NATIONAL NATIVE TITLE TRIBUNAL

Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales, **[2013] NNTTA 2 (15 January 2013)**

Application No: **NF12/1**

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

- and -

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

Coalpac Pty Ltd **(Applicant/Grantee party)**

- and -

Gundungurra Tribal Council Aboriginal Corporation #6 **(First native title party)**

Wiray-dyuraa Maying-gu **(Second native title party)**

Warrabinga-Wiradjuri People **(Third native title party)**

- and -

The State of New South Wales **(Government party)**

FUTURE ACT DETERMINATION

Tribunal:	President Graeme Neate
Place:	Brisbane
Date of decision:	15 January 2013

Hearing dates: 5 July 2012, 24 August 2012, 12 November 2012

Representatives:

Grantee party:	Ms Georgia Denisenko, Just Outcomes
First native title party:	Mr Eddy Neumann, Eddy Neumann Lawyers
Second native title party:	Mr Philip Teitzel, Teitzel & Partners
Third native title party:	Mr Simon Blackshield, Blackshield and Co.
Government party:	Mr James Herrington, Lawyer, on behalf of the Department of Industry & Investment

Catchwords: Native title – future act – application for determination for the grant of mining leases and permission for prospecting activities – three native title parties – agreement reached between Grantee party and First and Third native title parties – no agreement with Second native title party – s 39 criteria considered – effect of act on native title parties' registered native title rights and interests – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – no contentions or evidence provided by Second native title party - determination that the act may be done.

Legislation:

Native Title Act 1993 (Cth), ss 29, 30, 30A, 31, 35, 36, 38, 39, 75, 76, 77, 109, 139, 142, 146, 151

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Environmental Planning and Assessment Act 1979 (NSW)

*Forestry Act 191*6 (NSW)

Forestry Regulation 2009 (NSW)

Mining Act 1992 (NSW)

National Parks and Wildlife Act 1974 (NSW)

Cases:

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

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

Chienmora v Striker Resources NL (1996) 142 ALR 21

Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales, [2012] NNTTA 117 (12 November 2012).

Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales, [2012] NNTTA 145 (24 December 2012)

Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area, [2009] NNTTA 133 (19 October 2009)

Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area, [2009] NNTTA 137 (28 October 2009)

Evans v Western Australia (1997) 77 FCR 193

The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia, [2006] NNTTA 19 (28 February 2006)

Jax Coal Pty Ltd v Smallwood and Others (2011) 260 FLR 99

McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423

Osland v Secretary, Department of Justice (2008) 234 CLR 275

O'Sullivan v Farrer (1989) 168 CLR 210

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31

Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492

Western Australia v Thomas (1996) 133 FLR 124

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

Western Australia/Judy Hughes and Others on behalf of the Thalanyji People, Ronald Crowe and Others on behalf of Gnulli/Rough Range Oil Pty Ltd, [2004] NNTTA 108 (1 December 2004)

WMC Resources & Anor v Evans (1999) 163 FLR 333

REASONS FOR DECISION

Introduction

[1] On 4 March 2011, the State of New South Wales ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'):

(a) of its intention to grant Mining Lease ('ML') 393 to Coalpac Pty Limited ('the Grantee party') pursuant to the *Mining Act 1992* (NSW)
(b) of its intention to grant ML 392 to Lithgow Coal Company Pty Limited, and
(c) apparently, that the Minister for Primary Industries would give consent to the Grantee party to conduct prospecting activities on Exploration Licence ('EL') 7517.

Notice was given by letters of that date to the Registrar of the National Native Title Tribunal ('the Tribunal') and the Manager of NTSCORP Limited in relation to each of the future acts, and to:

(a) Mr Bret Leismann of Lithgow Coal Company Pty Limited (in relation to MLA 392)
(b) Mr Bret Leismann of Coalpac Pty Limited (in relation to MLA 393, and
(c) Mr Bret Leismann of Coalpac Pty Limited and the Gundungurra Tribal Council Aboriginal Corporation c/- Eddy Neumann Lawyers (in relation to EL 7517).

It is relevant to note at this stage that the Grantee party purchased the Lithgow Coal Company Pty Limited in 2008.

[2] In accordance with s 29(5) of the Act, 24 March 2011 was specified as the notification day in relation to these proposed future acts.

[3] The notices for MLA 392 and MLA 393 stated that the grant of these tenements would authorise the mining of coal by open cut methods for a term of 21 years. The notice for EL 7517 stated that the Grantee party is the holder of the EL in relation to Group 9 minerals. It specified that the licence contains a condition that the holder must not prospect on any land or waters on which native title exists without the prior consent of the Minister for Primary Industries and that the licence holder has sought the Minister's consent to conduct prospecting activities. The Minister's consent requires that EL 7517 be notified pursuant to

s 29 of the Act. (The Government party states that EL 7517 was granted to the Grantee party on 16 April 2010 and expired on 16 April 2012. However, the Grantee party has applied for its renewal and, by s 117 of the *Mining Act 1992* (NSW), EL 7517 remains in force pending the determination of the application for renewal.) In these reasons, the grant of MLA 392 and MLA 393 and the Minister's consent to conduct prospecting activities on EL 7517 are described collectively as the 'proposed future acts'.

[4] Although the Grantee party holds EL 7517, for ease of reference, MLA 392, MLA 393 and EL 7517 are described collectively in these reasons as 'the proposed tenements'. The proposed tenements are located adjacent to the township of Cullen Bullen, in the Central Tablelands region of New South Wales. MLA 392 has an area of 865 hectares and MLA 393 has an area of 335 hectares. They are situated approximately to the north and east of Cullen Bullen respectively. EL 7517, covers an area of 1803 hectares and is situated to the east of Cullen Bullen. The location of each of the proposed tenements is shown on a plan 'Mining Lease Applications Subject To Native Title & Proposed Boreholes' prepared by the Grantee party. The plan is Annexure GED-1 referred to in the Affidavit of Georgia Elizabeth Denisenko sworn on 17 August 2012, and is reproduced as Attachment A to these reasons for decision.

[5] At the time that notice of the proposed future acts was given by the Government party, there was a registered native title determination application by Elsie Stockwell and Pamela Stockwell on behalf of members of the Gundungurra Tribal Council Aboriginal Corporation ('the First native title party') which overlaps more than half (about 1063.85 hectares) of the area covered by EL 7517.

[6] On 17 June 2011, William (Bill) Allen, Joe Bugg, Stephen Riley and John Brasher on behalf of the Wiray-dyuraa Maying-gu Native Title Claim Group ('the Second native title party' or 'WDM') filed a native title determination application in the Federal Court in response to the s 29 notices for the proposed tenements. The application, NSD955/11 (NC11/3), covers only the proposed tenements and was filed within three months after the notification date, as required by s 30(1)(a)(i) of the Act.

[7] On 22 June 2011, Wendy Lewis, Mavis Agnew and Martin de Launey on behalf of the Warrabinga-Wiradjuri People ('the Third native title party') filed a native title determination application in the Federal Court in response to the s 29 notices for the proposed

tenements. This application, NSD1000/11 (NC11/4), was also filed within the three month period after the notification date and covers only the proposed tenements, and MLA 376 (which has an area of 309.5 hectares situated approximately seven kilometres east of Portland).

[8] On 19 July 2011 and 21 July 2011, respectively, a delegate of the Native Title Registrar accepted the native title determination applications for registration and entered them on the Register of Native Title Claims. Each application was registered within a four month period after the notification date. Consequently, each registered native title claimant is a 'native title party' within the meaning of s 30(1) of the Act, with status as a 'negotiation party' under the right to negotiate provisions (s 30A).

[9] In summary, at the end of the four months after the notification date there were registered native title determination applications by the following native title parties in respect of the proposed tenements:

MLA 392	Second native title party Third native title party
MLA 393	Second native title party Third native title party
EL 7517	First native title party (part of EL 7517) Second native title party Third native title party.

[10] On 6 June 2012, being a date more than six months after the s 29 notices were given, the Grantee party made an application pursuant to s 35 of the Act for a future act determination under s 38. The application stated that the Grantee party had 'not been able to reach agreement' with the Second native title party in relation to the proposed tenements. On 7 June 2012, I was appointed as the Member to conduct the inquiry in relation to the application.

The proposed tenements and the Project

[11] The future act determination application states that the proposed tenements form part of the Grantee party's Consolidation Project of the Invincible Colliery and the Cullen Valley Mine, located within the Western Coalfields area ('the Project'). The background to the Project is described in the Affidavit of Dr Ian Follington, the Chief Executive Officer of

Coalpac Pty Ltd, sworn on 12 October 2012. It appears from that Affidavit that Coalpac was established in 1989 and has owned and operated coal mines in the Lithgow district for more than 20 years. Coalpac purchased the Invincible Colliery in 1989 and has operated it using various mining methods (i.e., continuous underground, open cut and highwall) since then. In February 2008, Coalpac purchased the neighbouring Cullen Valley Mine which it acquired when it purchased the Lithgow Coal Company. The Grantee party operates both mines, which coalesce as a single complex with shared staff and management.

[12] The Grantee party is in the process of seeking a contemporary Project Approval under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to consolidate and extend the coal mining operations and management of both the Invincible Colliery and Cullen Valley Mine sites under a single planning approval for the Project. The Project will allow for the continuation of coal mining operations for a further 21 years. An Environmental Assessment Statement ('EA') has been through the public submission process, and submissions have been reviewed and commented on by the Grantee party.

[13] Dr Follington describes the proposed tenements as 'essential elements' of the Project's goals of consolidation and extension. As part of its consolidation plans, EL 7517 was granted to the Grantee party in 2010, subject to a 'Minister's consent' condition, which requires native title future act processes to be completed subsequent to the grant of the tenement. The area of EL 7517 has been subject to active underground and surface coal exploration for many years. MLAs 392 and 393 (lodged in 2010) are another 'key element' of the Grantee party's expansion plans. It is important to note that the boundary of the EA covers all of MLA 392 and MLA 393 only ('Project Boundary'). Although the Project Boundary geographically includes some of the western portion of EL 7517, the overlapping MLA 393 effectively cancels out the underlying exploration licence. The balance of EL 7517 is therefore not included in the Project Boundary or addressed in the EA.

[14] However, EL 7517 is required to allow the Grantee party to more accurately define the coal quality of the Lithgow Seam for future underground mining within the existing Invincible Colliery underground Mining Lease CCL702 held by the Grantee party.

[15] Accordingly, the Grantee party contends that the grant of MLA 392 and MLA 393 and the giving of Ministerial consent in relation to EL 7517 are a 'central aspect of both the

consolidation and expansion aspects of the Project and potential future development of Coalpac's coal resources'.

[16] There are more than nine other tenements within close proximity to each other in the area of these proposed tenements, and the area is underlain by old underground workings in the Lithgow Seam which were the subject of historical tenements. According to the Grantee party, underground mining has occurred 'beneath the greater part of the EL 7517 area'. The Grantee party states that there is a long history of mining in the immediate vicinity of Cullen Bullen dating back over a period of 120 years and that the Invincible Colliery has been in existence for over 100 years operating predominately as an underground mine up until 1998 when underground operations were suspended. It has operated as an open cut mine since that time. The application also lists a number of other large resource areas and mines within the immediate vicinity of the Project.

[17] As noted earlier, the Project will allow the Grantee party to extend the life of the mines by up to 21 years. The main elements of the Project comprise:

(a) consolidation and extension of the existing Cullen Valley Mine and Invincible Colliery operations to produce up to a total of 3.5 million tonnes per annum ('Mtpa') of product coal, including:

- the continuation of mining operations at Cullen Valley Mine (the area west of the Castlereagh Highway) via both open cut and highwall mining methods to access an additional resource of approximately 40.1 Million tonnes Run of Mine ('Mt ROM'), and

- the continuation of mining operations at Invincible Colliery (including an extension north into the East Tyldesley area) via open cut and highwall mining methods to access an additional resource of approximately 68.4 Mt ROM

(b) continuation of coal supply to the local Mt Piper Power Station via a dedicated coal conveyer over the Castlereagh Highway (to be constructed), and emergency supply to Mt Piper Power Station and Wallerawang Power Station (via road), with flexibility for supply to domestic destinations and to Port Kembla (via rail) for export

(c) upgrades to existing Invincible Coal Preparation Plant, administration and other infrastructure
(d) construction and operation of additional offices at Cullen Valley Mine
(e) construction and use of the East Tyldesley Coal Preparation Plant (incorporating the previously approved Coal Deshaling Project at Cullen Valley Mine)
(f) construction and operation of a bridge and haul road across the Wallerawang–Gwabegar Railway Line to permit access to mine the previously approved Hillcroft resource
(g) the extraction of the Marrangaroo Sandstone horizon from immediately below the Lithgow Coal Seam in the northern coal mining area of Cullen Valley Mine. This material will be trucked to an onsite crushing/screening station prior to sale into the Sydney (and surrounds) industrial sand market
(h) construction of a rail siding and associated infrastructure to permit transport of coal and sand products
(i) integration of water management infrastructure on both sites into a single system, and
(j) integration of the management of mine rehabilitation and conceptual final landform outcomes for Cullen Valley Mine and Invincible Colliery.

The 'good faith issue'

[18] The Act states that the negotiation parties 'must negotiate in good faith' with a view to obtaining the agreement of 'each of the native title parties' to the doing of the future act or the doing of the future act subject to conditions to be complied with by any of the parties (s 31(1)(b)). The Act also provides that if any negotiation party satisfies the Tribunal that any other negotiation party (other than a native title party) did not negotiate in good faith, the Tribunal must not make a determination pursuant to s 38 (see s 36(2)).

[19] On 5 July 2012, a preliminary conference was convened by the Tribunal to consider whether any of the native title parties wished to contend that either the Government party or the Grantee party had failed to negotiate in good faith and to set directions for the inquiry. The preliminary conference was attended by the legal representatives for each of the native title parties, representatives from the State and representatives from the Grantee party. At the preliminary conference, the Grantee party indicated that it was close to finalising an agreement with both the First and the Third native title parties. This view was confirmed by

the representatives of these two native title parties. On 30 October 2012, the Tribunal was advised that the Grantee party had settled an Ancillary Deed with the First native title party and the Third native title party. The contentions of the Grantee state that, given the late stage of these proceedings, an agreement to accompany the Ancillary Deed under s 31(1)(b) of the act 'is not proposed to be pursued'.

[20] At the preliminary conference on 5 July 2012, the legal representative of the Second native title party, Mr Teitzel, contended that the Grantee party did not negotiate in good faith with the Second native title party as required by s 31(1)(b) of the Act. He stated that the Second native title party made no such contention in relation to the Government party. He confirmed that position at the directions hearing on 24 August 2012.

[21] Neither the First native title party nor the Third native title party contended that any other negotiation party did not negotiate in good faith as required by s 31(1)(b).

[22] Consequently, there was only one issue to be resolved in order to decide whether the Tribunal has power to exercise its jurisdiction in relation to the future act determination application: is the Tribunal satisfied that the Grantee party did not negotiate in good faith with a view to obtaining the agreement of the Second native title party to the grant of the proposed tenements or the grant of the proposed tenements subject to conditions to be complied with by any of the parties? That question is referred to as 'the good faith issue' in these reasons for decision.

[23] On 5 July 2012, the Tribunal issued directions to the parties for the filing of statements of contentions and supporting documentary evidence in relation to the good faith issue.

[24] In accordance with Directions 1, 2 and 3 made on 5 July 2012 and varied on 2 August 2012, the negotiation parties lodged the following documents with the Tribunal in relation to the good faith issue:

(a) Statement of contentions on behalf of the Second native title party and Annexures 1–7
(b) Statement of contentions on behalf of the Grantee party and Affidavit of Anthony John Hanrahan dated 6 August 2012 and Annexures AJH1–AJH4, AJH5a–AJH5d and AJH6–AJH20.

(c) Statement of reply to Grantee party's Statement of contentions on behalf of the Second native title party and Annexures 1–5.
(d) Additional material on behalf of the Grantee party: Affidavit of Georgia Elizabeth Denisenko dated 17 August 2012 and Annexures GED1–GED6.
(e) Additional material on behalf of the Grantee party: Affidavit of Anthony John Hanrahan dated 23 August 2012, to correct previous affidavit dated 6 August 2012.

[25] On 24 August 2012, a directions hearing was held to identify whether any of the parties was of the view that a hearing was required in relation to the good faith issue and, if so, what facts or issues were outstanding. The Second native title party contended that a hearing 'on country' was required in order for the Tribunal to determine the issue. The remaining parties were of the view that a decision on the good faith issue could be made on the papers (see s 151(2)).

[26] In accordance with Directions 1, 2 and 3 made on 24 August 2012 and varied on 7 September 2012, the negotiation parties lodged the following documents with the Tribunal in relation to whether the Tribunal should conduct a hearing in relation to the good faith issue:

(a) Letter from Second native title party dated 31 August 2012 advising of the outcome of discussions with the Grantee party regarding a cultural heritage survey
(b) Statement of contentions on behalf of the Second native title party regarding the issues requiring a hearing, and
(c) Statement of reply on behalf of the Grantee party regarding the requirement for a hearing.

[27] Having considered the submissions of the Second native title party and the Grantee party in relation to the request by the former for a hearing to deal with the good faith issue, as well as the affidavits and other material provided by the parties for this purpose, I decided that the Tribunal could decide the good faith issue without holding a hearing, by considering the documents lodged with or provided to the Tribunal. The reasons for that decision were provided with the reasons for deciding the good faith issue: see *Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South*

Wales, [2012] NNTTA 145 (24 December 2012) (the '*Coalpac good faith decision*') at [308]–[313]).

[28] As to the good faith issue, the Second native title party contended, in summary, that the Grantee party failed to negotiate with it in accordance with s 31(1)(b) of the Act because of the way the Grantee party behaved in relation to the conduct of the negotiations, the content of the negotiations and the form of outcome which it sought to negotiate.

[29] For the reasons published on 24 December 2012, I was not satisfied that the Grantee party did not negotiate in good faith as mentioned in s 31(1)(b) of the Act. Consequently, the Tribunal has power to exercise its jurisdiction in relation to the future act determination application made by the Grantee party on 6 June 2012.

Statutory requirements

[30] Central to the scheme by which the Tribunal makes a determination about whether the future act may or must not be done are the requirements of s 39 of the Act. Subsections (1) and (2) of that section provide:

> **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.

[31] The Tribunal has long accepted that its task involves weighing the various criteria in s 39(1) by giving proper consideration to them on the basis of evidence. 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. Indeed it is apparent that the Tribunal is required to take into account quite diverse and what may sometimes be conflicting interests in making its determination. 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 (see *Western Australia v Thomas* (1996) 133 FLR 124 ('*Thomas'*) at 165–166; *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 at [37]).

[32] Subsection 39(4) provides:

> *Agreements to be 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.

The operation of this sub-section in relation to these proceedings is considered at [151]–[153] below.

Evidentiary issues

[33] In accordance with Directions made by the Tribunal as amended on 2 October 2012, the following documents (in addition to documents provided earlier in these proceedings) are before the Tribunal:

(a) Grantee party's statement of contentions in relation to the relevant criteria in s 39 of the Act dated 12 October 2012

(b) Affidavit of Dr Ian Leonard Follington, Chief Executive Officer of Coalpac Pty Ltd, sworn 12 October 2012 and Annexures 1-6a-c

(c) Affidavit of Colin James Bailey, a principal of Hansen Bailey Environmental Consultants, sworn 12 October 2012 and annexed curriculum vitae

(d) Register Extracts for: NC97/7 Gundungurra Tribal Council Aboriginal Corporation #6, NC11/3 Wiray-dyuraa Maying-gu and NC11/4 Warrabinga-Wiradjuri

(e) Government party's statement of contentions to the relevant criteria in s 39 of the Act dated 12 October 2012 and two volumes of documents, Volume 1, Tabs 1–69 and Volume 2, Tabs 70–137.

[34] The Second native title party did not provide contentions and supporting documents.

[35] The background to the absence of contentions and evidence from the Second native title party is set out in detail in the reasons for decision in *Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales*, [2012] NNTTA 117 (12 November 2012) ('the *Coalpac directions decision'*).

[36] In summary, during the period when the Tribunal was considering the relevant parties' contentions and evidence in relation to the good faith issue, specified parties were directed to provide contentions and evidence as to whether, assuming the Tribunal has power to make a future act determination in these proceedings, the Tribunal should make a determination that the future acts must not be done or may be done, with or without conditions to be complied with by any of the parties.

[37] Direction 5 required the Grantee party and the Government party to provide their contentions and evidence on or before 12 October 2012. The Grantee party and the Government party complied with that direction.

[38] Direction 6 required the Second native title party to provide their contentions and evidence on or before Wednesday 31 October 2012. The Second native title party did not comply with Direction 6.

[39] After communications from the Tribunal, the Second native title party's lawyer, Mr Teitzel, replied by email on 7 November 2012, confirming that he was unable to make submissions or participate further in the Coalpac matter within the timeframes set by the Tribunal's directions due to his involvement as the solicitor on the record in the trial of the

Barngarla native title claim. He stated that although he was aware and mindful of the six month time limitation in the Coalpac matter, he would not be in a position to make submissions in compliance with the Directions until the fourth week in February 2013. He sought a variation of Order 6 of the Amended Directions to late February 2013 and a consequential variation of orders 7 to 11 of those Amended Directions.

[40] At a directions hearing on 12 November 2012, Mr Teitzel outlined the extensive amount of work he had to undertake in relation to the preparation of the Barngarla native title claim for the hearing to commence on Monday 19 November 2012. Due to preparation for that hearing, he had not had an opportunity to prepare for this future act determination application matter, in particular to do the work required to comply with Direction 6.

[41] Mr Teitzel advised the Tribunal that, in relation to possible compliance with Direction 6:

(a) he had gathered materials from the Second native title party and the other parties
(b) he estimated that it would take up to eight days of work to assess and analyse the materials, write up the contentions and check the document or documents
(c) if he worked on this matter during the judicial vacation in early 2013 (when the hearing of the Barngarla native title claim would not be occurring), he might be able to comply with Direction 6 by late January 2013 or early February 2013.

[42] Mr Teitzel also stated that his clients were aware that Direction 6 had not been complied with, and he had advised them of the potential implications for them of not complying with it. Mr Teitzel advised that he holds instructions from his clients to submit that the proposed future acts may be done subject to specified conditions, and that they agree to the determination being made on the papers.

[43] Having considered Mr Teitzel's application in light of the sections of the Act that govern future act determination proceedings, and the factors said to be in favour of or against acceding to the application I noted that, arguably, s 142 of the Act had been complied with in the sense that the Tribunal had ensured that the Second native title party had been given a reasonable opportunity to:

(a) present its case
(b) inspect any documents to which the Tribunal proposes to have regard in making a determination in the inquiry, and

(c) make submissions in relation to those documents**.**

[44] I concluded that the fact that, to that date, the Second native title party had not taken the opportunity to present its case, indeed had not complied with a Tribunal direction to do so, did not mean that the requirements of s 142 had not been satisfied, or that the Second native title party would be 'punished' if the Tribunal did not vary Directions 6 to 11 in the way sought by Mr Teitzel. Consequently, lack of compliance with Direction 6 at that date need not prevent the Tribunal from performing its functions in the way mandated by the Act.

[45] Despite the absence of contentions and evidence from the Second native title party in accordance with Direction 6, I decided that the Tribunal would:

(a) proceed to decide whether it has power to make a determination in relation to the application made by the Grantee party on 6 June 2012, and then
(b) if the Tribunal decides that it has power to make the determination, proceed to make that determination on the papers by reference to the contentions and evidence before it.

[46] Nonetheless, it was appropriate in the circumstances to see whether the Second native title party could be assisted to comply with Direction 6 so that their evidence and contentions could be taken into account if a determination was to be made by the Tribunal under s 38. Additional Directions were made accordingly. In late compliance with direction 4 of the directions made on 12 November 2012, as set out in the *Coalpac directions decision* (at [48]), Mr Teitzel wrote to the Tribunal on 20 November 2012 to advise that he had provided a copy of the *Coalpac directions decision* to his clients and explained the consequences of not providing contentions and evidence to the Tribunal in compliance with Direction 6. He set out a timetable for compliance with Direction 6 by the Second native title party, with a projected date for the provision of contentions and evidence of 25 January 2013. On 26 November 2012, Mr Teitzel wrote to inform the Tribunal that he had consulted with his clients regarding engaging alternative legal representation and was instructed to proceed on the Second native title party's behalf. He stated that he would be providing submissions to the Tribunal by 25 January 2013. That date is more than three months after the date set in the original Directions. Furthermore, to wait until late January or early February for that material, and then deal with the probable applications by at least two other parties for an opportunity to make contentions in reply, would mean that a determination in this matter could not be made for about three months beyond the six months period contemplated by the Parliament.

Accordingly, the Tribunal proceeded on the basis indicated in the *Coalpac directions decision* (at [46]) that, if it decides that it has the power to make a determination, it would proceed to do so. That approach was reiterated in the *Coalpac good faith decision* (at [307]).

[47] Before considering the contentions and evidence in these proceedings, there are four evidentiary issues that merit comment.

[48] *Burden of proof:* The Tribunal has taken the approach that there is no burden or onus of proof on a party to satisfy the Tribunal that the proposed future act should or should not be done. The Tribunal is not bound by the rules of evidence (s 109(3)) and adopts a commonsense approach to evidence. So, for example, where facts may be peculiarly within the knowledge of a party to an issue that party might be expected to produce evidence as to those facts. That does not mean that the party bears an evidential onus of proof. The parties have an evidentiary choice to lead or not lead evidence on a particular issue. It is for the parties to present all the evidence readily available to them and for the Tribunal to examine the available material. A party's failure to produce evidence as to facts peculiarly within its knowledge may lead to an unfavourable inference being drawn when the Tribunal, as an administrative body, applies its commonsense approach to the evidence. In other words, if parties fail to produce such evidence, they cannot complain if the Tribunal gives little or no weight to their contentions. Although the Tribunal can, in appropriate cases, make its own inquiries, it is not under a general obligation to do so. As a matter of general practice, where (as in this case) parties are represented before the Tribunal, it would not do so (see *Thomas* at 155–163; also *Western Australia/Judy Hughes and Others on behalf of the Thalanyji People, Ronald Crowe and Others on behalf of the Gnulli/Rough Range Oil Pty Ltd*, [2004] NNTTA 108 (1 December 2004) Hon CJ Sumner at [18], [19] and [49]).

[49] *How to proceed in the absence of contentions and evidence from the Second native title party:* Unfortunately, this is not the first case in which the Tribunal has had to proceed without the benefit of evidence from the native title party when discharging its statutory obligation to make a future act determination. Indeed, a differently constituted Tribunal was in the same position, albeit for different reasons, in previous Coalpac proceedings involving the North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area. In that case (see *Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area,* [2009] NNTTA 137 (29 October 2009) (the *'2009 Coalpac determination'*) at [19]–[21]), Deputy President Sumner relied on the principles involved in

making a determination in the absence of evidence from the native title party as enunciated in future act determinations including *Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland)*, [2006] NNTTA 3 (30 January 2006) ('*Gugu Badhun*') DP Sosso, especially at [15]–[17], and *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, [2006] NNTTA 19 (28 February 2006) ('*Griffin Coal*') DP Sumner, especially at [7]–[10].

[50] As the Act makes clear and those decisions show, following acceptance of a future act determination application (ss 75, 76, 77) the Tribunal 'must' hold an inquiry into it (s 139(a)); 'must make a determination that the act must not be done or may be done with or without conditions' (s 38(1)); and, in making its determination, 'must' take into account certain criteria set out in s 39. The Tribunal 'must' take all reasonable steps to make a determination in relation to the act 'as soon as practicable' (s 36(1)).

[51] Although the Tribunal is obliged to give proper consideration to the factors in s 39, it is likely that, without the benefit of contentions and evidence from the native title party, a determination will be made that the act may be done. Proper consideration of some of the criteria in s 39 will almost certainly require evidence of which only the native title party is aware and which only the native title party can provide. For example, the Tribunal is directed to consider the effect of the future act on the enjoyment by the native title parties of their registered native title rights and interests (s 39(1)(a)(i)), the way of life, culture and traditions of the native title parties (s 39(1)(a)(ii)), and any area or site on the land of particular significance to the native title parties, in accordance with their traditions (s 39(1)(a)(v)). Further, the Tribunal must take into account the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the relevant land that will be affected by the future act (s 39(1)(b)). Although s 39 is drafted in mandatory terms, it only compels the Tribunal to take into account any evidence before it relating to such matters. The section does not prohibit the making of a determination in the absence of such evidence.

[52] The Tribunal must act on the basis of relevant and probative evidence which ordinarily will be provided by the parties. As noted earlier, there is no onus of proof as such, but a commonsense approach to evidence means that parties will produce evidence to support their contentions particularly where facts are peculiarly within their knowledge. The Tribunal will not normally conduct its own inquiries and obtain evidence, particularly where a party is represented before the Tribunal. If a party fails to provide relevant evidence, the Tribunal is

normally entitled to proceed to make a determination without it (see *Gugu Badhun* at [17]). In the present case, the Second native title party has been legally advised. Based on past practice and for the reasons set out in the *Coalpac directions decision*, I am satisfied that the Tribunal is entitled to proceed without the benefit of contentions and evidence from the Second native title party.

[53] *Reference to previous findings of Tribunal:* The Grantee party draws attention to s 146 of the Act, the relevant provision of which states that, in the course of an inquiry, the Tribunal may, in its discretion adopt any findings, decision, or determination of the Tribunal that 'may be relevant to the inquiry'. The Grantee party also quotes from the determination of the Tribunal in *WMC Resources & Anor v Evans* ((1999) 163 FLR 333 (*'WMC Resources'*) at [51]) where Hon CJ Sumner wrote:

> Section 146 is obviously designed to assist the Tribunal to carry out its functions in an economical, informal and prompt way (s 109(1)). I do not consider that the provisions can only be used in uncontroversial matters. The requirement to be fair and just (also in s 109(1)) can be met by enabling parties to comment on the proposal to adopt the findings and giving them the opportunity to call evidence. If evidence calling into question the findings is then produced the Tribunal would be required to consider whether adoption is still appropriate or whether different findings are justified.

[54] The Grantee party contends that the principal findings of the Tribunal in the *2009 Coalpac determination* in relation to matters pertaining to s 39(1) and (2) of the Act should be adopted in this matter, particularly as they affect the Second native title party and (to any extent necessary taking into account the existing Ancillary Deed with) the Third native title party, unless the native title parties produce evidence to justify the Tribunal making different findings. The basis of that submission is that the native title party in the *2009 Coalpac determination* comprised William (Bill) Allen, Ester Cutmore, Wendy Lewis, Lynette Syme, Elaine Bugg and Martin De Launey on behalf of the North Eastern Wiradjuri People of the Bathurst/Lithgow/Mudgee area. A dispute arose within the native title party in that matter which resulted in the formation of two factions:

(a) Bill Allen, Ester Cutmore and Elaine Bugg represented by Philip Teitzel of Teitzel & Partners, and

(b) Wendy Lewis, Lynette Syme and Martin de Launey represented by Peter Gore of Gore & Associates (see *Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area,* [2009] NNTTA 133 (19 October 2009)).

[55] The dispute resulted in that claim being withdrawn and two new claims being filed by:

(a) Bill Allen and Joe Bugg representing the WDM native title party, and
(b) Wendy Lewis and Martin De Launey representing the Warrabinga-Wiradjuri People native title party.

[56] I am willing to accept as correct the approach outlined in *WMC Resources.* However, I note that the Member who constituted the Tribunal in that case had also been a Member of the Tribunal which heard evidence in the previous cases to which reference was made (see *WMC Resources* at [51]) and so would have brought an informed appreciation of that evidence to the later proceedings. In the present proceedings, the Tribunal is constituted differently from the Tribunal that made the previous future act determination involving the Grantee party. That fact does not negate the operation of s 146 in relation to these proceedings. However, it is not necessary to adopt the principal findings in the *2009 Coalpac determination* in order to deal with the current future act determination application. In this case there is evidence in relation to some of the matters listed in s 39 and I have not needed to have recourse to findings made in earlier Coalpac determinations other than for the purpose of subsequently comparing them with the findings on the evidence in these proceedings.

[57] *Overlap of criteria and repetition of reference to evidence:* There is a degree of overlap between some criteria in s 39(1). Consequently, the evidence and contentions for one criterion (e.g. in relation to sites and areas of significance in accordance with the native title parties' traditions) can be relevant to one or more other criteria (e.g. the enjoyment of native title rights and interests, or freedom of access to the area concerned for ceremonial or other culturally significant activities). In these proceedings, the consideration of some criteria involves a degree of repetition or some cross-references to other parts of the reasons for decision.

The future act in a factual and legal context

[58] Given that the Tribunal must take into account the criteria listed in s 39(1) as they relate to the grant of the proposed tenements, it is necessary to consider the evidence and submissions about the proposed tenements in relation to each of those criteria. To some degree that evidence should also be considered in light of the factual context (particularly the historical dealings with and uses of the land) and relevant legislation.

[59] As noted earlier in these reasons for decision, s 39(2) of the Act requires the Tribunal, in determining the effect of the acts as mentioned in s 39(1)(a), to take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned, and existing use of the land or waters concerned by persons other than the native title parties.

[60] The Government party provided detailed information about the tenures granted over or the status of the areas of land covered by the proposed tenements. That material included status search results for each parcel of land in the areas covered by the proposed tenements (comprising a description of the land, the results of each current search and historical searches, a plan or plans of each area, and, in some instances, copies of title documents for each parcel). Also provided were the following maps: 'Coal titles in Cullen Bullen', and a Map showing MLA 392, MLA 393 and EL 7517. The Grantee party also provided Dr Follington's Affidavit and other evidence in relation to land tenure and uses of the areas covered by the proposed tenements including maps 'Mining Lease Applications Subject to Native Title Land Ownership', 'Coalpac Current Mining Tenements Lease Expiry & Depth Restrictions', 'MLA 392, MLA 393 & EL 7517 Areas Of Restricted Access' and the map annexed to these reasons for decision.

[61] Most of the area covered by the proposed tenements is State Forest. The Government party provided the following information in relation to each of the proposed tenements:

(a) MLA 392: the tenure covered by MLA 392 is four lots held by State Forests, six lots comprising freehold land, and one lot comprising Crown land. The tenure of land contiguous with the border of MLA 392 is eight lots comprising freehold land, five lots comprising Crown land, a road (Castlereagh Highway) held by Lithgow City Council, and an area held by State Forests

(b) MLA 393: the land covered by MLA 393 is held by State Forests. The tenure of land contiguous with the border of MLA 393 is three lots comprising freehold land and one lot comprising Crown land

(c) EL 7517: the tenure of the land covered by EL 7517 is one area held by State Forests, 44 lots comprising freehold land, four lots comprising Crown land, and local roads held by Lithgow City Council. The tenure which is contiguous with the border of EL 7517 is one area held by State Forests, 11 lots comprising

freehold land, three lots comprising Crown land, and a road (Castlereagh Highway) held by Lithgow City Council.

[62] A map annexed to Dr Follington's Affidavit, 'Mining Lease Applications Subject To Native Title Land Ownership' dated 11 October 2012, shows the current status of land in the area of the proposed tenements. Dr Follington lists 14 tenements that are held by Coalpac Pty Ltd or Lithgow Coal Company Pty Ltd. Another map annexed to his affidavit, 'Coalpac Current Mining Tenements Lease Expiry & Depth Restrictions', shows the locations of those tenements.

[63] In relation to the existing use of the land or waters concerned, the Government party stated that, aside from the freehold interests, the land includes Council-owned land and areas dedicated as State forests (the dedication, protection and management of which is governed by the *Forestry Act 191*6 (NSW) and *Forestry Regulation 2009* (NSW)). The land concerned also includes existing Crown reserves (predominantly for mining purposes) that were lawfully used, managed and controlled in the past and are subject to continuing lawful use, management and control as Crown reserves.

[64] The Grantee party's contentions describe the land occupied by the Ben Bullen State Forest as historically having been used for forestry and mining. Other minor areas within the areas covered by the proposed tenements are used for agricultural activities including sheep and cattle grazing, road and rail infrastructure and historical and existing mining operations.

[65] The detailed information about current and historic tenures in relation to the areas covered by the proposed tenements, and the uses to which the land has been put by non-Aboriginal people over more than a century, provide part of the factual context in which to consider the present future act determination application. It is not the Tribunal's function to determine whether native title exists in relation to any or all of the land concerned and, if so, which native title rights and interests are recognised and who holds them. To date no determination of native title has been made. However, it is reasonable to proceed in this case on the basis that mining and other land uses in the region over the past century would have restricted and even prevented the exercise and enjoyment of at least some of the native title rights and interests held by local Aboriginal people.

The effect of the act on the enjoyment by the native title parties of their registered native title rights and interests – s 39(1)(a)(i)

[66] The focus here is on the effect (if any) of the proposed future acts on the enjoyment of 'registered' native title rights and interests for that area. As the Tribunal stated in *Western Desert Lands Aboriginal Corporation v Western Australia* ((2009) 232 FLR 169 at [64]), this issue is considered by examining the evidence relating to the actual exercise or enjoyment of the rights in the area, not by reference to a scenario which assumes the existence and enjoyment of all the registered native title rights equally over the whole of the land concerned. Furthermore, as a three Member Tribunal wrote relatively early in the operation of the right to negotiate scheme, the Tribunal will give weight to the effect of the proposed act on those rights and interests by reference to the evidence with respect to native title and the proposed act, without either assuming that there will be an effect just because certain rights and interests are claimed or establishing an evidentiary threshold test which must be met. Indeed, the Tribunal will not assume that all such native title rights and interests will be affected in a particular way. Given the range of future acts to which the scheme applies, and the variety of native title rights and interests that might be recognised, there might be some native title rights and interests that could not be affected by a proposed future act. Thus, the question of whether a particular proposed future act 'affects' the registered native title rights and interests of a particular native title party or parties is a matter of fact to be determined on the evidence in each case (*Thomas* at 167; see also *Gugu Badhun* at [45]).

[67] The Register of Native Title Claims contains information about specified native title rights and interests claimed by the Second native title party over areas where a claim to exclusive possession cannot be recognised. In those areas, the Second native title party claims the 'non-exclusive right to use and enjoy the land and waters in accordance with their traditional laws and customs' being:

(a) the right to access the application area
(b) the right to camp on the application area
(c) the right to erect shelter 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 have access to and use the natural water resources on the application area

(j) the right to gather and use 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 maintain and protect places of importance under traditional laws, customs and practices in the application area

(m) the right to participate in cultural activities including the conduct of burials and the maintenance of burial sites on the application area

(n) the right to transmit the cultural heritage knowledge of the native title claim group including knowledge of particular sites

(o) the right to cook on the application area and to light fires for all purposes other than the clearance of vegetation.

[68] As noted earlier, although the Act does not cast an evidentiary onus on a party in relation to any of the s 39(1) criteria, where facts about an issue may be peculiarly within the knowledge of a party, that party might be expected to produce evidence as to those facts. The native title parties have not provided any evidence in these proceedings about the effect (if any) of the grant of the proposed tenements on their registered native title rights and interests. The Grantee party submits in effect that, given that it has reached agreement and signed an Ancillary Deed with the First and Third native title parties, such evidence is only likely to be provided by the Second native title party. That is an appropriate submission in the circumstances, particularly as the representatives of each of the native title parties have participated at each stage of these proceedings but only the representative of the Second native title party has taken an active role in making oral and written contentions at previous stages. However, the Second native title party has not lodged written contentions and supporting documentation in relation to the s 39 criteria, despite directions made by the Tribunal on 5 July 2012 requiring such material to be lodged with the Tribunal by 31 October 2012, and the approach taken by the Tribunal in the *Coalpac directions decision*. Consequently, the Tribunal does not have the benefit of the Second native title party's evidence and contentions in relation to this matter and must proceed primarily on the basis of the materials provided by the Grantee party and the Government party.

[69] Not much assistance can be found in material provided by the Second native title party at earlier stages of these proceedings. Indeed, the *Coalpac good faith decision* ([2012] NNTTA 145 at [310](a)) records the Second native title party's submission that, as a result of being unable to participate in a cultural heritage survey of the mining tenements, it was not able to provide advice on the impact of the proposed mining on its native title rights and interests.

[70] As already noted, the land covered by the proposed tenements has and had a range of tenures, tenements and uses by persons other than the native title parties. The Government party submits that the effect of the proposed future acts upon the enjoyment of native title rights and interests by the WDM is likely to be diminished as a result of the lawful exercise of non-native title rights and interests and assertions of control which have already occurred within those lands. The Government party also submits that, regardless of those proposed grants of tenements and Ministerial consent, the lawful use of the land concerned by persons other than the WDM is likely to have already had consequences upon the enjoyment of native title rights and interests. In particular, they are likely to have diminished the enjoyment of registered native title rights and interests.

[71] That submission was qualified, in the sense that, at the time it was made, the Government party had not received any evidence from the Second native title party (for the purposes of this future act determination application) concerning the enjoyment of their claimed native title rights and interests. In particular, the Government party was not aware of the extent to which any of the particular registered native title rights and interests claimed have been enjoyed in the past, or are presently enjoyed, in relation to the land concerned (or other places). Nor was the Government party aware of the extent to which any or all of the land concerned has been, or is, significant or essential to the enjoyment of particular registered native title rights and interests. Thus the Government party did not know the effect (or likely effect) of the proposed future acts on the enjoyment by the WDM of their registered native title rights and interests.

[72] In a similar vein, the Grantee party notes that, as the native title parties did not provide any evidence in these proceedings as to the effect (if any) of the grant of the proposed tenements on the matters referred to in s 39(1)(a), the Grantee party had no evidence (or contentions) to which it could respond. However, given that the Grantee party had reached agreement and signed an Ancillary Deed with the First and Third native title

parties, it understood that any such evidence was only likely to be provided by the Second native title party.

[73] The Grantee party states that the tenement areas (along with the surrounding Western Coalfields) have been heavily mined since 1888 by way of underground operations and above ground open cut methods. The Grantee party holds other tenements that have permitted mining over sections of the tenement areas for many years. Thus, the Grantee party contends, the grant of the proposed tenements (which are primarily sought as part of the Project for the purposes of consolidation and consistency) would not be over 'new' areas of land. There is also significant existing infrastructure on the tenement areas, including a coal processing plant, a crushing and screening area, and other surface facilities.

[74] The Grantee party contends that, taking into account the significant mining which has occurred in the area of the proposed tenements for many years and the existing infrastructure, the proposed future acts are unlikely to have any significant effect on the enjoyment of any native title rights and interests which may be held by the native title parties.

[75] *Conclusion:* The absence of evidence and contentions from any native title party, particularly the Second native title party, in relation to this criterion means that a finding cannot be made about the effect of the proposed future acts on the enjoyment by the native title parties of their registered native title rights and interests. It is clear from the history of dealings with and use of the area covered by the proposed tenements over the past century that mining and other land uses would have restricted and even prevented the exercise and enjoyment of at least some of the registered native title rights and interests. It is arguable that some of the registered native title rights and interests would be affected or prevented by mining activity consequent to the future acts. However, in the absence of evidence about the current enjoyment of those rights and interests, no such finding can be made.

The effect of the act on the way of life, culture and traditions of any of those parties – s 39(1)(a)(ii)

[76] The Government party is not aware of the extent to which the way of life, culture and traditions of the WDM have previously or are presently related to the land concerned or other places. The Government party submits that, having regard to the prior grants of rights and interests and assertions of control in relation to the land concerned by people other than registered native title parties, the Government party did not know the way of life, culture and

traditions of the WDM and the effect (or likely effect) of the relevant future acts on the way of life, culture and traditions of the WDM.

[77] The Grantee party contends that the grant and exercise of rights under the proposed tenements will have no or little impact on the way of life, culture and traditions of the native title parties. It makes that contention on the basis that:

(a) the Grantee party is not aware of the native title parties accessing or using the tenement areas other than to participate in cultural heritage surveys from time to time

(b) at least two of the native title parties (albeit perhaps differently constituted) have not been opposed to mining operations at the Invincible Colliery or the Cullen Valley Mine, having previously entered into two agreements with the Grantee party approving mining operations there:

- an agreement under s 31(1)(b) of the Act dated 18 August 1998 and a separate ancillary agreement between the Grantee party and the Wiradjuri People (Wendy Lewis, now an Applicant for the Third native title party) was reached in relation to the proposed grant of (then) MLA 70 at Invincible Colliery, and
- an agreement under s 31(1)(b) of the Act dated 5 July 2004 and a separate ancillary agreement between the Grantee party and the Wiradjuri (Bathurst/Lithgow/Mudgee) People (including William (Bill) Allen, now an Applicant for the Second native title party) was reached in relation to the proposed grant of MLA 78 (now ML1556) and MLA 202 (now ML 1557) at the neighbouring Cullen Valley Mine

(c) the First and Third native title parties have entered into an Ancillary Deed with the Grantee party consenting to the grant of the proposed tenements.

[78] *Conclusion:* In the absence of evidence and contentions from any native title party, particularly the Second native title party, it is not possible to make a finding about the effect (if any) of the proposed future acts on the way of life, culture and traditions of any of the native title parties.

The effect of the act on the development of the social, cultural and economic structures of any of those parties – s 39(1)(a)(iii)

[79] The Government party does not know what the social, cultural and economic structures of the WDM are. It submitted that, having regard to the prior grants of rights and interests and assertions of control in relation to the land concerned by people other than registered native title parties, it does not know the effect (or likely effect) of the relevant future acts on the development of those structures.

[80] In his Affidavit, Dr Follington expresses the belief that the grant of the proposed tenements would not have any significant impact on the social and cultural structures of the native title parties. Dr Follington also states, in relation to economic structures, that the Grantee party contracts a significant proportion of activities relating to its rehabilitation and maintenance operations to external contractors. If the proposed tenements are granted and the Project is fully approved, employment for full-time personnel will increase from the current 46 to up to 120 people, plus additional contractors. This and other s 39(1) criteria have been 'positively addressed' in the Ancillary Deed for the First and Third native title parties. I take this to refer to the offer by the Grantee party in relation to such things as possible contracts with native title parties (on an independent competitive contractors basis) as reflected in the offer to native title parties set out in the letter from Mr Hanrahan dated 26 September 2011 and in a draft Ancillary Deed referred to in the *Coalpac good faith decision* (at [151](g), [257](b) and (d)) and at [136]–[137] below.

[81] The Grantee party contends that the grant of the proposed tenements will have no detrimental effect on the development of the social, cultural and economic structures of the native title parties. In the absence of relevant material from the native title parties it is not possible to test that contention. I note that the Grantee party has existing agreements with local Aboriginal groups that will continue if the proposed tenements are granted, and which, it submits, contribute to the economic well-being of those groups, and which include the native title parties. Also, commitments have been made by the Grantee party in the EA which will benefit the native title parties in relation to the criteria in s 39(1)(a)(iii).

[82] *Conclusion:* In the absence of evidence and contentions from any native title party, particularly the Second native title party, it is not possible to make a finding about the effect

(if any) of the proposed future acts on the development of social, cultural and economic structures of any of the native title parties.

The effect of the act on 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 – s 39(1)(a)(iv)

[83] The Government party is not aware of the extent to which the WDM have in the past enjoyed, or presently enjoy, freedom of access to the land concerned and/or freedom to carry out rites, ceremonies or other activities of cultural significance on the land concerned in accordance with their traditions. The Government party submits more generally that, having regard to the prior grants of rights and interests and assertions of control in relation to the land concerned by people other than registered native title parties, the Government party does not know about the freedom of access by the WDM to the land concerned, their freedom to carry out rites, ceremonies or other activities of cultural significance on that land, or the effect (or likely effect) of the proposed future acts on those freedoms.

[84] The Grantee party states that, for many years during its use of the tenement areas, the freedom of access of the native title parties has been restricted in relation to areas of active mining and exploration, as part of the Grantee party's safety and security obligations. A map showing the location and extent of 'Areas Of Restricted Access' on the proposed tenements is Annexure ILF-5 to Dr Follington's Affidavit. The Grantee party has erected signage and felled timber barricades to indicate the boundary, and access to the restricted areas is prevented. The Grantee party has not been aware of the native title parties accessing the restricted areas, unless that access has related to cultural heritage inspections and surveys.

[85] However, the Grantee party also states that it would not object to requests from the native title parties for access to restricted areas within the tenement areas for the purposes of carrying out rites and ceremonies. Any such access would need to meet health and safety obligations, including that members of the native title parties be accompanied by Coalpac personnel at all times.

[86] According to the Grantee party, the native title parties are not prevented from accessing the remaining State Forest areas of the tenements outside the restricted access area, and this will not change if the proposed tenements are granted. In any case, the Grantee party

is not aware of the native title parties accessing the unrestricted areas of the tenements, or performing rites and ceremonies in the relevant areas, except in relation to cultural heritage surveys and inspections.

[87] The Grantee party therefore contends that the proposed future acts will not have any greater impact on the freedom of access of the native title parties or their freedom to perform rites and ceremonies over the tenement areas over and above the existing arrangements.

[88] *Conclusion:* There is no evidence of the extent to which (if at all) any of the native title parties have enjoyed access to the land covered by the proposed tenements (other than for cultural heritage survey purposes) or have carried out rites, ceremonies or other activities of cultural significance on that land. It is clear, however, that access by the native title parties to some areas has been restricted as a consequence of mining and exploration activities. Given the statements by the Grantee party that it would not object to requests from the native title parties for access to restricted areas for the purposes of carrying out rites and ceremonies, but that any such access would need to meet health and safety obligations (including the presence of Coalpac personnel), I conclude that the proposed future acts might have some additional effect on the freedom of access by the native title parties to the parts of the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on parts of that land.

The effect of the act on any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions – s 39(1)(a)(v)

[89] This criterion refers to the location and the characteristic of areas or sites. The Act requires the Tribunal to take into account the effect of the proposed future acts on any area or site of particular significance 'on the land or waters concerned'. In this case, the land or waters concerned is the area of the proposed tenements.

[90] Subparagraph 39(1)(a)(v) focuses on sites of 'particular significance'. In *Chienmora v Striker Resources NL* ((1996) 142 ALR 21 at 34-5) Carr J stated in relation that expression:

> 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. ... If parliament intended that there be no qualification on the extent of the significance of the site, it would have left the word 'particular' out. 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.

Although Carr J was dealing with the use of the expression in s 237 of the Act, the passage has been endorsed by the Tribunal as also providing the correct understanding of its use in s 39(1)(a)(v) (see e.g. *Bissett v Mineral Deposits (Operations) Pty Ltd* (2001) 166 FLR 46 at [83], [84]; *Jax Coal Pty Ltd v Smallwood and Others* (2011) 260 FLR 99 at [69]).

[91] The threshold question is whether there are any areas or sites of 'particular significance' to the native title parties 'in accordance with their traditions' on the land or waters within the area of the proposed tenements. If there are such areas or sites it will be necessary to consider what effect (if any) the proposed future acts would have on any such area or site.

[92] As noted in the *Coalpac good faith decision* (at [310](a)), one of the issues that the Second native title party wanted dealt with at a hearing in relation to the good faith issue was its inability to advise the Grantee party of areas and sites of significance. It was submitted that, as a result of being unable to participate in a cultural heritage survey of the mining tenements, the Second native title party was not able to provide that advice. The submission was dealt with in that decision (at [156]–[247]).

[93] Although the Second native title party has not provided evidence at this stage of the proceedings, some of the evidence given in relation to the good faith issue is relevant for considering the matter referred to in s 39(1)(a)(v).

[94] *Location and significance of areas or sites:* As recorded in the *Coalpac good faith decision*, an Aboriginal Archaeology and Cultural Heritage Impact Assessment of the Project area which includes the areas covered by MLAs 392 and 393 (the Assessment) was conducted on behalf of the Grantee party by Hansen Bailey Environmental Consultants (Hansen Bailey) in 2010-11. The draft report on the Assessment was provided to the Mingaan Aboriginal Corporation (MAC). Although not being available to take part in the fieldwork for the Assessment, the MAC requested a meeting to discuss the key findings and management recommendations in the draft report. This meeting was held on 11 March 2011 at the MAC offices in Lithgow, with Andrew McLaren of AECOM (a consultant company that worked with Hansen Bailey on the Assessment) and Dorian Walsh of Hansen Bailey present. The MAC attendees at this meeting included Helen Riley, Sharon Riley, Ronny Riley, Paula Summers and Gayle Dawes. At this meeting, the MAC representatives indicated that they held cultural knowledge relating to the site and that there were additional sites present within

the Project area that had not been identified during the fieldwork component. In response to the new information noted by the MAC, arrangements were made for an additional site visit on 22 March 2011, to be attended by MAC representative Sharon Riley, AECOM archaeologists Andrew McLaren and Geordie Oakes and Hansen Bailey representative Dorian Walsh. The agreed purpose of this visit was to facilitate the identification and recording of the new sites noted in the meeting with MAC on 11 March 2011 and to allow a review of some of the key sites identified in the main component of the Project fieldwork. However, on 21 March 2011, Dorian Walsh was informed by MAC representative Helen Riley that Sharon Riley would be unable to attend the site visit (see *Coalpac good faith decision* at [202]).

[95] The Second native title party's native title claim was filed on 17 June 2011 and was registered on 19 July 2011. At the meeting in Lithgow on 24 August 2011 between representatives of the Second native title party (including Sharon Riley, Bill Allen and Philip Teitzel) and representatives of the Grantee party, claim group members raised various questions in relation to cultural and heritage issues and known Wiradjuri sites located in the area. The draft minutes of the meeting record that the claim group proposed that members of their group undertake a survey of the proposed drill sites. Coalpac was in agreement with the proposal. There was a discussion about dealings with the claim group being kept confidential. Ms Riley indicated that site registers or cultural heritage site details have different levels of access for others. She asked if there was an opportunity for further cultural surveys in the area. Mr Hanrahan said this could be encompassed in future Aboriginal Cultural Heritage Management Plan ('ACHMP') consultations. Ms Riley stated that their group couldn't attend the previous C & H surveys due to the group's insurance coverage. She informed the meeting of rock shelters in the area and said that she has expert knowledge in what type of rock shelters are found. Ms Riley questioned whether their values had been properly recorded as there is a lot more work involved in preserving the rock shelters. Mr Hanrahan suggested that these important issues could be addressed in future ACHMP consultations. Dr Follington said the Grantee party would protect the rock shelters whatever and wherever they are located. It would work with the claim group on whatever queries they have. The draft minutes record that, when the participants were considering the next steps, Mr Teitzel suggested that the claim group would require one full day to survey the eight proposed drill sites. (Having regard to the plan that is Attachment A to these reasons for decision, it is apparent that each of the eight proposed drill sites, or boreholes, is located on that part of the EL 7517 that is not

overlapped by MLA 393, an area not included in the Assessment.) Mr Hanrahan and Dr Follington agreed and requested the claim group to provide the names of those members who would be available to conduct the survey as well as possible dates to visit the area. Although the minutes did not record an agreement about funding, it is apparent from Mr Hanrahan's Affidavit of 6 August 2012 and the Second native title party's statement of reply to the Grantee party's statement of contentions on the good faith issue that it was agreed at the meeting that a survey of EL 7517 could take place and the Grantee party would fund that survey (see *Coalpac good faith decision* at [218]). For reasons noted in the *Coalpac good faith decision,* that survey did not take place.

[96] However, the Department of Planning and Infrastructure requested an additional survey of ridgelines to the north-east of Invincible Open Cut Mine, with particular emphasis on the identification of rock shelters. A letter was sent to all registered Aboriginal stakeholder groups for the Project on 20 September 2011 informing them of the request and seeking their participation in a targeted archaeological field survey of the relevant ridgelines. Three groups, including the MAC, indicated that they wanted to be involved. Mr Elwin Wolfenden was nominated as the representative of the MAC to attend the additional fieldwork program. An archaeological survey of the ridgelines was undertaken on 12 October 2011 by a combined field team of two AECOM archaeologists (Andrew McLaren and Geordie Oakes) and three Aboriginal community representatives: Elwin Wolfenden (MAC), Kevin Williams (Warrabinga Native Title Claimants Aboriginal Corporation) and Donna Whillock (North East Wiradjuri Aboriginal Corporation). No new Aboriginal archaeological sites were identified during the survey. Mr Wolfenden was encouraged, during and after his participation in this fieldwork, to provide information regarding the archaeological and cultural values of the Project area. No specific archaeological or cultural issues pertaining to the Project area were raised by him at that time. On 18 October 2011, a letter confirming the results of the additional fieldwork undertaken was sent to all registered Aboriginal stakeholder groups for the Project (see *Coalpac good faith decision* at [203]–[206]).

[97] That evidence indicates that at least some members of the Second native title party have knowledge about particular sites within the area covered by the proposed tenements. However, the Second native title party has not provided the Tribunal with information about the features and locations of those sites or about their significance to the Second native title party.

[98] The absence of specific evidence from the Second native title party does not mean that there is no evidence in relation to cultural heritage sites on the land concerned. Indeed documentary material provided by the Government party and the Grantee party included maps showing the location of such sites, descriptions of places and artefacts located there and some photographs.

[99] The Government party states that a search of the records maintained on the Aboriginal Heritage Information Management System (AHIMS) for the land concerned (and a 50 m buffer beyond the borders of the land concerned) reveals that seven sites are recorded within or on the border of that land. The approximate locations of those sites are identified on a map 'Approximate location of Aboriginal heritage sites', prepared by the State. Each appears to be on or near the area covered by either MLA 392 or MLA 393, and none are on that part of EL 7517 that is not covered by MLA 393. Of the seven sites:

(a) three sites are recorded as featuring artefacts
(b) one site is recorded as featuring artefact and a potential archaeological deposit
(c) three sites are recorded as featuring a potential archaeological deposit.

Documents provided by the Government party include descriptions of each site, and photographs of some sites.

[100] As is clear from the Assessment report, and as noted in the *Coalpac good faith decision* (at [194]), there have been at least seven studies conducted wholly or partially within the Project Boundary. Other studies have been undertaken within the greater Cullen Bullen-Wallerawang area. The relevant areas within EL 7517 (which are outside the Project Boundary), have also been recently surveyed separately by the First and Third native title parties, with the conclusion that there is one registered Aboriginal place, and some possible sites of relatively low significance (First native title party) and higher significance (Third native title party).

[101] In his Affidavit sworn on 12 October 2012, Colin James Bailey, a principal and director of Hansen Bailey, describes the process of commissioning and conducting the Assessment which was conducted in accordance with the *Guidelines for Aboriginal Cultural Heritage Impact and Community Consultation* (2005) and the *Aboriginal Cultural Heritage Consultation Requirements for Proponents* (2010) published by the Department of Environment, Climate Change and Water ('DECCW').

[102] The Assessment process (including the involvement of some Aboriginal people who are parties to these proceedings) and the key findings are described in the *Coalpac good faith decision* (at [167]–[212]) and need not be repeated.

[103] It is sufficient to record here that Mr Bailey sets out the following as the principal conclusions of the Assessment with regard to Aboriginal archaeological cultural heritage within the area of the proposed mineral leases:

(a) 15 Aboriginal heritage sites were identified in the Assessment (including five Aboriginal heritage sites located within the ML Area), five of which had been recorded on the AHIMS by previous assessments in the local area
(b) the majority of Aboriginal sites located during the survey were stone artefact sites, with nine artefact scatters (six of low scientific significance, two of moderate scientific significance and one of high scientific significance) and a single isolated find (of low scientific significance)
(c) three rock shelter sites were definitively identified (one of low scientific significance and two of moderate scientific significance), and
(d) two rock shelters that were considered to have some archaeological potential (both of these potential sites were of low scientific significance).

[104] It is appropriate to note that because a site or area is recorded on an official register it is not necessarily of 'particular significance' to the relevant native title party or parties in accordance with their traditions (see *Thomas* at 174). In that regard it might be relevant to look at the criteria for entry on a register, who sought the registration of a particular site or area, the steps to be taken before a site or area is registered, and the classification of the site or area. It is also appropriate to note that the level of 'scientific significance' accorded to a site might not represent the type or level of significance of that site to Aboriginal people in accordance with their traditions.

[105] In his Affidavit, Dr Follington states that a 'new cultural heritage site' was recently identified in the course of the New South Wales Planning Assessment Commission public hearings. The site is located on the edge of the Project Boundary, but outside any disturbance area and 400 metres from the closest point of open cut. The find has been notified, inspected and recorded, and the Grantee party has been asked by the cultural heritage ranger/traditional owner from the National Parks and Wildlife Service to treat details confidentially and not

make public the site's precise location. The Grantee party intends to include this site in the AHMP process.

[106] In summary, there is evidence about the location and physical features of recorded sites. According to the Assessment report, consultation with the registered Aboriginal stakeholder groups indicated a common interest in the well-being of recorded Aboriginal sites within the Project area. Registered stakeholders involved in the fieldwork advised AECOM that all Aboriginal archaeological sites within and surrounding the Project area are culturally significant and need to be cared for appropriately. However, there is no direct evidence as to whether any or all of the sites are of 'particular significance' to the native title parties in accordance with their traditions.

[107] For its part, the Government party states that it does not know whether the areas or sites recorded on the AHIMS in respect of the land concerned are of particular significance to the WDM in accordance with their traditions, or the nature of the significance and the traditions under which the significance attaches.

[108] Mr Bailey, however, referred to one registered Aboriginal place. I understand this to be a place known as Blackfellows Hand. According to Dr Follington's Affidavit, it is located on an existing bush track near Borehole UG011 in the eastern area of EL 7517.

[109] The term 'Aboriginal place' is defined in s 5 of the *National Parks and Wildlife Act 1974* (NSW) to mean any place declared to be an Aboriginal place under s 84 of that Act. Section 84 provides:

> The Minister may, by order published in the Gazette, declare any place specified or described in the order, being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act.

The Director-General is the authority for the protection of Aboriginal places in New South Wales (NTPWA s 85) and is to establish a public register that contains, among other things, details of each Aboriginal place declared under s 84 (NTPWA s 188F(f)).

[110] There was no evidence in these proceedings as to how the Aboriginal place became registered. Given the terms of s 84 quoted above, it would seem that the relevant Minister was of the opinion that the place is or was of 'special significance with respect to Aboriginal culture'. However, in the absence of evidence on this point, I cannot decide whether that Aboriginal place (or any of the other areas or sites identified for the purpose of these

proceedings) is of 'particular significance' to any or all of the native title parties 'in accordance with their traditions'.

[111] *Effect of proposed future acts on areas or sites:* The Government party does not know the effect (or likely effect) of the proposed future acts on those areas or sites. The Government party notes, however, that the exercise and enjoyment by the Grantee party of the rights conferred by the proposed future acts would be subject to Part 6 of the *National Parks and Wildlife Act 1974* (NSW), which includes provisions for the protection of Aboriginal places and relics. The protection available under that State legislation is, the Government party submits, reinforced by protection available under ss 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

[112] The evidence considered in the *Coalpac good faith decision* (see [208]–[212]) shows that some identified sites are likely to be damaged or destroyed by mining activity if the proposed future acts occur, but that steps are proposed to reduce or avoid damage to sites or the culturally significant artefacts on them.

[113] In summary, the Assessment report lists five Aboriginal archaeological sites that have been identified as being within the proposed open cut mining areas and which would be 'greatly impacted or destroyed' by ground works associated with this activity (Assessment page 65, 10.2.1). Other sites could be indirectly impacted by the Project, for example as a result of subsidence and/or blasting-related vibration (Assessment page 66, 10.3). Other identified sites will not be impacted directly or indirectly. The Assessment states that the 'loss of the sites in question would not constitute a significant impact to the identified Aboriginal heritage resources of the region' (Assessment page 68, 10.5.1). Strategies to mitigate the impact (e.g. surface artefact collection prior to the commencement of the works) are proposed later in the Assessment. The Management Recommendations in the Assessment include that:

(a) management strategies to mitigate the impacts of the Project on the identified Aboriginal heritage resources of the Project area should be detailed in an Aboriginal Heritage Management Plan (AHMP) for the Project

(b) the AHMP should be prepared in consultation with registered Aboriginal stakeholders and the NSW Office of Environment and Heritage (formerly DECCW) and to the satisfaction of the NSW Department of Planning and Infrastructure, and

(c) the commitment to the development of the AHMP should be addressed in the Environmental Assessment being prepared by Hansen Bailey to support the Grantee party's Project Application under s 75 of the *Environmental Planning and Assessment Act 1979* (NSW) (Assessment page 73, 11.2).

[114] The Assessment also states:

> Aboriginal stakeholder input is fundamental to determining an appropriate management strategy for identified Aboriginal archaeological sites within the Project area. Accordingly, throughout the assessment process, Aboriginal stakeholders were encouraged both verbally and in writing to provide input on appropriate management measures. (page 73, 11.2.1)

[115] Written reviews of a draft of the Assessment were provided by five of the seven registered Aboriginal stakeholder groups. All of them indicated that they were satisfied with the proposed management strategy for identified Aboriginal heritage sites within the Project area. That strategy included surface artefact collection by a qualified archaeologist and Aboriginal stakeholder representatives prior to the commencement of works for all six sites at risk of destruction by the Project. Recovered artefacts will be subject to appropriate forms of analysis and managed in accordance with the AHMP for the Project. Appropriate long-term management options for recovered artefacts should be developed in consultation with Aboriginal stakeholders during the preparation of the AHMP. Other strategies were proposed for five Aboriginal rockshelter sites that had been identified as having potential to be indirectly impacted by the Project through subsidence and/or blast related vibration. The Assessment concludes with a recommendation that, in the interests of promoting intergenerational equity, the AHMP for the Project should contain provision for registered Aboriginal stakeholder groups to access, through the operational life of the Project, sites outside the Disturbance Boundary for cultural purposes (see Assessment pages 73–75, 11.2.1–11.2.5).

[116] The Grantee party has stated repeatedly that, if it is successful in gaining approval for the Project, the Second native title party would be invited to provide Wiradjuri heritage and cultural information to be included in the AHMP as well as participate in its implementation.

[117] In his affidavit, Dr Follington states that, although he is aware that there are 'numerous cultural heritage sites' in the areas covered by the proposed tenements, he does not believe that any of these sites will be adversely affected by the Project because:

(a) the tenement areas which will be subject to disturbance by the Project have already been extensively surveyed, and the Grantee party is aware of the location of these sites of significance

(b) the EA sets out a Statement of Commitments, whereby the Grantee party has committed (numbers 25–27) to properly managing and protecting these sites (including the establishment of a keeping place), and the Grantee party takes very seriously its legal and ethical responsibilities in relation to Aboriginal and non-Aboriginal cultural heritage

(c) other Aboriginal groups affected by the EA have provided positive endorsement of the Assessment, the survey and fieldwork, and of the Grantee party's management of cultural heritage issues (see the Assessment report annexures A-21–27 inclusive)

(d) should the proposed tenements be granted and the EA be approved, an AHMP under the *National Parks and Wildlife Act 1974* (NSW) will be completed over the Project areas to be disturbed, prior to any ground disturbance taking place. This AHMP will be completed in consultation with local Aboriginal communities, to ensure the continued management of Aboriginal cultural heritage for the life of the Project, and the Second native title party may choose to participate in the AHMP process if they wish, and

(e) the Grantee party's approach to cultural heritage matters as outlined in the EA and the Assessment apply equally to the minor works which are proposed on EL 7517.

[118] The Grantee party contends that:

(a) there is only one site of high significance within the Project boundary, and at this stage, only one formally identified site registered on AHIMS in the EL7517 disturbance area, and

(b) cultural heritage sites of significance will not be adversely affected by the Project.

[119] In his affidavit, Mr Bailey states that the Project proposes that management of the identified Aboriginal cultural heritage sites will include:

(a) a surface collection prior to disturbance of five open artefact scatters and the isolated find (all of which were assessed to be of low scientific significance),

with the collection process being undertaken in consultation with the local Aboriginal community

(b) the five rock shelter sites (including both the known and potential sites) being monitored regularly through the life of the Project to ensure that the potential for indirect impacts are appropriately managed.

[120] The Grantee party, in the conduct of the Project, also proposes:

(a) to develop and implement an AHMP in consultation with Aboriginal stakeholders and the Office of Environment and Heritage

(b) to maintain a Keeping Place during the life of the Project for all Aboriginal archaeological material salvaged prior to disturbance, in consultation with the Aboriginal community.

[121] *Conclusion:* The evidence shows that there are various sites or areas located on the area covered by the proposed tenements. At least one of those is an 'Aboriginal place' as defined in the *National Parks and Wildlife Act 1974* (NSW). Although registered stakeholders involved in the fieldwork for the Assessment of the Project Area (MLAs 392 and 393) advised AECOM that all Aboriginal archaeological sites within and surrounding the Project area are culturally significant and need to be cared for appropriately, there is no direct evidence as to whether any or all of the sites are of 'particular significance' to the native title parties in accordance with their traditions. The evidence shows that the proposed future acts are likely to affect some identified areas or sites, but will have little or no effect on others as a result of the combined operation of the relevant provisions of the *National Parks and Wildlife Act 1974* (NSW), the development by Coalpac of an AHMP (including in consultation with the Second native title party about the Wiradjuri heritage and cultural information to be included in the AHMP and their participation in its implementation), and the approach taken by the Grantee party to Aboriginal cultural heritage matters. However, on the evidence before the Tribunal, it is not possible to make findings about the effect of the proposed future acts on any area or site of particular significance to the native title parties in accordance with their traditions.

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 – s 39(1)(b)

[122] In the absence of material from the Second native title party about their interests, proposals, opinions or wishes in relation to the management, use or control of the land or waters that will be affected by the proposed future acts, neither the Government party nor the Grantee party offered comment or made submissions about such interests, proposals, opinions or wishes.

[123] In his affidavit, Dr Follington states that he attended a meeting with the Second native title party in Lithgow on 24 August 2011 in relation to the proposed grant of the tenements. Although some 'limited information' about the interests, opinions, or wishes of the Second native title party was received, the Grantee party has been 'unable to meet in person' with the Second native title party since then, and hence he has no information on this matter. The reasons for the *Coalpac good faith decision* referred to the meeting in Lithgow on 24 August 2011, and the criticism by the Second native title party of the draft minutes of that meeting prepared by Mr Hanrahan. For present purposes (and in the absence of contentions from the Second native title party about s 39(1)(b) of the Act) it is relevant to note that the minutes record Mr Teitzel stating that the Second native party's preferences for the possible content of an Ancillary Deed were education and training, employment, health services, business development, community services, and cultural and environmental initiatives. It is not clear from the minutes whether (or to what extent) satisfying those preferences would relate to the management, use or control of the land concerned. However, other people are noted as talking about land management programs in consultation with the Second native title party to benefit the community, contributions back to the local community, and business development (see [2012] NNTTA 145 at [151](b), [257](a)). The draft minutes also record that the Second native title party agreed to provide a 'more detailed description of the overall benefits they would prefer to have included in the ancillary deed'. However, there is no evidence of such a description being provided.

[124] For completeness, I note Dr Follington's statement that he believes that the interests, proposals, opinions or wishes of the other two native title parties have been addressed to the satisfaction of those parties in the Ancillary Deed.

[125] Although not making a submission in relation to the matters referred to in s 39(1)(b), the Grantee party submits that:

(a) the weight to be given by the Tribunal to this criterion is lessened by the fact that the native title parties do not hold determined native title rights and interests in relation to the areas of the proposed tenements

(b) in cases where the future acts would have little impact on the enjoyment of native title rights and interests and no interference with sites of particular significance, the weight to be given to such a determination will be less, perhaps much less, and

(c) the fact that the First and Third native title parties have entered into an Ancillary Deed with the Grantee party demonstrates that at least two of the three native title parties are not opposed to the project.

[126] *Conclusion:* Apart from general statements made at the meeting in Lithgow on 24 August 2011 and in some correspondence between the representatives of the Second native title party and the Grantee party (as recorded in the *Coalpac good faith decision*), there is no evidence or contentions in these proceedings about 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 they have registered native title rights and interests that will be affected by the proposed future acts. I proceed on the basis that any interests, proposals, opinions or wishes of the First and Third native title parties have been accommodated in the Ancillary Deed entered into by them and the Grantee party. I am unable to make any finding in relation to the Second native title party.

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 – s 39(1)(c)

[127] The Government party made no submission on this matter, noting that the matter would be addressed by the Grantee party.

[128] The Grantee party contends that the Project, which includes the grant of the proposed tenements as an essential element, will provide significant economic and social benefits for the region and the State of New South Wales through the provision of employment, electricity generation, taxes and fees.

[129] Particulars of those benefits are found in Dr Follington's Affidavit, where they are described in three categories. First, the Project will provide coal for the Mt Piper and

Wallerawang Power Stations. These power stations are base load and provide power to the Sydney area. Coalpac has been contracted to provide 70 per cent of the coal required for the Mt Piper Power Station over the next 20 years. According to Dr Follington, Coalpac's coal supply is essential for the maintenance of a reliable power supply to Sydney. Table 8 from the EA, 'Key Project Components and Comparison with Existing Coalpac Approvals' (reproduced in Dr Follington's Affidavit), states that production from the Consolidation Project will be 3.5 Mtpa of product coal and up to 0.45 Million bank cubic metres (Mbcm) of product sand per annum. Under the existing approvals for the Cullen Valley Mine and the Invincible Colliery production is 1.0 Mtpa and 1.2 Mtpa product coal respectively.

[130] Second, Dr Follington states, the Project will maintain direct employment of up to 120 people, and support of contractors, with a total of 293 direct and indirect jobs for the region. Other local contract service providers depend on the mines for their livelihood. The maintenance of a reliable local coal supply to the power station also ensures continued employment of power station staff.

[131] Third, Dr Follington states that the Project will result in the following economic benefits to the Lithgow and Bathurst regional economies:

(a) $219 million in annual direct and indirect regional output or business turnover
(b) $105 million in annual direct and indirect value added
(c) $30 million in annual household income, and
(d) 293 direct and indirect jobs.

[132] According to Dr Follington, the economic impact to New South Wales associated with the Project is estimated in the order of:

(a) $144 million, present value, in royalties and tax income to the State over the life of the Project
(b) $275 million in annual direct and indirect regional output or business turnover
(c) $133 million in annual direct and indirect regional value added
(d) $48 million in annual direct and indirect household income, and
(e) 519 direct and indirect jobs.

[133] The Grantee party is also in the process of finalising a Voluntary Planning Agreement (VPA) with Lithgow City Council, pursuant to s 93F of the *Environmental Planning and Assessment Act 1979* (NSW) which is designed to deliver up to $5 million to the Lithgow

region. The VPA is focused on providing a sewerage scheme for the township of Cullen Bullen which will greatly improve the health and amenity of the local community. The Grantee party has agreed to the terms, and the VPA was on display for 28 days until approximately 18 October 2012.

[134] On the other hand, the Grantee party also submits that there will be significant economic consequences for the company and the local economy if the proposed tenements are not granted. According to the Grantee party, the currently approved reserves contained within the Grantee party's mining operations are close to being exhausted. If the proposed tenements are not granted and the Project is not approved, then the Grantee party will be forced to shed its workforce, cease trading, and it will not be able to meet its contractual commitments to local power stations. Coalpac is contracted to supply 70 per cent of the coal required for the Mt Piper Power Station over the next 20 years. Furthermore, the Grantee party contends that, if the proposed tenements are not granted:

(a) there will be a loss of more than 90 local jobs plus contractors as the Invincible and Cullen Valley mines will close
(b) up to 300 more local service industry jobs would be at risk
(c) more than $50 million per year trade with local and regional businesses would be lost, and
(d) Mt Piper coal supply would decrease by approximately 40 per cent, with power station jobs being at risk and electricity price rises.

[135] The only evidence about the economic scale of the Project came from the Grantee party. It was not disputed and the Tribunal has no independent means of assessing the estimates. On the basis of that evidence, it is apparent that the Project will have beneficial economic significance for the local community and the State of New South Wales.

[136] The economic significance for Aboriginal people who live in that area is less clear. As noted earlier and in the *Coalpac good faith decision*, the Second native title party sought education and training, employment and business development as among the possible content of an Ancillary Deed (see *Coalpac good faith decision* at [151](b) and 257(a)). The offer made by the Grantee party to each of the three native title parties on 26 September 2011 was said to be based on its understanding of the views and aspirations of the three native title parties as derived from the Lithgow meeting with the Second native title party, additional

meetings held with the other native title parties, and the Grantee party's history of dealings with various groups over the years. Two of the three components of the offer were:

(a) commercial contracts: the Grantee party would use its best endeavours to offer contracts (on an independent competitive basis) to the registered native title claim groups (i.e. the three native title parties) in respect of areas of opportunity (supplementary work to the planned operations, such as fencing, rehabilitation and landscaping and clearing), and to advise the groups of tendering opportunities as they arose (noting that any potential contractor would have to be able to meet the necessary occupational health and safety requirements as well as being able to demonstrate the necessary skills to undertake the work)

(b) education: the Grantee party was willing to enter into an arrangement with the Australian Indigenous Education Foundation (AIEF) with the aim of assisting 'Aboriginal youth, from within the Claim Group's community', to access first rate education opportunities. Specifically, the Grantee party was prepared to make an annual contribution to the AIEF over a 20 year period as it 'believes this program to be not only a considerable benefit to the Claim Group community overall but also a benefit that can create generational change'.

[137] Although the Second native title party was highly critical of the offer (see *Coalpac good faith decision* at [257](c)), the Grantee party sent a draft Ancillary Deed to each of the native title parties on 13 March 2012. Clause 9.1 of the draft Ancillary Deed stated that, in consideration of the native title applicants entering into this Deed, the Grantee party agrees to 'contribute directly to the economic wellbeing and self-determination of the Native Title Claim Groups' by fulfilling commitments to, in summary:

(a) facilitate, by way of a Liaison committee, the development of a business plan that is intended to regulate the benefits and other economic arrangements between the parties to the Deed

(b) enter into an arrangement with the AIEF to assist Aboriginal youth 'from within either or both of the Native Title Claim Groups or (failing suitable candidates) from within the general Lithgow/Bathurst Aboriginal Community' to access educational opportunities with the AIEF's Scholarship Program, and the Grantee party would contribute $30,000 per annum (CPI indexed) for the life of the deed to facilitate scholarships for at least two students at any one time

(c) provide the Native Title Claim Groups with the opportunity to tender for contracts, and to consider favourably such tenders, in nominated areas (including land management, general maintenance of surrounding infrastructure, and management, of the re-establishment of natural vegetation communities). The Grantee party would use all reasonable endeavours, in consultation with the Native Title Claim Groups, to structure contractual arrangements to maximize the Native Title Claim Groups' opportunity to make tenders.

[138] The Ancillary Deed entered into by the Grantee party and the First and Third native title parties is not in evidence in these proceedings, and its content is described by Dr Follington as confidential. However, given that the draft Ancillary Deed was provided by the Grantee party, I proceed on the basis that it indicates at least the tenor of what is contained in the Ancillary Deed.

[139] *Conclusion:* The evidence demonstrates that the Project will have beneficial economic significance for the State of New South Wales and the local community. Given that the proposed tenements are central to the Project, it follows that the proposed future acts will have beneficial economic significance. The evidence also indicates that the grant of the proposed tenements is likely to have little direct economic significance for Aboriginal peoples who live in the area, although there might be economic benefits in the medium to longer term for those who tender successfully for contracts or obtain educational scholarships.

[140] There is no evidence as to any 'other' significance of the future acts to Australia, New South Wales, the area in which the land concerned is located or the Aboriginal peoples who live in that area.

Any public interest in the doing of the act – s 39(1)(e)

[141] As the High Court has pointed out in judgments over more than 60 years:

> the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'. (see O'*Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019 at [30] per French CJ and Kiefel J; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [137] per Hayne J)

[142] Justices of the High Court have also observed that 'public interest' is a term to which it is difficult to give a precise content (*Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019 at [30] per French CJ and Kiefel; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ). The question about what is in 'the public interest' will ordinarily require consideration of a number of competing arguments about, or features or facets of, the public interest (see *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [137] per Hayne J, citing *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]).

[143] Consistently with that approach to the 'public interest', a three Member panel of the Tribunal wrote in *Thomas* (at 176) in relation to s 39(1)(e) of the Act:

> 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.
>
> As noted earlier, it may be argued by reference to this criterion that there is a public interest in maintaining a viable mining industry and, because a viable mining industry depends on extensive exploration, there is a public interest in the grant of each mining lease to be used for exploration purposes.
>
> It is not appropriate to speculate at this stage about all the issues which could be raised in this context other than to note the fact that there are many matters that potentially could be considered as relevant under the public interest.

[144] The Grantee party contends that the grant of the proposed tenements will enhance the mining industry in New South Wales, and notes that the Tribunal has accepted that there is a public interest in a thriving mining industry in Australia (citing *Thomas* at 215–216, *Evans v Western Australia* (1997) 77 FCR 193 at 214—215, *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 at [180]). In support of its contention, the Grantee party relies on parts of Dr Follington's Affidavit.

[145] The Government party simply contends that the grant of MLA 392 and MLA 393, and the grant of Ministerial consent under EL 7517, is in the public interest, but provides no evidence in support of that contention.

[146] *Conclusion:* I am satisfied on the evidence that, for economic and related reasons referred to at [127]–[139] above, there is a public interest in the Project proceeding and hence in the proposed future acts being done. There is no evidence in this case to suggest a public interest in the proposed future acts not being done.

Any other matter that the arbitral body considers relevant – s 39(1)(f)

[147] The Government party was not aware of any other matter that the Tribunal may consider relevant, or which the Grantee party or Second native title party might contend is relevant. Accordingly, it made no submission.

[148] The Grantee party contends that the Tribunal can have regard to the environmental protection regime of the State which has been afforded by the 2008 Environmental Assessment process (see *2009 Coalpac determination* at [56]) and the current EA process for the Project. In its submission:

(a) the broad coverage of an EA operates to largely ameliorate any effect of the future acts on some of the factors in s 39(1)(a)
(b) through the EA, the Project has been thoroughly vetted and publicly examined, and
(c) a broad range of relevant matters are canvassed within the EA (noise, air quality, greenhouse gas, traffic and transport) including Aboriginal cultural heritage.

[149] The Government party made no submission in response to this contention.

[150] *Conclusion:* I note the contention made by the Grantee party about the operation of the environmental protection regime of the State of New South Wales in relation to the Environmental Assessment process for the Project. However, it is not necessary to reach any conclusions about that regime for the purpose of these proceedings.

Any issues on which the parties agree - s 39(4)

[151] As noted at [32], s 39(4) of the Act states that, before making its determination, the arbitral body (in this case, the Tribunal) 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 s 39(1), to the extent that the matters relate to those issues.

[152] Although all three native title parties were involved in these proceedings, only the Second native title party participated by making contentions and providing evidence in

relation to some of the issues about which the Tribunal has to make findings or decisions. Given that the Grantee party and the First and Third native title parties have entered into an Ancillary Deed that would allow the future acts to occur, and in the absence of any contentions or evidence from the First and Third native title parties about the matters listed in s 39(1), I proceed on the basis that those parties agree in relation to them.

[153] However, this is not a case where all of the negotiation parties agree on issues relevant to the Tribunal's determination. Nor do all the negotiation parties consent, such that the Tribunal must take their agreement into account and need not take into account the matters mentioned in s 39(1) to that extent. Consequently, in making the determination in relation to the proposed future acts, the Tribunal must take into account each of the matters mentioned in s 39(1).

Summary of conclusions in relation to s 39(1) criteria

[154] Section 39 of the Act lists a diverse range of criteria that the Tribunal must take into account when making a determination under s 38 that:

(a) the act must not be done, or
(b) the act may be done, or
(c) the act may be done subject to conditions to be complied with by any of the parties.

Each of those criteria has been considered in these reasons for determination.

[155] As noted earlier (see [31]), the Act gives no direction as to the weight that the Tribunal is to give to those criteria relative to each other. The weight to be given to them will depend on the evidence before the Tribunal.

[156] It is regrettable that the Second native title party did not provide evidence to the inquiry despite having made a native title claim in relation only to the areas of the proposed tenements, and having obtained registration of that claim for the purpose of obtaining the right to negotiate in relation to the proposed future acts. The failure of the Second native title party to provide evidence and make contentions in relation to the matters covered by s 39 of the Act means that the Tribunal has had to perform its statutory duty by reference primarily, and in most instances only, to the evidence and contentions provided by the Grantee party and the Government party. As is clear from these reasons, those parties made few or no

substantive contentions or provided little evidence in relation to some of the matters listed in s 39(1) which, one might have expected, the Second native title party would have been best placed to address.

[157] I proceed on the basis that the history of land usage on and in the vicinity of the land covered by the proposed tenements would have significantly disrupted the enjoyment and exercise of any native title rights and interests that existed in that area. In the absence of any determination that native title exists in favour of any of the native title parties, I note that by operation of the Act native title will not be extinguished by the grant of ML 392 and ML 393.

[158] In summary, the Tribunal's conclusions in relation to each of the criteria in s 39(1) are as follows:

(a) *s 39(1)(a)(i):* The absence of evidence and contentions from any native title party, particularly the Second native title party, in relation to this criterion means that a finding cannot be made about the effect of the proposed future acts on the enjoyment by the native title parties of their registered native title rights and interests. It is clear from the history of dealings with and use of the area covered by the proposed tenements over the past century that mining and other land uses would have restricted and even prevented the exercise and enjoyment of at least some of the registered native title rights and interests. It is arguable that some of the registered native title rights and interests would be affected or prevented by mining activity consequent to the future acts. However, in the absence of evidence about the current enjoyment of those rights and interests, no such finding can be made.

(b) *s 39(1)(a)(ii):* In the absence of evidence and contentions from any native title party, particularly the Second native title party, it is not possible to make a finding about the effect (if any) of the proposed future acts on the way of life, culture and traditions of any of the native title parties.

(c) *s 39(1)(a)(iii):* In the absence of evidence and contentions from any native title party, particularly the Second native title party, it is not possible to make a finding about the effect (if any) of the proposed future acts on the development of social, cultural and economic structures of any of the native title parties.

(d) *s 39(1)(a)(iv):* There is no evidence of the extent to which (if at all) any of the native title parties have enjoyed access to the land covered by the proposed

tenements (other than for cultural heritage survey purposes) or have carried out rites, ceremonies or other activities of cultural significance on that land. It is clear, however, that access by the native title parties to some areas has been restricted as a consequence of mining and exploration activities. Given the statements by the Grantee party that it would not object to requests from the native title parties for access to restricted areas for the purposes of carrying out rites and ceremonies, but that any such access would need to meet health and safety obligations (including the presence of Coalpac personnel), the proposed future acts might have some additional effect on the freedom of access by the native title parties to the parts of the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on parts of that land.

(e) *s 39(1)(a)(v):* The evidence shows that there are various sites or areas located on the area covered by the proposed tenements. At least one of those is an 'Aboriginal place' as defined in the *National Parks and Wildlife Act 1974* (NSW). Although registered stakeholders involved in the fieldwork for the Assessment of the Project Area (MLAs 392 and 393) advised AECOM that all Aboriginal archaeological sites within and surrounding the Project area are culturally significant and need to be cared for appropriately, there is no direct evidence as to whether any or all of the sites are of 'particular significance' to the native title parties in accordance with their traditions. The evidence shows that the proposed future acts are likely to affect some identified areas or sites, but will have little or no effect on others as a result of the combined operation of the relevant provisions of the *National Parks and Wildlife Act 1974* (NSW), the development by Coalpac of an AHMP (including in consultation with the Second native title party about the Wiradjuri heritage and cultural information to be included in the AHMP and their participation in its implementation), and the approach taken by the Grantee party to Aboriginal cultural heritage matters. However, on the evidence before the Tribunal, it is not possible to make findings about the effect of the proposed future acts on any area or site of particular significance to the native title parties in accordance with their traditions.

(f) *s 39(1)(b):* Apart from general statements made at the meeting in Lithgow on 24 August 2011 and in some correspondence between the representatives of the

Second native title party and the Grantee party, there is no evidence or contentions in these proceedings about 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 they have registered native title rights and interests that will be affected by the proposed future acts. I proceed on the basis that any interests, proposals, opinions or wishes of the First and Third native title parties have been accommodated in the Ancillary Deed entered into by them and the Grantee party. I am unable to make any finding in relation to the Second native title party.

(g) *s 39(1)(c):* The Project will have beneficial economic significance for the State of New South Wales and the local community. Given that the proposed tenements are central to the Project, it follows that the proposed future acts will have beneficial economic significance. The grant of the proposed tenements is likely to have little direct economic significance for Aboriginal peoples who live in the area, although there might be economic benefits in the medium to longer term for those who tender successfully for contracts or obtain education scholarships. There is no evidence as to any 'other' significance of the future acts to Australia, New South Wales, the area in which the land concerned is located or the Aboriginal peoples who live in that area.

(h) *s 39(1)(e):* For economic and related reasons, there is a public interest in the Project proceeding and hence in the proposed future acts being done. There is no evidence in this case to suggest a public interest in the proposed future acts not being done.

(i) *s 39(1)(f):* There is no other matter that the Tribunal considers relevant.

[159] For the purposes of s 39(2) I conclude that, even if all the registered native title rights and interests exist in relation to some or all of the area covered by the proposed tenements, the enjoyment of native title rights and interests would be affected (and in some places would have been restricted or even prevented) by:

(a) existing non-native title rights and interest 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.

Consequently, the effect of the proposed future acts on the matters set out in s 39(1)(a) is likely to be less than if there had been no non-native title rights and interests in relation to, or other uses of, the land or waters concerned.

Possible conditions

[160] The Tribunal is empowered to make a determination that the act may be done subject to conditions to be complied with by any of the parties (s 38(1)(c)).

[161] The Grantee party seeks a determination that the proposed future acts may be done and that there be no specific conditions imposed on the grant of the tenements. It submits that conditions should not be imposed unless the evidence suggests a need for them and that, in this case, there is no need for conditions to be imposed by the Tribunal. Rather, the Grantee party should be permitted to do all activities and works permitted by the tenements once granted, in accordance with applicable laws.

[162] At a directions hearing on 12 November 2012, Mr Teitzel stated that he held instructions that if the Tribunal had power to make a determination, the determination should be that the future acts could be done subject to conditions. At that stage, he was not able to specify what those conditions should be. No submission in relation to possible conditions was received from the Second native title party.

[163] The Government party made no submission in relation to whether the proposed future acts may be done subject to conditions,

[164] Neither the First native title party nor the Third native title party has submitted that any conditions be imposed on the doing of the proposed future acts.

[165] *Conclusion:* There is no basis on which the Tribunal should make a determination that the proposed future acts may be done subject to conditions to be complied with by any of the parties.

Determination

[166] The determination of the Tribunal is that the future acts comprising:

(a) the grant of Mining Lease 392 to Lithgow Coal Company Pty Limited
(b) the grant of Mining Lease 393 to Coalpac Pty Limited, and

(c) the consent of the Minister for Primary Industries to Coalpac Pty Limited to conduct prospecting activities on Exploration Licence 7517

may be done.

Graeme Neate
President

Attachment A