participation in water planning and 'wherever they can be developed'[21] in relation to incorporating Indigenous social, spiritual and customary objectives and strategies to achieve the objectives of the NWI, begs the question, just how much prominence will water planners afford to Indigenous rights and interests?

Another concerning feature of the NWI is the lack of guidance given to water planners about how to consult with affected Indigenous people, including the most effective ways to engage, who to approach, when and how to best approach them. These questions are left unanswered under the NWI.

Virginia Falk provided the second presentation, focussing on the research that she undertook for her PhD. Virginia spoke of the need to reconsider water as a sacred resource and an asset for Indigenous people. Contemporary thinking about water issues should extend beyond a classic physical science understanding to incorporate Indigenous science. Virginia raises a somewhat overlooked point in advocating for the knowledge and science of natural resources as understood by Indigenous people. The knowledge that abounds from an Indigenous perspective might assist in water planning and directly benefit native title holders in access to water based rights and interests.

Virginia Falk and Poh-Ling Tan raise important points in relation to native title and water. The National Water Initiative, while recognising that Indigenous interests are important, lacks any compelling mechanism to ensure Indigenous engagement in water planning is effectively carried out. It must be remembered that without access to decent supplies of good quality water and planning that accounts for access to these supplies, the rights and interests of Indigenous people recognised through native title will be compromised.

Both presentations are available online from the NILC website: http://www.nilcsa2009.com/.

Australian Capital Territory and the Northern Territory, (signed 25 June 2004 at COAG meeting) Cl 52(i).

[21] Ibid Cl 52(ii).

Summer Course in Native Title in January 2010 @ UNSW

The UNSW Law School will be offering an intensive course in Native Title Law, Policy and Practice in Sydney in the week commencing Monday 11 January 2010.

Over four days, the course examines the essential elements of native title law in Australia. Because that law can only be properly understood in context, the course also covers the broader policy and political debates that have influenced the evolution of Australian native title law in the last 15 years. The course also looks at the practical impacts of native title at ground level.

In past years, the class has included a mix of NTRB personnel, government and private sector lawyers, postgraduate coursework students and some final-year undergraduates. Since the course started in 2006, participants have come from NSW, WA, NT, Qld, SA, Victoria and the ACT.

For those not seeking academic credit, the course can be taken on a Continuing Legal Education (CLE) basis.

For those seeking academic credit, the course can be undertaken (with assessment and at a higher cost) on three other bases:

- through UNSW's postgraduate coursework programs
- cross-institutionally, for students enrolled elsewhere
- on a non-award voluntary basis (ie one-off, for interest or professional development).

For CLE enrolments, contact the CLE Centre at UNSW on 02 9385 2267 or cle@unsw.edu.au. For cross-institutional and non-award voluntary enrolments, go to www.unsw.edu.au/futureStudents/nonAward/sad/fsnacrossinst.html. Existing UNSW postgraduate students can enrol online.

Places are limited, so early enrolment is advisable to avoid missing out.

Classes will be held on Monday 11, Tuesday 12, Thursday 14 and Friday 15 January 2010 on the UNSW Kensington campus in Sydney.

For more information about the content of the course, contact the course convenor Sean Brennan at the UNSW Law School on 02 9385 2334 or s.brennan@unsw.edu.au.

Letter to the Editor

Comment on Burnside Paper

Blair McGlew, Head of Land Access, Fortescue Metals Group Limited

Sarah Burnside's article "Negotiation in Good Faith under the Native Title Act: A Critical Analysis" (Volume 4 Issues Paper No.3, October 2009) discusses the recent Full Federal Court decision of FMG Pilbara v Cox (an application for special leave to appeal the High Court was refused recently) in which FMG Pilbara (a subsidiary of Fortescue Metals Group) was found to have negotiated in good faith over the grant of a mining lease. Burnside draws several conclusions about the way in which negotiations were undertaken and the overall application of s31(1) (b) of the NTA and the concept of negotiating in good faith. I wish to respond to Burnside's comments about the conduct of the negotiations and discuss the experience of Fortescue Metals Group (Fortescue) in conducting negotiations with Native Title Claimant Parties (NTCPs) in the Pilbara and their representatives, particularly in relation to the Puutu Kurnti Kurrama Pinikura (PKKP) people and their representatives Yamatji Marlpa Aboriginal Corporation (YMAC).

In section III of the article, Ms Burnside discusses the limits of good faith and notions of bad faith and notes the following:

• Good faith does not require the proponent to fund negotiations;

• Good faith does not require face to face meetings with the native title parties;

• Negotiations could be conducted wholly through a party's legal representatives; and

• Indicia of bad faith include delays, non responses and an "ulterior purpose" - namely the avoidance of contractual obligations to a native title party.

In specifically discussing FMG Pilbara v Cox, Ms Burnside asserts that:

• Fortescue unilaterally ended negotiations when they were "at a preliminary stage"; and

• Fortescue's "obvious 'ulterior purpose'" in the negotiations was to obtain the "tenement with no contractual obligations attached".

Fortescue's negotiations with PKKP occurred in a manner quite different to what is represented in the article. From the inception of negotiations with PKKP, Fortescue funded an internal YMAC lawyer, external consultant lawyer chosen by YMAC and an economist. Fortescue attended face to face meetings with the PKKP working group which includes over 20 members (a one day meeting costing the company in excess of $50,000). Various representatives of Fortescue attended these meetings including representatives of exploration and resource development, heritage, land access and Fortescue's internal native title lawyer. All these actions were taken with a view to concluding a comprehensive, contractually binding agreement covering mining, which was always envisioned to include the benefits Burnside lists such as heritage protection, environmental provisions, employment and training opportunities as well as financial compensation. A draft of such an agreement was provided to the YMAC lawyers at the commencement of negotiations and mirrored previous comprehensive agreements concluded between Fortescue and three other NTCPs represented by YMAC.

These negotiations continued until 22 October 2009, when Fortescue reached an in-principle agreement that guarantees the PKKP substantial financial and other benefits into the future. The agreement with PKKP came almost two years after Burnside asserts Fortescue "unilaterally ended negotiations" and was reached despite the High Court decision one week earlier that provided strong support to the conclusion that the tenement would be granted to Fortescue without further contractual obligations. Prior to the meeting at which the agreement was brokered, YMAC released a press statement that claimed "FMG never began any substantial negotiations towards an agreement … they just went through the motions".

Burnside's claim that Fortescue sought to avoid contractual obligations and terminate negotiations prematurely is invalid and unsustainable in light of these facts and decisions by the Full Federal Court and two judges of the High Court in Fortescue's favour.