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.

The second point I wish to discuss is Ms Burnside's conclusion that "s31(1)(b) of the Native Title Act 1993 (NTA) "requires amendment if it is to be both substantive and enforceable". I would suggest that there is a better and more immediate solution to the problem that she identifies in her paper. Namely, that the right to negotiate provisions contained within the NTA represent 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". Ms Burnside's paper explains that the RTN and the requirement for "good faith" is somewhat unusual in law, but was established due to the inherent power imbalance that generally exists between the two negotiation parties (in this case a mining company and a Native Title Claim Group). She suggests that although it has the appearance of protecting the NTCP, it actually works to disempower them by providing a legitimate structure through which the grantee party can secure its rights to land without ever having to engage in meaningful negotiations.

Where Ms Burnside argues that better legal protection is required, I recommend a different focus from the legal or negotiation representatives. In my view, while the lawyers with whom Fortescue has negotiated are competent in their field of legal expertise, Native Title Representative Body (NTRB) lawyers generally do not act "commercially", instead focusing on process at the expense of advancing a negotiated outcome.

They seem to expect that the Grantee Party fund expensive representation and meeting costs ad infinitum, regardless of progress made towards agreement. Also, they seem to hold out and delay with a view to increasing the level of compensation. Delays to the grant of a tenement have significant cost implications to mining companies. Therefore, delaying behaviour is not rewarded and only works to disadvantage their clients in the long run. In the case of PKKP, the deal would have been substantially more rewarding had the agreement been concluded twelve months ago. The NTRB lawyers should not find it surprising when a Grantee Party resorts to the only real alternative to securing the grant of the tenement – a determination through the National Native Title Tribunal.

In its NTA negotiations, Fortescue foots the bill for all legal, economic and strategic resources employed by the NTRB and NTCP. With this in mind, it seems implausible to suggest that there is any power imbalance in the negotiation room. Yet this seems to be the case. No amount of statutory amendment will change that. It requires NTRBs to employ specialist and experienced negotiators in matters where the stakes are high.

Author Response to Comment

Sarah Burnside

The letter written by Fortescue is apparently a response to my paper. I would like to be clear that my paper was not about FMG or its negotiating conduct at all; it was an analysis of s31(1)(b) of the NTA.

My paper focused on the meaning of 'good faith' in s31(1)(b) of the Native Title Act 1993 (Cth) and the inherent limitations of this section from the perspective of native title claimants and holders.

It should also be noted that my paper was about the Tribunal and Court decisions and on the facts before the courts; it only dealt with the state of negotiations prior to the s35 application. Any negotiations or outcomes reached since then were not the concern of the Tribunal or the Court and are not relevant to my paper.

The issues paper is available to read online at: http://ntru.aiatsis.gov.au/publications/issue_papers.html.

Alternatively, if you would like to receive a hard copy please email: ntru@aiatsis.gov.au .