NATIONAL NATIVE TITLE TRIBUNAL

***White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd & ICRA Ashton Pty Ltd/Scott Franks & Anor (Plains Clans of the Wonnarua People)/New South Wales*, [2011] NNTTA 110 (24 June 2011)**

Application No: NF 11/1

IN THE MATTER of the *Native Title Act* 1993 (Cth)

and

IN THE MATTER of an inquiry into a future act determination application

White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd and ICRA Ashton Pty Ltd (grantee party)

and

Scott Franks and Robert Lester on behalf of the Plains Clans of the Wonnarua People (native title party)

and

State of New South Wales (government party)

FUTURE ACT DETERMINATION

Tribunal: **John Sosso**
Place: **Brisbane**
Date: **24 June 2011**

Hearing Dates: 1 June 2011

Representatives:

Grantee party: Mr Brendan Tobin, McCullough Robertson Lawyers

Native title party: Mr Eddy Neumann, Eddy Neumann Lawyers

Government party: Ms Natasa Najdovski, NSW Crown Solicitor's Office

Catchwords: Native title – future act – proposed grant of Mining Lease – future act determination application – s. 39 criteria considered – determination that the act may be done

Legislation: *Crown Lands Act 1989* (NSW) ss. 34, 87

Environmental Planning and Assessment Act 1979 (NSW) Part 3A

Native Title Act 1993 (Cth) – ss. 29, 35, 36, 38, 39, 47, 75, 190, 237

Cases:

Attorney General v Ward (2003) 134 FCR 16

Australian Manganese Pty Ltd v State of Western Australia (2008) 218 FLR 387

Bissett v Mineral Deposits (Operations) Pty Ltd (2001) 166 FLR 46

Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland WF05/3 [2006] NNTTA 3 (30 January 2006) Member Sosso

Cheinmora v Striker Resources NL (1996) 142 ALR 21

Evans v Western Australia (1997) 77 FCR 193

Little v Western Australia [2001] FCA 1706

Re Koara People (1996) 132 FLR 73

Silver v Northern Territory (2002) 169 FLR 1

Western Australia v Thomas (1996) 133 FLR 124

Western Australia v Ward (2002) 213 CLR 1

Western Desert Lands Aboriginal Corporation v Western Australia (2009) 232 FLR 169

White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd & ICRA Ashton Pty Ltd/Scott Franks & Anor (Plains Clans of the Wonnarua People)/New South Wales, NF 11/1 [2011] NNTTA 72 (28 April 2011) Deputy President Sosso

WMC Resources v Evans (1999) 163 FLR 333

REASONS FOR DECISION

[1] On 11 June 2010 the State of New South Wales ('the government party') gave notice under s. 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant Mining Lease Application MLA 351 ('the proposed tenement') to White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd and ICRA Ashton Pty Ltd (collectively referred to as 'the grantee party'). For the purposes of s. 29(4), 2 July 2010 was specified as the notification day.

[2] The notice described the proposed tenement as being located approximately 4 kilometres south south-east of Ravensworth and comprising an area of 215 hectares. The proposed tenement would authorise the mining of coal by open cut methods for a term of 21 years. The grantee party advised in its Statement of Contentions lodged on 22 March 2011 (at para 2.1) with respect to the good faith challenge, that the proposed tenement is one of a number of mining lease applications that comprise the South East Open Cut Project. In addition, the grantee party advised that the corporate entities comprising the grantee party authorised the operator of the Ashton Coal joint venture, Ashton Coal Operations Pty Ltd ('ACOL'), to do all things necessary to obtain approvals for the grant of the proposed tenement, including addressing any native title issues. The grantee party lodged an affidavit of Mr Peter Stuart Barton, a Director of White Mining (NSW) Pty Ltd and ACOL. Annexed to his affidavit is a letter signed on 13 December 2010 pursuant to which the joint venture companies:

> *"... authorise Ashton Coal Operations Pty Limited (ACOL), as the operator of the Ashton Coal Mine, to manage matters related to the grant of MLA 351 including:*
>
> *(a) negotiating a native title agreement with the native title party for MLA 351; and*
>
> *(b) settling a native title agreement with the native title party, which is subject to final approval and sign off by the JV Participants."*

[3] The proposed tenement is partly overlapped by the Plains Clans of the Wonnarua People native title determination application (NC10/3), which was accepted for registration pursuant to s. 190A on 2 November 2010. The following native title rights and interests were entered on the Register of Native Title Claims:

> *"1. Over areas where a claim to exclusive possession can be recognised (such as where there has been no prior extinguishment of native title or where s.238, including where ss. 47 47A or 47B apply the Wonnarua People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.*

2. Over area where a claim to exclusive possession cannot be recognised, the Wonnarua People claim the following rights and interests:

(a) the right to access the application area

(b) the right to camp on the application area

(d) the right to live on the application area

(e) the right to move about on the application area

(f) the right to hold meetings on the application area

(g) the right to hunt on the application area

(h) the right to fish on the application area

(i) the right to use the natural water resources of the application area including the beds and banks of the watercourses

(j) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs

(k) the right to conduct ceremony on the application area

(l) the right to participate in cultural activities on the application area

(m) the right to maintain places of importance under traditional laws, customs and practices in the application area

(n) the right to protect places of importance under traditional laws, customs and practices in the application area

(p) the right to speak for and make non-exhaustive decisions about the application area

(q) the right to cultivate and harvest native flora according to traditional laws and customs

(r) the right to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional law and custom"

[4] On 11 February 2011 a future act determination application was lodged with the Tribunal pursuant to ss. 35 and 75 of the Act by McCullough Robertson Lawyers on behalf of the grantee party. The application was made more than six months after the notification day – s. 35(1)(a).

[5] On 15 February 2011 Deputy President Sumner appointed me as the Member to constitute the Tribunal for the purpose of conducting the future act determination application inquiry.

[6] On 25 February 2011 I convened a Preliminary Conference during the course of which the native title party contended that the grantee party had not negotiated in good faith. There was no submission that the government party had failed to negotiate in good faith. The Tribunal cannot make a s. 38 determination if any negotiation party satisfies the presiding Member that either the grantee party or government party did not negotiate in good faith – s. 36(2). After considering the contentions lodged by the parties, the Tribunal determined that the grantee party had fulfilled its obligation to negotiate in good faith and that the Tribunal had power to conduct an inquiry

and make a determination pursuant to s. 38 – *White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd & ICRA Ashton Pty Ltd/Scott Franks & Anor (Plains Clans of the Wonnarua People)/New South Wales*, NF 11/1 [2011] NNTTA 72.

[7] Directions were initially made on 25 February 2011 with respect to both the issue of good faith and the substantive inquiry. Those Directions were subsequently amended on 14 March 2011 and 20 May 2011. A Listings Hearing was convened in Sydney on 1 June 2011. By the time that the Listings Hearing was convened each of the negotiation parties had lodged with the Tribunal their Contentions. Both the government and grantee parties had confirmed with the Tribunal that they requested that the matter be heard "on the papers". Mr. Neumann on behalf of the native title party, initially submitted that the Tribunal should engage in a bifurcated inquiry, whereby the Tribunal should first determine if the proposed future act could be done, and if it determined that the future act could be done, then the parties could make further submissions on what conditions if any, should be imposed. Such an approach was not supported by either the government or grantee parties. It would not be helpful if an inquiry was split in the manner sought by Mr. Neumann. In order to determine if an act should or should not be done, it is necessary for all of the material to be before the Tribunal. It could be, for example, that the conditions sought by a party are legally impossible to impose and, in which case, that party may then oppose the doing of the future act. Mr. Neumann then agreed that the Tribunal should make a determination on the basis of the material before it.

Nature of the Proposed Future Act

[8] During the course of this inquiry, copious material has been provided to the Tribunal about the proposed future act and more generally, the related coal mining operations of the grantee party in the Hunter Valley of New South Wales. For the purposes of this inquiry it is appropriate to briefly set out the nature of the proposed future act, and how it relates to existing mining operations in this area. The Tribunal found of particular assistance the affidavit of Mr. Brian Wesley who has been the General Manager of the Ashton Coal Project (ACP) since September 2010.

[9] Ashton Coal Operations Pty Limited (Ashton) owns and operates the ACP approximately 14 km north-west of Singleton in the Hunter Valley. The ACP comprises an open cut and

underground coal mine as well as related handling and processing plants, support facilities and a rail loading facility. Development consent was granted for ACP by the New South Wales Minister for Planning in October 2002. In March 2009 Ashton submitted a major project application under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to develop a new open cut coal mine, which is referred to as the South East Open Cut (SEOC).

[10] The SEOC Project comprises an open cut coal mine and related surface support facilities, including a coal handling facility. It is proposed that coal extracted from the SEOC will be transported by conveyor to the existing ACP processing plants and then transported to market. The proposed project is situated approximately 1.5 km south of the existing ACP open cut mine and 0.5 km east of the existing ACP underground coal mine.

[11] The SEOC is intended to be a replacement mine to the current open cut, which is in the final stages of mining. It is intended to provide coal supply security to Ashton and employment security for approximately 160 current Ashton mine employees. If it proceeds, the grantee party will be able to extract up to 16.5 million tonnes of coal.

[12] This region of New South Wales is the focus of extensive coal mining operations. Not including ACP, there are eight open cut and two underground coal mines within a 4 km radius of the SEOC Project. In total these coal mining operations provide employment to approximately 2,500 people.

Material before the Tribunal

[13] Apart from the contentions lodged by the parties for the good faith challenge, the following material was provided for the purpose of the substantive inquiry:

(a) Statement of Contentions of the native title party dated 24 May 2011 (NTPSC);

(b) Statement of Contentions of the grantee party dated 21 April 2011 (GPSC); and

(c) Statement of Contentions of the government party dated 21 April 2011 (GovPSC).

[14] Each of the parties attached to their contentions other material they have relied upon.

[15] The grantee party attached to its contentions the following affidavits made by:

(a) Mr. Brian Wesley sworn on 18 April 2011;

(b) Ms. Angela Besant sworn on 19 April 2011;

(c) Mr. Neville Smiles sworn on 18 April 2011; and

(d) Mr. Keith Moss sworn on 18 April 2011.

[16] The government party produced a folder of documents which related to the notification of the proposed future act, details of recorded sites kept on the Aboriginal Heritage Information Management System (AHMS) Register, maps relating to the current tenure of lots covered by MLA 351 and lots in its vicinity, documents relating to current land tenure for lots wholly or partially in the area covered by MLA 351 or sharing a border with it and maps and documents relating to the current mining tenure in the vicinity of MLA 351.

[17] Attached to the contentions of the native title party was an Affidavit of Mr. Scott McCain Franks which was affirmed on 24 May 2011 and which is set out below:

> *"1. I was born in Singleton and have lived and worked in or near the claim area all my life until about four (4) years ago when I moved to Sydney. Most of my family continue to reside in the Singleton area.*
>
> *2. I am one of the registered claimants. I have been involved in Aboriginal Cultural clearance work in the Hunter Valley area for over ten (10) years.*
>
> *3. When growing up I was taught Wonnarua law and custom and I in turn teach my children and nephews and hope to teach my grandchildren in time to come.*
>
> *4. I refer to the report by Angela Besant ("Besant") entitled "Aboriginal Archaeological Assessment – Ashton Coal Operations Limited – Proposed South East Open Cut Project" dated 5 November 2009 and being Annexure "AB-2" in the Affidavit of Angela Besant dated 19 April 2011 annexed hereto and marked "A" are pages 56-62 of Besant.*
>
> *5. It is an important part of our tradition and culture that we are able to show our young people where our ancestors lived and how they lived.*
>
> *6. Of particular importance is how our ancestors made the tools and implements on which they relied for their survival.*
>
> *7. It is important that we can show our young people workshop sites used by our ancestors in relation to the manufacture of weapons and implements.*
>
> *8. Many of such sites have been destroyed by development and many are buried and been impacted by the use made of country by non-indigenous people.*
>
> *9. It is our part of our culture and tradition that we seek to preserve sites important to our ancestors day to day survival so they can used for teaching our young people.*
>
> *10. The area of MLA351 contains many areas which are evidence of our people's use of the area and the manufacture of weapons and implements for daily life.*
>
> *11. These are detailed in Besant and set out in Annexure "A" hereto.*

12. *I have been taught and I believe that the area where the village of Camberwell is located and the area of MLA351 were extensively used by my ancestors.*

13. *Besant at page 56 in annexure "A" states "that it is likely that the terrace flanking the east bank of Glennies Creek is likely to be a continuous site, at least across the Northern half of the study area. Artefacts were located in virtually all exposures along that portion of the terrace". It is significant that Besant states that "the artefacts that had been exposed are evidence of localised events such as Knapping, workshops or small camp sites".*

14. *In my experience there are few examples of knapping sites still in existence in the Wonnarua Country.*

15. *Also at page 56, 57 in annexure "A" Besant states "given the excavation of a hearth elsewhere on Glennies Creek and the presence of a variety of older terraces and meanders on the flood plane area of this study area, there may be potential for the detection of older occupation sites".*

16. *Besant has classified one site within the claim area as of high significance and two to three other areas of moderate to high significance. See figure 10 at page 62 in annexure "A".*

17. *Furthermore within MLA 351 within a kilometre of the high significance site referred to in paragraph 15 there is a further area of high significance (noted as SA11 * 6 and) and within 3 kilometres is another area (SA9.2) which is also classified by Besant as of high significance.*

18. *Besant also acknowledges at page 61 in annexure "A", "the local Aboriginal community representatives have indicated that they believe that this area is to be of high cultural significance and desire further investigation to be undertaken".*

19. *If the mine goes ahead by its very nature, these sites will be destroyed and they will no longer be available to be shown to future Wonnarua generations.*

20. *In my experience it is of the utmost importance to the welfare of our people that they can be shown evidence of where and how our ancestors lived.*

21. *If this mine goes ahead such evidence will no longer be available in situ.*

22. *In my opinion and experience the educational use of traditional workshops is lost once removed from the ground.*

23. *There have been a number of discussions and meetings held by the native title claim group at which I have been present in relation to opinions and wishes relating to the sites recorded by Besant. The very clear wish and opinion of the claim group is that because of the wholesale destruction of aboriginal sites in the Hunter Valley as a result of mining the sites classified by Besant as of high significance and moderate to high significance should not be destroyed and instead should be preserved in situ so as to be available to be used to educate our young people as to how our ancestors lived and survived.*

24. *I refer to paragraphs 11 and 12 of Besant's Affidavit sworn 19 April 2011. I do not agree that "large stone working sites are relatively common". I agree that at one time they were but the reality is that most such sites of our people have been destroyed during the European occupation. Our people lived in the valley and creek lines, not in the mountains and because the coal seams are in and around the creek lines and valleys they been destroyed by mining operations.*

25. *I refer to paragraph 12 of Besant's Affidavit sworn 19 April 2011 and say that the SEOC Project is open cut mining so similar sites would be destroyed if the mine proceeds.*

26. *I also refer to paragraph 19 of Besant's Affidavit sworn 19 April 2011 and point out that the "full investigation" referred to would in fact involve the destruction of the integrity of the sites. I further point out that while such evidence has been recorded throughout the Hunter Valley the fact is that it has mostly been destroyed after being recorded.*

27. *I refer to the Affidavit of Neville Gordon Smiles dated 18 April 2011 herein and the Affidavit of Keith William Moss sworn 15 April 2011. I do not know Neville Gordon Smiles or Keith William Moss and have asked my brother Charles Claude Franks who is a farmer and contract earthmover who has always lived in or near the claim area if he knows either of them. My brother informs me that Neville Gordon Smiles and Keith William Moss are not known to him.*

28. *I refer to paragraph 13 of the Affidavit of Neville Gordon Smiles and paragraph 14 of the Affidavit of Keith William Moss and I say I believe one of the young persons on a bike would have been my son who lived locally with his mother until about 2006.*

29. *I refer to annexure "BW 8" to the Affidavit of Brian Gregory Wesley dated 18 April 2011 entitled "Site Specific Management Recommendations". I have discussed these management recommendations with the senior members of the claim group. Our claim group is of the firm view that the recommendations are completely unsatisfactory because they each involve the total destruction of each of the sites referred to with no prospect of preservation of any of the sites in situ.*

The Proposed Tenement Area – previous freehold grants and exploration and mining

[18] The uncontested submission of the government party (GovPSC at para 35) was that the vast majority of the land and waters comprising the proposed tenement comprised freehold land owned by Ashton Coal Mines Limited. The government party outlined 22 lots that have been the subject of grants in fee simple, and the maps provided show that these constitute most of the proposed tenement. Apart from those 22 lots, a further four lots are Crown reserves held by the State of New South Wales and one lot is held by Singleton Council.

[19] The grantee party's statement of contentions (at para 2.1), state that while the area of the proposed tenement is approximately 400 hectares (the actual area is 215 ha), the negotiations between the parties focused on an area of land of approximately 48.5 hectares which formerly comprised the Camberwell Common, and is now contained in Lot 7004 on DP 93630. The only other parcel of land referred to by the grantee party (at para 2.4) was a small portion of Lot 7004 which had been alienated in the name of Singleton Council for a children's playground (Lot 1 DP 1156548).

[20] Mr. Wesley deposed (at paras 15 – 18) that the land comprised in Lot 7004 was devoted to temporary commonage by Gazette notice dated 21 October 1876. The Common was managed by the Camberwell Common Trust pursuant to various statutes, the most recent being the *Commons Management Act 1989* (NSW). On 16 April 2010 the Minister for Lands published a notification in the Government Gazette pursuant to s. 87 of the *Crown Lands Act 1989* (NSW) reserving Lot

7004 for the public purpose of rural services and revoking Reserve 170176, being the land comprised in Lot 7004. Also on 16 April 2010 the Minister for Lands entered into a Licence pursuant to s. 34 of the *Crown Lands Act 1989* with Ashton Coal Operations Pty Limited (ACOL). The Licence allows for access, agricultural activities and the undertaking of site investigations by ACOL. ACOL is currently grazing horses on Lot 7004. The only persons currently having access to Lot 7004 are ACOL employees, associated contractors and a local community member who is permitted to agist horses.

[21] The subject land also includes land that has been, and continues to be subject to exploration licences granted pursuant to the *Mining Act 1992* (NSW) and a petroleum exploration licence granted pursuant to the *Petroleum Act 1955* (NSW). The extant overlapping exploration tenements are as follows:

(a) EL 7509 (granted 7 April 2010);

(b) EL 5860 (renewed on 17 December 2009 until 21 May 2012); and

(c) PEL 207 (renewed on 15 June 2006 until 19 January 2012).

Aboriginal Cultural Heritage

[22] The grantee party lodged an affidavit of Ms. Angela Besant, which was referred to in the affidavit of Mr. Franks, quoted earlier. Ms. Besant is the principal archaeologist of Insite Heritage Pty Ltd, which company was commissioned by the grantee party in 2008 to conduct an Aboriginal Archaeological Assessment for an area of land including the area of the proposed tenement (the Study Area).

[23] Ms. Besant deposed (at para 4) that she, with the assistance of two her colleagues, Mr. Christopher Carter and Ms. Elizabeth Wyatt, carried out a survey of the Study Area between 15 – 19 December 2008. She was also assisted by Aboriginal community representatives. Subsequently she authored the Aboriginal Archaeological Assessment Report for the South East Open Cut Project (SEOC Project) which is attached to her affidavit and is dated 5 November 2009.

[24] Ms. Besant deposed (at para 6) that during the survey work for the Aboriginal Archaeological Report (the Report) she found 1125 artefacts from 85 sites within the Study Area. Of these, 9 sites containing 207 artefacts were found within Lot 7004, with one site of 50 x 50 metres accounting for 158 of those artefacts. Details of the artefacts and their location are set out in some length at paragraph 3.3 and Figure 7 of the Report which is attached to her affidavit.

[25] Ms. Besant deposed as follows:

> *"8 Out of the nine sites I identified, seven were scatters of artefacts and two ('SA2-2' and 'SA1-6') were isolated finds.*
>
> *9 The sites in common contained stone artefacts being generally flakes (the products or byproducts of flaking) with a few cores. From current analysis only one site ('SA2-6) exhibited, by reason of the presence of useware (striations of glaze on the working end of the stone flake produced by use), signs of use. The flakes were made of mudstone and silcrete, which is common in the Hunter Valley.*
>
> *10 The scatters and isolated find indicate a past presence of Aboriginal people in the landscape including the Study Area."*

[26] The grantee party also lodged with the Tribunal an affidavit from Mr. Wesley, which has previously been referred to. He deposed, inter alia, to commitments given by the grantee party to the State of New South Wales pursuant to its Part 3A application for the SEOC Project. Following the public exhibition of the Project's Environmental Assessment between 27 November 2009 and 18 January 2010, ACOL revised its statement of commitments in relation to Aboriginal cultural heritage. Mr Wesley deposed (at para 27) that under its revised commitments ACOL will:

(a) prepare and implement an Aboriginal Cultural Heritage Management Plan (ACHMP) for the SEOC in consultation with a qualified archaeologist and the local Aboriginal community;

(b) salvage all artefacts from impacted areas in consultation with a qualified archaeologist and the local Aboriginal community;

(c) undertake specific tasks with respect to the location and collection of artefacts as outlined in Table 5.49 of the annexed Environmental Assessment Report;

(d) avoid impacts to Aboriginal sites outside mine disturbance areas;

(e) if Aboriginal objects are identified during the project, manage the site in accordance with the ACHMP and register the site in the Aboriginal Heritage Information Management System;

(f) ensure that the ACHMP includes a cultural awareness document clearly highlighting and explaining the materials likely to be exposed by earth moving activities which will be supplied to workers and kept on site at all times; and

(g) if human remains are located during project activity, ensure that all works cease in the immediate area to prevent any further impacts to the find. The local police will be called and if the police consider the site not an investigation site for criminal activities, the Aboriginal community and the Office of Environment and Heritage will be notified. Works will not resume in the designated area until approval from the police and the Office of Environment and Heritage is obtained.

Legal Principles

[27] The criteria for making a future act determination are set out in s. 39 of the Act. The section provides as follows:

"***39 Criteria for making arbitral body determinations***

(1) In making its determination, the arbitral body must take into account the following:

(a) The effect of the act on:

(i) the enjoyment by the native title parties of their registered native title rights and interests; and

(ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(e) any public interest in the doing of the act;

(f) any other matter that the arbitral body considers relevant.

Existing non-native title interests etc.

(2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:

(a) existing non-native title rights and interests in relation to the land or waters concerned; and

(b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

Agreements to given effect

(4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:

(a) must take that agreement into account; and

(b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues."

[28] The long accepted approach by the Tribunal to applying the criteria outlined in s. 39 was explained in *Western Australia v Thomas* (1996) 133 FLR 124 (at 165-166) as follows:

> *"We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of the evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.*
>
> *The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any matter we consider relevant.*
>
> *The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence."*

[29] Pursuant to s. 38(1) the Tribunal must make one of three types of determinations, namely a determination that the act must not be done, or that the act may be done, or that the act may be done subject to conditions. Specifically, the Tribunal is prohibited from imposing a profit-sharing condition – s. 38(3). The Act does not specify what sort of conditions the Tribunal may impose, although the Federal Court has pointed out that the s. 39 criteria "*provides a indication in broad terms of what Parliament considers might be the appropriate subject matter of*

conditions which the Tribunal might impose upon the doing of the act" per Carr J *Walley v Western Australia* (1999) 87 FCR 565 at 576.

Section 39(1)(a)(i) – enjoyment of registered native title rights and interests

[30] The Tribunal proceeds on the basis that registered native title rights and interests are assumed to exist as if they had been determined by the Federal Court. This principle was expressed as follows in *Western Australia v Thomas* (1996) 133 FLR 124 (at 167): "*by giving the right to negotiate to claimants as well as holders of native title, the Act requires us to accept the possibility that each of the native title rights and interests described in the application exist."* Subparagraph 39(1)(a)(i) requires the Tribunal to determine the likely effect of the proposed future act on those registered native title rights and interests. The Tribunal does not proceed on the assumption that the doing of the proposed future act will negatively impact on the *enjoyment* of those rights and interests. There must be evidence of the nature of that enjoyment in order for the Tribunal to engage in the weighing exercise envisaged by s. 39(1)(a)(i). As the Tribunal explained in *Western Australia v Thomas* (at 167): "*The question whether a proposed future act has effect on the native title rights and interests of the particular native title party (or parties) is a matter of fact to be determined on the evidence of each case and will depend on the nature of the act and the native title rights and interests which are capable of being effected."*

[31] In determining the effect of the act on the enjoyment by the native title party of its registered native title rights and interests, the Tribunal is required, pursuant to s. 39(2) to take into effect the nature and extent of non-native title rights and interests and the existing use of the land by persons other than the native title party.

[32] The grantee party contended (GPSC at paras 3.1 – 3.2) that the doing of the proposed future act would have minimal impact on the *enjoyment* of the registered rights and interests of the native title party. Two reasons were advanced in support of this submission:

(a) the native title party can only assert native title rights and interests over the Camberwell Common (Lot 7004), and this land is subject to partial extinguishment, to the extent that it included a right to control access to and use of the land. In short, it was submitted, the native title party cannot claim exclusive possession of Lot 7004. The grantee party referred the Tribunal to the following statement of the law given

by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia v Ward* (2002) 213 CLR 1 at 138/[219]:

> *"Nevertheless, by designating land as a reserve for a public purpose, even a purpose as broadly described as 'public utility', the executive, acting pursuant to legislative authority, decided the use or uses to which the land could be put. The executive thus exercised the power that was asserted at settlement by saying how the land could be used. The exercise of that power was inconsistent with any continued exercise of power by native title holders to decide how the land could or could not be used. The executive had taken to itself and asserted to say how the land could be used. This step was not, however, necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation."*

(b) It was also submitted that, as a matter of fact, some of the registered native title rights and interests are logically or practically incapable of being enjoyed, or enjoyed without qualification on Lot 7004. The examples given were as follows:

(i) The right to fish: the only bodies of water within Lot 7004 are some recently man-made dams for agricultural purposes, and there have been no reports of fish in the dams;

(ii) The right to use the natural water resources of the application area: there are no natural water resources within Lot 7004;

(iii) The rights to protect, speak for and make 'non-exhaustive' decisions about the application area: these registered rights are not coupled with a right of exclusive possession. On the basis of various Federal Court decisions, including the Full Court decision in *Attorney General v Ward* (2003) 134 FCR 16, the grantee party submitted that a "right to protect" does not amount to a right to exclude. The grantee party submitted (at para 3.2):

> "*It is submitted that in the absence of a right of exclusive possession, the rights to protect, speak for and make 'non-exhaustive' decisions accepted by the delegate of the Registrar in the present case as among the registered native title rights and interests 'could include protecting places from environmental damage or degradation and seeking to prevent unwitting damage or disturbance by animals or people', but do not allow the exclusion of lawful entrants on those places.*
>
> *It follows from the approach taken by the Full Federal Court, that in the absence of an exercisable native title right to exclusive possession, evidence or assertions of an obligation to or rights to protect, speak for and make 'non-exhaustive' decisions will not extend to a right of control over the land covered by MLA 351 or the undertaking of actions permitted by a mining lease. Native*

title rights of these kinds are therefore not rights that are prone to being effected by the proposed act."

[33] The grantee party properly conceded (para 3.3) that registered native title rights and interests which allow the native title party to do things on the land (as opposed to exercising control over it) are, at least in theory, capable of being negatively impacted by the doing of the proposed future act. Nonetheless the grantee party asserted that the paucity of evidence before the Tribunal on the exercise of such rights made it unlikely that the grant of MLA 351 would have little, if any, effect, on the enjoyment of those rights. In support of this submission the grantee party produced affidavits of neighbouring landholders and employees who regularly viewed Lot 7004. The Tribunal was provided with affidavits from Mr. Neville Smiles and Mr. Keith Moss. Both gentlemen lived and worked in the immediate vicinity of Lot 7004. Both affidavits are very similar and, for present purposes it will suffice to set out in full, the affidavit of Mr. Smiles:

"1 Between 1987 and 2010, I lived at 5831 New England Highway, Camberwell, in the state of New South Wales (my Property).

2 I have worked in the vicinity of my Property, between Singleton and Muswellbrook, from 1981 to 2005, when I retired.

3 Except to the extent that I was employed in the coal mining and processing industry I have no affiliation by way of employment, shareholding or otherwise with the operations or owners of the Ashton Coal Project.

4 The north-western corner of my Property bordered the corner of the land formerly known as the Camberwell Common, now known as Lot 7004 DP 93630 (Lot 7004). Annexed hereto and marked with the letters 'NS-01' is a plan showing my Property in proximity to Lot 7004.

5 When I lived at my Property I viewed Lot 7004 almost daily and I had an unimpeded view over most of Lot 7004 from my Property.

6 I never grazed my cattle on Lot 7004 and in the time I lived in my Property, I only entered Lot 7004 once or twice.

7 I entered Lot 7004 through a gate just past the Camberwell Hall. I was also aware of another gate on Glennie Street.

8 I did not ever ask any person for permission to enter Lot 7004.

9 A small number of people from the local community grazed cattle and horses on the land at different times while I lived at my Property. I either knew these people or knew of them and was aware of their use of Lot 7004.

10 Before Neil Worth, one of the local residents who grazed his cattle on the land, completed the fencing of Lot 7004 along Glennie Street, I would infrequently see a few young people from the local community riding their motorbikes around Lot 7004. I never saw a vehicle or a trailer that transported the motorbikes to Lot 7004.

11 I knew nothing about Aboriginal people of the area and did not ever see persons who I could identify as Aboriginal people on Lot 7004. I have never heard from anyone, any report of persons known or thought to be Aboriginal persons using Lot 7004.

12 I have never seen any person carrying out any of the following activities on Lot 7004:

(a) camping or erecting shelters;

(b) gathering, living or holding meetings;

(c) hunting, fishing or gathering of food or any other natural products;

(d) ceremonies or cultural activities;

(e) burials or cultivating and harvesting native flora.

13 The only people that I can remember seeing moving about on Lot 7004 are the people who I knew to be grazing cattle and horses and the young people riding their motorbikes.

14 Other than the people who I knew to be grazing cattle and horses on Lot 7004. I have never seen anyone maintaining Lot 7004.

15 I have never been told of any significant or special Aboriginal sites on Lot 7004."

[34] Mr. Moss deposed (at para 6) that while he never grazed cattle on Lot 7004, he had a water pipeline running through the Common, and if the pipe didn't work he would walk across the land to look for leaks in the pipeline. This occurred on a monthly basis between 1999 and 2008. His wife would tend to their horses on a daily basis and viewed Lot 7004 regularly. The only people he deposed (at para 14) that he saw on the Common were people grazing cattle and horses, young motorbike riders and employees of the electricity company carrying out maintenance on power lines running through the Common.

[35] The grantee party also placed reliance on the affidavit of Ms. Besant. She deposed that there was no evidence of any significant Aboriginal presence on the SEOC Project land in the post European period. She deposed (at para 17): *"There is also no evidence, on Lot 7004 or on the SEOC Project land, of meeting or living places used in the post European period such as fringe dwellings or informal town camps."*

[36] Consequently, the grantee party contended (at para 3.6) that the enjoyment of the native title party's registered rights and interests has been minimal, and accordingly it is unlikely that the doing of the proposed future act would have any significant effect on the enjoyment of those rights and interests.

[37] The government party contended (GovPSC at para 14) that the proposed tenement included lands that have been the subject to grants of rights and interests which had the potential to adversely effect the enjoyment of native title rights and interests. In the context of its submissions on s. 39(2)(a), the government party provided the Tribunal with a list of all those

parcels of land the subject of freeholding, as well as those parcels either held as a Crown reserve or by the Singleton Council.

[38] In response the native title party contends (NTPSC at paras 2.1 and 2.2) that the grant of the proposed tenement will have "*a disastrous effect*" on the enjoyment of their registered rights and interests. This, it was contended, would be so because open-cut mining will necessarily affect the surface and sub-surface material resulting in the destruction or removal of the soil and its contents. It was contended that this would have an immediate impact on the right to gather natural products of the area, the right to participate in cultural activities, the right to maintain places of importance and the right to protect places of importance. The native title party then contended (at para 2.3 and 2.4):

> *"2.3 The Grantee Party asserts that enjoyment in the past has been minimal and accordingly it is unlikely that the proposed future act would have any significant effect. However in our submissions section 39(1)(a)(i) does not depend upon any existing use or recent use of the claim area. The wording of the section is different to the wording of section 39(2)(a) \&(b) which refer specifically to 'existing use'.*
>
> *2.4 The nature of the mine means that during the life of the mine there can be no enjoyment of the traditional rights and interests. Furthermore, even after the end of the mine after its term of 21 years the Native Title Claim Group will no longer be able to enjoy native title rights and interests in respect of the sites identified in a report by Angela Besant ('Besant') entitled 'Aboriginal Archaeological Assessment – Ashton Coal Operations Limited – Proposed South East Open Cut Project' dated 5 November 2009."*

[39] The only other material submitted by the native title party that is of assistance in assessing the matters referred to in s. 39(1)(a)(i) is the affidavit of Mr. Franks set out earlier. Mr. Franks does not assert that he or members of the native title party access the area of the proposed tenement in exercising their registered native title rights. Instead he deposed (at para 12): *"I have been taught and I believe that the area where the village of Camberwell is located and the area of MLA 351 were extensively used by my ancestors."*

[40] In short not only is there no evidence before the Tribunal of the actual enjoyment of the registered rights and interests by members of the native title party, but an implicit acknowledgement that there is little or no contemporary enjoyment of those rights and interests. The only direct evidence that any members of the native title party access the subject land, is the assertion by Mr. Franks (at para 28) that one of the boys seen by Mr. Smiles on motor bike on the Common was his son, who lived in locality with his mother until 2006. However there is no

suggestion that, even if the boy in question was his son, he was accessing the subject land to exercise any registered native title right or interest.

[41] The native title party contends that s. 39(1)(a)(i) is not directed towards any existing use or recent use of the claim area. This contention is inconsistent with the clear wording of the paragraph. In *Australian Manganese Pty Ltd v State of Western Australia* (2008) 218 FLR 387 Deputy President Sumner said in relation to this paragraph (at 404/[43]): "*The Tribunal's task is to examine the native title rights and interests which are enjoyed by the native title party over the relevant area and which would be affected in the way described by the mining proposal."* In short there must be some evidence of contemporary enjoyment of the registered rights and interests. The word "*enjoyment"* connotes a current and future state of affairs and not previous activities.

[42] Reference can also be made to the reasons of the Tribunal in *WMC Resources v Evans* (1999) 163 FLR 333 where the Tribunal comprehensively considered the effect of the 1998 amendments on s. 39(1)(a)(i), and in particular, the insertion of the words "*the enjoyment by the native title parties of their registered native title rights and interests".* Deputy President Sumner made the following observations (340/[30]):

> *"The Tribunal must assume for the purpose of the inquiry that the native title rights and interests which potentially could be effected are those set out in the Register of Native Title Claims and then consider evidence of what are the likely effects of the act on those registered native title rights and interests. The introduction of the word 'enjoyment' in s 39(1)(a)(i) must also be taken into account and implies that the Tribunal must make an assessment of the effect of the act on present usage and future amenity. The fact that the Tribunal must now look at the enjoyment of the native title rights and interests reinforces the point that evidence needs to be given of how those registered native title rights and interests (whether determined or only claimed) are exercised and enjoyed. A mere statement, contention or assertion that interests claimed will be effected without evidence of their current use and the potential impact on them will not suffice to enable the Tribunal to make findings on this point."*

[43] In this matter there is no suggestion that any members of the native title party have accessed the subject land to exercise their registered native title rights and interests. Indeed there is no evidence at what point of time in the past this ceased. Consequentially, there is no evidentiary basis for assessing whether the doing of the future act would have any impact on the future amenity of the subject land for any prospective exercise of such rights and interests.

[44] Further, the grantee party has properly asserted that the only part of the proposed tenement area where native title can still be claimed is the non-freehold parcel of land previously known as Camberwell Common. The native title party did not dispute this contention, nor is there any evidence before the Tribunal of the possible operation of ss. 47 – 47B. Likewise, the native title party did not dispute the contention of the grantee party that certain registered rights and interests were as a matter of fact, incapable of being enjoyed. It is open to the Tribunal when taking into account s. 39(1)(a)(i) to consider undisputed and clear evidence of extinguishment or any practical limitations on the exercise of registered native title rights and interests.

[45] Accordingly I find that that the doing of the proposed future act is unlikely to have any significant deleterious impact on either the current or future enjoyment of the native title party's registered native title rights and interests.

Section 39(1)(a)(ii) – the way of life, culture and traditions of any of those native title parties

[46] In *Western Australia v Thomas* (1996) 133 FLR 124 the Tribunal observed (at 169-170): "*As with the previous criterion there will need to be evidence of the way of life, culture and traditions of the native title parties and of the effect of the proposed act on them."* In this regard the grantee party submitted that there was very limited, if any, use of Lot 7004 by the members of the native title party. The grantee party contended (GPSC at para 4.2): "*There is also very limited, if any, indication that Lot 7004 is integral or significant to the way of life, culture or traditions of the native title party. Accordingly, there is a strong and logical argument that where there has been little to no use of the area, any future act is unlikely to significantly affect the way of life, culture and traditions in relation to this particular area."*

[47] The native title party did not provide any contemporary evidence of how the way of life, culture and traditions of the claim group would be negatively impacted by the grant of the proposed tenement. Instead the native title party made the following submission (NTPSC at para 3.1):

> *"For the same reason stated in 2 above the Native Title Parties assert that the mine will have a disastrous effect. The Native Title Parties assert that because of the number of mines in their traditional country there are very few sites remaining in situ which evidence and show how their ancestors survived. It is our contention that the evidence of post European occupation to date is not the crucial factor. The crucial factor is that the right and the opportunity to exercise the right will be lost to future generations if the mine proceeds as is intended."*

[48] In order for the Tribunal to sensibly evaluate the likely effect of the doing of the future act on the matters contained in s. 39(1)(a), there must be evidence from which inferences can be drawn and scenarios developed. It is true that the grant of this tenement will result in very intrusive ground breaking activities. Open cut coal mining results, by its very nature, in substantial impacts on the environment. To that extent, the Tribunal readily understands and appreciates the native title party's contention that the grant of the proposed tenement will have far reaching ramifications. However, with respect, one can only evaluate the likelihood of any future negative impacts of the grant of the tenement if there is evidence before the Tribunal about the contemporary way of life, culture and traditions of the claim group and how that way of life, culture and tradition manifests itself on the subject land. Consequently, there is insufficient evidence provided by the native title party about the way of life, culture and traditions practised on the subject land to support a conclusion the grant of the proposed tenement will have a negative impact.

Section 39(1)(a)(iii) – development of social, cultural and economic structures

[49] The grant of an exploration or mining tenement could have negative or positive impacts on the development of social, cultural and economic structures of a native title party. In this regard the Tribunal in *Western Australia v Thomas* (1996) 133 FLR 124 (at 170) made the following observation: *"The social, cultural and economic structures of Aboriginal societies are not static. A mining proposal could have either a negative or positive effect on the development of these structures. If the Tribunal were to decide that the act can be done then conditions could be imposed to minimise any adverse effect on, or to promote the development of, these structures."*

[50] The grantee party contended that the grant of the proposed tenement would have both direct and indirect positive effects on the development of social, cultural and economic structures. The direct positive effects involved the proposed provision of apprenticeship and traineeship opportunities in relation to the SEOC Project area. The grantee party submitted (GPSC at para 5.3) that it proposed to offer two traineeships and two apprenticeships to the native title party during the term of MLA 351. If no response is received of such notification, or there are no successful candidates able to take up these opportunities, then the grantee party will offer the remaining positions to other local Aboriginal people.

[51] The grantee party also contended (GPSC at para 5.4) that the proposed Aboriginal Heritage Management Plan will not only assist in protecting and minimising harm to identified significant objects and sites located both within Lot 7004 and the broader SEOC Project area, but it also has the potential to heighten awareness among members of the native title party of the history of Aboriginal presence in the area and its material culture.

[52] The grantee party further contended (GPSC at para 5.6) that for the most part members of the native title party were also local residents, and referred to the contrast "*between the prospect of closure of an exhausted mine with the attendant loss of jobs, prosperity and optimism and the alternative of a fresh lease of life for the community (which the grant of MLA 351 will signal) are alternatives for a future that will affect the whole community.... The consequences that flow from the alternative possibilities will affect the development of the social, cultural and economic structures of the native title party."*

[53] The native title party rejected the contention of the grantee party that the grant of the proposed tenement would have a positive effect. It was contended (NTPSC at para 4.1):

> "*... of significance to the claim group is not that apprenticeships will be offered but that important sites showing how their ancestors survived will again be destroyed. Furthermore, the claim group will not be able to use the site to educate younger members of the claim group or show the wider community evidence of their ancestors occupation and way of life before European settlement."*

[54] The evidence before the Tribunal that is relevant to this paragraph is quite scant. Clearly mining can have, and has had a negative impact on some Aboriginal communities. The direct benefits flowing from the grant of the proposed tenement to the native title party are minimal. The right to a first offer of two traineeships and two apprenticeships, while a positive development, is unlikely to have a major beneficial impact on the socio-economic structures of the native title party. Nonetheless I accept that for local people, including members of the native title party, the ongoing operation of coal mining is, potentially, of significance and is likely to produce economic and consequential social benefits.

[55] The contentions of the native title party were not helpful in that they amounted to broad assertions not supported by evidence of the social, cultural or economic structures of the native title party. I accept that the possible destruction of objects and sites could have a negative impact on the social and cultural structures of a claim group. However, as previously noted, there is next

to no material before the Tribunal about the interaction of members of the claim group to the subject land or of their culture and traditions.

[56] In these circumstances, I find that it is likely that the grant of the proposed tenement will have some positive impacts on the development of the social and economic structures of the native title party.

Section 39(1)(a)(iv) – freedom of access and freedom to carry out rites and ceremonies

[57] It is clear from the contentions of the grantee party and the Affidavit of Mr. Wesley that access to the proposed tenement will be strictly limited during the course of mining and rehabilitation activities. Mr Wesley deposed (at para 25): *"For safety reasons, access to Lot 7004 will be restricted during the life of the mine. During the term of MLA 351 and the end of year seven, it may be possible to allow some limited conditional access to the site, pending safety requirements and limitations, if Aboriginal persons request it."*

[58] However, there is scant material before the Tribunal about any contemporary accessing of the subject land by members of the claim group. The only suggestion that any member of the claim group has accessed Lot 7004 in recent years is contained in the affidavit of Mr. Franks concerning the possible bike riding on the site by his son more than five years ago.

[59] I accept that the open cut coal mining of the proposed tenement will result in members of the native title party being denied access to the subject land, however the land is already fenced and there is no suggestion that members of the native title party visit the land nor is there any evidence of the carrying out of rites and ceremonies.

Section 39(1)(a)(v) – areas or sites of particular significance

[60] This paragraph focuses on areas or sites of *particular* significance to members of the native title party in accordance with their traditions. Similar wording is also adopted in s. 237(b), and the jurisprudence on that paragraph is of assistance when undertaking an assessment pursuant to s. 39(1)(a)(v). The leading decision is *Cheinmora v Striker Resources NL* (1996) 142 ALR 1 where Carr J said (at 34 – 35): "*It is not enough that the site simply be of significance to the native title holders. That would leave the word 'particular' with no work to do. The situation is,*

in my opinion, that a relevant site is one that is of special or more than ordinary significance to the native title holders in accordance with their traditions."

[61] In order that the Tribunal can sensibly evaluate whether an area or site is of "particular significance" it must be identified by the native title party, its location stated and the nature of its significance explained – *Silver v Northern Territory* (2002) 169 FLR 1 at 34. In addition the person or persons asserting that an area or site is of "particular significance" must have the necessary authority within the claim group and be properly qualified to speak about the traditions of the claim group in relation to the area or site in question – *Little v Western Australia* [2001] FCA 1706 at [78].

[62] The grantee and native title parties both made submissions on this paragraph, referring to the affidavit of Ms. Besant. However for the purposes of this paragraph I do not need to set out at length the contentions regarding the relevance or content of her affidavit on this point. As the above cases emphasise, primary reliance is placed on a native title party identifying areas or sites of particular significance and explaining their significance.

[63] The only material produced in evidence is the report of Ms. Besant and subsequent commentary both in her affidavit and that of Mr. Franks.

[64] Ms. Besant's report alone cannot address the requirements of s. 39(1)(a)(v). She is not a member of the native title party, and, as such, she cannot provide direct evidence on the significance of an area or site to the native title party in accordance with their traditions. She can, and has, produced expert evidence of a scientific nature, but this can only sensibly assist the Tribunal if it supplements primary evidence given a duly qualified and senior member of the claim group who has the authority of the claim group to speak on behalf of an area or site.

[65] Mr. Franks deposes (at para 2) that he is one of the registered native title claimants and that he was taught Wonnarua law and custom (para 3). He also deposed (para 2) that he has been engaged in Aboriginal cultural heritage clearance work in the Hunter Valley for a decade. However nowhere does he depose of this authority within the claim group to speak on behalf of areas or sites. Nonetheless, I have proceeded on the assumption, that he does have the requisite authority.

[66] Further, while Mr. Franks deposes (at para 10) that the proposed tenement contains many areas which evidence the Wonnarua People's use of the area and the manufacture of weapons and implements for daily life, he does not refer to particular sites other than referring in paragraphs 16 - 18 to references in Ms. Besant's affidavit to sites of "high significance" and to local Aboriginal People believing the area to be of "high cultural significance".

[67] The grantee party submitted (GPSC at para 7.2) that: "*Ms Besant's references to the 'significance' of sites should be understood to be references to the scientific significance, educational significance, public significance and representative significance of the sites, not to cultural or traditional significance of the sites."*

[68] The native title party contended (NTPSC at para 6.1) that "*Besant admits the Aboriginal people with whom she worked considered all sites to be significant."* Even if that were the case, the requirement of this paragraph is the identification by members of the claim of areas or sites of "particular significance". It is the special quality of "particular significance" that needs to be addressed in future act determination inquiries. A reading of Ms. Besant's affidavit does not disclose that either she or any Aboriginal person identified any area or site within the proposed tenement as being of "particular significance" either within the meaning of the Act or from a broader archaeological perspective.

[69] In fairness to Ms. Besant, what she actually said in her affidavit was as follows:

> *"19 Although there has not been a full investigation and analysis, the sites recorded in Lot 7004 only evidence activity which is commonly recorded throughout the Hunter Valley. Full investigation and analysis will entail partial excavation of the area and extensive artefact collection for detailed analysis by a specialist and will be carried out upon approval of the project.*
>
> *20 In my communications with members of the Aboriginal community (which include affording all representatives who registered an interest in the survey and reporting process the opportunity to commend on a draft of the Archaeological Report), no specific cultural significance has been placed on Lot 7004, although they have stated that in general, all sites which indicate prior Aboriginal presence, are considered to be of significance."*

[70] In summary then, the Tribunal has no direct evidence from members of the native title party about the areas or sites of particular significance as explained by Carr J in *Cheinmora v Striker Resources NL.* Accordingly I find that there is no evidence before the Tribunal of any

areas or sites of particular significance to members of the native title party in accordance with their traditions.

[71] Although it is not necessary for the purpose of this determination, I note the protective operation of various statutes in New South Wales for areas and objects of significance to Aboriginal People. These provisions were discussed by the Tribunal in *Bissett v Mineral Deposits (Operations) Pty Ltd* (2001) 166 FLR 46 (at 72 -73), and I adopt, for the purposes of this inquiry, the observations of the Tribunal in that matter.

Section 39(1)(b) – interests, proposals, opinions or wishes of the native title party

[72] The native title party made the following contentions in relation to this matter (NTPSC at paras 7.1 – 7.2):

> *"7.1 As stated by Scott McCain Franks, the opinions and wishes of the native title claim group is that the mine not go ahead because it would result in the sites being destroyed in the context of their being few sites of this nature still in existence intact as a result of large scale coal mining.*
>
> *7.2 There has been no Aboriginal Cultural Heritage Management Plan prepared and the Native Title Party has no confidence in a Plan being developed which would preserve the sites in situ."*

[73] The Tribunal has factored into its assessment of the criteria contained in s. 39 that the native title party does not wish the proposed future act to be done because of the deleterious impact it will necessarily cause to the natural environment and to the Aboriginal cultural heritage contained therein.

[74] A native title party does not have a right of veto to a proposed future act. Accordingly, in the evaluative weighing exercise which is part of reaching a s. 38 determination, the Tribunal has given due and appropriate weight to the opinions and wishes of the native title party as expressed and manifested in the material submitted to this inquiry.

Section 39(1)(c) – economic and other significance of the act to Australia etc

[75] In *Western Australia v Thomas* (1996) 133 FLR 124 the following observation was made about this paragraph (175): *"The words 'or other significance' are not to be limited in any way by the word 'economic'. The economic or other significance of the proposed future act is to be demonstrated by the evidence produced."*

[76] In the affidavit of Mr. Wesley, lodged on behalf of the grantee party, is an undisputed account of the possible economic implications of the proposed open-cut coal mine proceeding:

> *"28 The 'Estimates of Regional Economic Impacts' section of the 'Construction and Operation of the Ashton Coal Operations Pty Ltd – South East Open Cut Mine Report' (Report), which was prepared by Hunter Valley Research Foundation, found that the SEOC project will result in a net community benefit of $368 million. Annexed hereto and marked with the letters 'BW-9' is a copy of the Report.*
>
> *29 The Report also estimates that over the seven year operational period of the SEOC, Federal Government taxation receipts (without regard to any new taxes that might be imposed) will total approximately $151 million; $92 million from income tax, $29 million from indirect taxes and $31 million from company tax. It also estimates that revenue to the State Government will be $125 million; $26 million from payroll tax and $99 million from production royalties.*
>
> *30 One of the principal objectives of the SEOC is to maintain employment of the workforce currently employed at the ACP NEOC operations.*
>
> *31 The Report also states, in the context of the aging population of the area:*
>
> > 'Job creation facilitated by the SEOC will assist in keeping young people in, and attracting them to the area. The age profile of the area is likely to be re-oriented toward the younger age groups as young families are encouraged to the area by the prospects of employment, lifestyle amenity and cheaper housing, and young singles no longer need to leave the area to find work. This, in turn, will assist in increasing the proportion of working age people in the area and so lessen the demand for infrastructure and services required to support an ageing population.'
>
> *32 Other benefits of the SEOC, as identified in the Report are:*
>
> *(a) the SEOC will directly increase employment in the mining sector and indirectly increase employment in related support industries, and provide a substantial economic boost to the regional economy;*
>
> *(b) the SEOC will promote both population growth and economic growth in the workforce and in the local area. While employment will be directly focused on the technicians and trades workers; machinery operators and drivers; and labourers occupational categories, growth of tertiary sector industries will also encourage employment in the other categories. Higher employment in the managers and professions categories may increase income levels in the area and encourage higher levels of educational attainment in the area;*
>
> *(c) higher incomes associated with the SEOC will encourage home ownership in the workforce area. The employment and income generation associated with the SEOC will assist in increasing housing demand;*
>
> *(d) the SEOC will assist in boosting socio-economic advantage in the workforce area; and*
>
> *(e) the SEOC will provide a boost to investment spending and confidence in the Hunter Region."*

[77] The documentation attached to the affidavit of Mr. Wesley suggest that the SEOC Project will provide a substantial economic boost to the Hunter Valley region in general and the workforce in particular. It suggests that 127 jobs will be created on average, in each of the first two years of construction and 160 will be created in each of the seven years of operation.

[78] The grantee party contends (GPSC at para 9.3) that the SEOC Project will result in a net community benefit of approximately $368 million.

[79] The undisputed evidence before the Tribunal is that the grant of the proposed tenement will result in significant economic benefits not only for the local community but the broader New South Wales and national economy. Insofar as the grant of the proposed tenement will result in a significant economic boost to the local Hunter Valley economy, it is also likely to result in increased employment and other prospects for the local Aboriginal community including some members of the native title party.

Section 39(1)(e) – the public interest

[80] From the outset both the Tribunal and the Federal Court have found that it is permissible under this paragraph to take into account the public interest both in the protection of native title and also in the development and maintenance of a viable and vibrant mining industry – *Re Koara People* (1996) 132 FLR 73 (at 98).

[81] This dichotomy has manifested itself in various Tribunal and Court decisions emphasising, on the one hand, the desirability, as a matter of general principle, in the maintenance of a healthy exploration and mining industry. Thus in *Western Australia v Thomas* (1996) 133 FLR 124 (at 216) the Tribunal observed: *"The Tribunal accepts that mining in general is significant to the Australian and Western Australian economies and that the public interest is served by the maintenance of an active minerals exploration program and the continuing development of the mining industry."*

The Federal Court has likewise reached the same conclusion. In *Evans v Western Australia* (1997) 77 FCR 193 Nicholson J said (at 215):

> *"While there is evidence the proposed act will have the effect of contributing to on-going exploration essential to the health of the mining industry and the economy, that will be evidence falling within the statutory description of public interest which must be taken into account. There is no express or implied reason why the reference in the Act to the public interest should be read down so as to exclude the effect of the proposed act on the public interest in a healthy mining industry."*

[82] Conversely the Tribunal, while recognising as a matter or general principle, the desirability of promoting exploration and mining, has repeatedly emphasised that there may an overriding

public interest in the future act not being done. Thus in *Western Australia v Thomas* (1996) 133 FLR 124 the Tribunal observed (at 176):

> "*There can be a public interest in the act proceeding or not proceeding. In this criterion the Tribunal is not limited to economic considerations. For instance there might be a public interest in the act not proceeding if, despite some economic benefits, the act was going to have a significant adverse effect on community relations because of the attitude of native title parties to it or because it was going to result in significant damage to a sensitive environment."*

More recently Deputy President Sumner in *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 explained this weighing exercise as follows (218/[182]):

> *"The native title party contends that it is in the public interest for the rights of the native title party to give precedence over the economic interests of the grantee party and economic benefits to the wider community. The Tribunal accepts that, in the abstract, it is possible to say that there is a public interest in a mining grant being refused depending on the circumstances such as the size, economic potential and location of the mine. To take an extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth. Likewise there would be public interest considerations against mining on the Burrup Peninsular if this involved the destruction of large areas of petroglygphs or rock carvings which are of high heritage value not just to Aboriginal people but the general community. Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people."*

[83] The grantee party contended (GPSC at para 10.1) that there is "*immense public interest*" in the benefits of the mining industry for Australia. It stated:

> "*... the exploitation of minerals has positioned the Australian economy as one of the worlds most robust. This productivity has underwritten high employment, a strong currency, high standards in government services and a confident, vibrant and optimistic society.... The grant of MLA 351... contributes to the continuation of these conditions and, in this respect, is clearly in the public interest."*

[84] The economic benefits that will flow from the grant of the proposed tenement have been outlined previously. Clearly it will result in the creation of new jobs in the short term and the continuation of current jobs in the medium term. It will also have flow on economic benefits for the broader Hunter Valley economy as well as contributing to the maintenance of a viable coal mining industry in New South Wales. There will also be social benefits in maintaining viable regional communities, and the revenue generated from mining will, no doubt, result in employment and prosperity in a number of service industries. In short, the social and economic benefits that will flow from the operation of the proposed open cut coal mine are considerable.

[85] As against these undoubted public benefits are the inevitable downsides that flow from the intrusive nature of open cut mining not only on the environment, but in the context of this criterion, on Aboriginal cultural heritage. The native title party has quite understandably emphasised in its submissions the potentially disastrous effect of open cut coal mining on the proposed tenement area and the possible implications this could have for Aboriginal objects and sites. I have factored these concerns into my assessment.

[86] Overall, and despite the negative impacts that inevitably flow from open cut coal mining, I find that it is in the public interest that the proposed tenement be granted. In making this finding I have had regard to the copious material lodged by the grantee party which illustrates the significant scrutiny to which this project has been subjected by the State of New South Wales and the enormous social and economic benefits that will flow from the operation of the proposed open cut coal mine. In short, I am satisfied that the benefits flowing from the grant of the proposed tenement far outweigh any negative considerations and that the project has been, and will continue to be, subject to appropriate scrutiny by those State government agencies responsible for mining, environmental protection and Aboriginal cultural heritage.

Section 39(1)(f) – any other matter that the Tribunal considers relevant

[87] This paragraph allows the Tribunal to factor into its assessment any matter that it believes is of relevance to making a s. 38 determination. However, this does not give the Tribunal carte blanche to consider matters that may not be germane to the inquiry. As was pointed out in *Re Koara People* (1996) 132 FLR 73 (at 98): *"If we consider any other matter relevant we must take it into account. It seems to us that a matter can only be relevant if its falls within the subject matter, scope and purposes of the Act."*

[88] Nonetheless, s. 39(1)(f) should not be narrowly construed. The correct approach was set out in *Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland* QF05/3 [2006] NNTTA 3 as follows (at [82]):

> *"The term 'any other matter' as used in section 39(1)(f) provides the Tribunal with a broad charter to take into consideration any matter lodged with the Tribunal that may be of relevance in making a section 38 determination. There is no logical reason from the wording of the paragraph to read it down or to limit its operation by reference to either the matters outlined earlier in section 39 or to supposition in advance of what the negotiation parties actually submit. The only limiting factor is that the matter must be relevant to the inquiry. This paragraph does not give the Tribunal a*

charter to inquire into matters that fall outside the very narrow issue of whether a particular future act should or should not be done."

[89] Matters previously taken into account by the Tribunal under this paragraph include environmental issues – *WMC Resources v Evans* (1999) 163 FLR 333 (at 341), intra claim group disputes – *Victoria Gold Mines NL v Victoria* (2002) 170 FLR 1, the ability of a native title party to pursue a claim for compensation – *Re Koara People* (1996) 132 FLR 73 (at 98) and the extent to which a grantee party has facilitated the process by payments made to the native title party for organising meetings and conducting heritage surveys – *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 (at 219/[184]). This is by no means an exhaustive list, but is illustrative of the type of matters that the Tribunal has factored into its assessment pursuant to this paragraph.

[90] The native title party made no submissions in relation to this paragraph, but the grantee party contended as follows (GPSC 11):

"The Grantee Party submits that the NNTT should determine that MLA 351 be granted. The Grantee Party submits that MLA 351 be granted on the basis that an Aboriginal heritage management plan will be developed, settled and executed in building upon the survey and report already completed to date and in accordance with the Grantee Party's project approval and legislative requirements. ACOL's commitment to address cultural heritage with the native title party will take into account other factors and commercial and legislative restraints including; the Office of Environment and Heritage (formerly the Department of Environment, Climate Change and Water) consultation requirements and any other legal requirements, existing arrangements, the current status of planning approvals and associated cultural heritage work and surveys undertaken prior to the native title party's registration."

[91] The Tribunal notes that since the submission of a major project application under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) the SEOC Project has been the subject of intensive public scrutiny. The Project has been the subject of an Environmental Assessment and that Assessment was displayed for 53 days from 27 November 2009. As a result of that process, a number of residual concerns were raised not only by the public but also by New South Wales government agencies, including the Department of Planning and the NSW Office of Water. The grantee party has revised its proposal with the aim of reducing dust and noise impacts, reducing alluvial groundwater interaction and putting in place a comprehensive Aboriginal cultural heritage management plan. The SEOC Project, should it proceed, will be the subject of ongoing close scrutiny by a range of government agencies, including the Office of Environment and Heritage.

[92] The Tribunal is satisfied that, having regard to the potentially intrusive and environmentally damaging nature of open cut mining, there is, nonetheless, in place a comprehensive legislative and regulatory regime aimed at minimising the deleterious impact of such mining through rehabilitation of the land and waters, close scrutiny of, and minimising damage to, Aboriginal cultural heritage, and limiting ongoing negative impacts to the air and water in the vicinity of the proposed mine.

Conclusion

[93] In making a determination pursuant to s. 38 the Tribunal is obliged to weigh carefully the various criteria outlined in s. 39. This is by no means an easy task as the criteria are diverse and not necessarily consistent. The task is made more difficult when the Tribunal is presented with less than fulsome submissions by some of the parties. In this evaluation I am guided by the following statement of the law provided by the Tribunal in *Western Australia v Thomas* (1996) 133 FLR 124 (at 165-166):

> *"We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of the evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interests of the Aboriginal people concerned.*
>
> *The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.*
>
> *The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence."*

[94] The key point in the above quotation is in the final paragraph. When undertaking an evaluative weighing exercise pursuant to s. 39, the ultimate conclusion reached will be predicated on the weight of the evidence submitted by the parties. The Tribunal can only make a sensible determination on the basis of evidence before it. If a party makes extensive legal submissions but provides no evidence, then this is not only a matter that the Tribunal will take into account pursuant to s. 39(1)(f) – see *Western Australia v Thomas* (1996) 133 FLR 124 (at 217) – but it also impacts on the manner in which the various criteria are weighed, particularly if either or both of the other parties have lodged evidence with the Tribunal.

[95] In this matter the grantee party provided the Tribunal not only with lengthy written submissions on the law and the nature of the proposed SEOC Project, but direct evidence from neighbouring land holders and employees. The government party provided the Tribunal with copious maps, extracts and other documents concerning land tenure, cultural heritage and land use issues. The native title party however, only provided the Tribunal with brief written submissions and one affidavit from one of the registered native title claimants. That affidavit consisted mostly of assertions and did not contain the type of direct primary evidence that is critical when undertaking a s. 39 evaluation.

[96] The material before the Tribunal demonstrates that the grantee party has invested considerable time, money and resources in an endeavour to secure the support of the native title party for the grant of the proposed tenement. The material also illustrates that the proposed SEOC Project has been the subject of appropriate and intensive public and government scrutiny, and that the Project has been modified to minimise negative environmental and cultural heritage impacts.

[97] It is entirely understandable that the native title party seeks to have a determination that the proposed future act not be done. Although a native title party does not have a right of veto under the Act, it does have a right to oppose the grant of a proposed tenement and the basis for that opposition is to be factored in when undertaking an evaluative assessment under s. 39. The problem that the Tribunal faces in this matter is that there is scant evidence of the exercise of any registered native title rights and interests on the area of the proposed tenement. Further there is no substantial evidence of the life, culture and traditions of the claim group either generally or in the area of the proposed tenement. There is no evidence that the subject land has been accessed by members of the native title party or that there are any areas or sites of particular significance on or near to the proposed tenement.

[98] The Tribunal has, pursuant to s. 39(1)(b), factored into its assessment the opposition of the native title party to the grant of the proposed tenement, but that opposition has to be weighed against the evidence provided on the economic and social benefits that will flow from the proposed open cut coal mine not only for the local community (including members of the claim

group) but for the economy of the Hunter Valley, the State of New South Wales and the nation generally.

[99] The evidence before the Tribunal leads to the following key conclusions:

(a) the proposed SEOC Project is expected to result in a net community benefit of $368 million;

(b) Commonwealth taxation receipts over the seven year mine operational period will be approximately $151 million, based on the current tax regime;

(c) State revenue receipts will amount to approximately $125 million, with $26 million being paid in payroll tax and $99 million from production royalties;

(d) ongoing medium term full time employment will be provided to approximately 160 persons;

(e) the SEOC Project will provide indirect benefits to numerous other persons and businesses in the Hunter Valley;

(f) New South Wales has in place a well integrated mining and environmental protection regulatory regime;

(g) the grantee party has been subjected, since submitting a major project application under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to close and ongoing government and public scrutiny;

(h) since submitting the major protection application, the proposed SEOC Project has been modified to minimise negative environmental and cultural heritage impacts;

(i) the grantee party is committed to preparing and implementing a detailed Aboriginal Cultural Heritage Management Plan for the SEOC Project in consultation with the local Aboriginal community, including members of the native title party;

(j) there is no evidence before the Tribunal that the subject land contains areas or sites of particular significance;

(k) there is no evidence that the subject land has been accessed by members of the native title party in recent years;

(l) the subject land is currently fenced and future access to the land will necessarily be restricted due to occupational health and safety issues;

(m) there is no evidence that the subject land has any endangered plant or animal species or is, in any particular respect, of environmental significance; and

(n) the whole of the proposed tenement is subject to current exploration tenements and the surrounding land is the subject of intensive coal mining.

[100] None of the parties have made any submissions to the Tribunal on the imposition of conditions pursuant to s. 38(1)(c).

[101] Having regard to all of the matters set out previously, I have reached the conclusion that the proposed future act can be done without the imposition of conditions.

Determination

[102] The determination of the Tribunal is that the grant of Mining Lease Application 351 to White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd and ICRA Ashton Pty Ltd may be done.

John Sosso
Deputy President