Equis Limited, [2000] NNTTA 290 (9 August 2000) – covered 2 mining leases

|   |             |
|---|-------------|
| Objection – jurisdiction considered                           | 2           |
| <b>TOTAL</b>  | <b>1834</b> |
| <b>Determinations – Right to negotiate</b>                    |             |
| Consent determination – act can be done                       | 244         |
| Consent determination – act can be done subject to conditions | 16          |
| Determination - act can be done                               | 26          |
| Determination - act can be done subject to conditions         | 18          |
| Determination – act cannot be done                            | 3           |
| Dismissed   | 20          |
| Negotiation in good faith not satisfied                       | 3           |
| Negotiation in good faith satisfied                           | 28          |
| Future Act - Tribunal has jurisdiction                        | 4           |
| Future Act – Preliminary issue                                | 6           |
| <b>TOTAL</b>  | <b>368</b>  |