NATIONAL NATIVE TITLE TRIBUNAL

***Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd*, [2009] NNTTA 49 (27 May 2009)**

Application No: **WF08/27**

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

- and -

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

Holocene Pty Ltd (Applicant/grantee party)

- and -

The State of Western Australia (Government party)

- and -

Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) – (WC96/78) (native title party)

FUTURE ACT DETERMINATION

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 27 May 2009

Catchwords: Native title – future act – application for determination for the grant of mining lease – relevance of international instruments – Declaration of the Rights of Indigenous Peoples – interaction of *Racial Discrimination Act* and *Native Title Act* – interpretation of *Native Title Act* – s 39 criteria considered – without prejudice and confidential negotiations – relevance of in principle agreement to mining – cash payments, royalties and equity in grantee party offered in negotiations – relevance of benefits offered in negotiations – effect of act on site of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – any other matters the Tribunal considered relevant – native title party opposed to mining unless adequate terms agreed – determination that the act must not be done

Legislation: *Native Title Act 1993* (Cth), ss 3, 7, 24, 29, 31, 33, 35, 36(2), 38, 39, 41(3), 51, 109, 150, 155, 156(1)
Mining Act 1978 (WA), ss 8, 29(2), 35, 82, 84, 85, 123, 125(A)
Aboriginal Heritage Act 1972 (WA), ss 5, 6, 17, 18, 62
Racial Discrimination Act 1975 (Cth), s 10
Environmental Protection Act 1986 (WA)

Cases:	*Australian Manganese Pty Ltd v State of Western Australia & Others* [2008] NNTTA 38; (2008) 218 FLR 387
	Cheinmora v Striker Resources NL & Ors [1996] 1147 FCA 1; (1996) 142 ALR 21
	Evans v Western Australia [1997] 741 FCA; (1997) 77 FCR 193
	FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49
	Haines v Bendall (1991) 172 CLR 60
	Holocene Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia, NNTT WF08/27, [2009] NNTTA 8 (6 February 2009), Hon C J Sumner
	James & Ors on behalf of Martu People v State of Western Australia [2002] FCA 1208
	Kanak v National Native Title Tribunal (1995) 61 FCR 103
	Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner
	Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274
	Parker v State of Western Australia [2008] FCAFC 23; (2008) 167 FCR 340
	Re Koara People [1996] NNTTA 31; (1996) 132 FLR 73
	Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi People); Valerie Holborow & Ors (Yaburara and Mardudhunera People) and Wilfred Hicks & Ors (Wong-goo-tt-oo People), NNTT WF02/17, WF02/18 and WF02/27 [2003] NNTTA 4 (21 January 2003), Hon C J Sumner
	Western Australia v The Commonwealth (1995) 183 CLR 373
	Western Australia v Thomas [1996] NNTTA 30; (1996) 133 FLR 124
	Western Desert Lands Aboriginal Corporation v State of Western Australia [2008] NNTTA 22; (2008) 218 FLR 362
	WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333
Hearing dates:	6 and 8 April 2009
Counsel for the native title party:	Mr Marshall McKenna, Hunt & Humphry Project Lawyers
Solicitor for of the native title party:	Ms Melissa Watts, Hunt & Humphry Project Lawyers Ms Christina Araujo, Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)

Counsel for the grantee party:	Mr Kenneth Pettit, SC, Francis Burt Chambers Mr Stephen Wright
Solicitor for the grantee party:	Wright Barristers & Solicitors Pty Ltd
Counsel for Government party:	Mr Domhnall McCloskey, State Solicitor's Office
Solicitor for the Government party:	Mr Timothy Sharpe, State Solicitor for Western Australia
Representative for the Government Party:	Ms Paola O'Neill, Department of Mines and Petroleum

REASONS FOR FUTURE ACT DETERMINATION

Introduction

[1] On 31 October 2007, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of a future act namely the grant of mining lease M45/1171 ('the proposed lease/the subject area') under the *Mining Act 1978* (WA) to Holocene Ltd ('the grantee party'). The proposed lease comprises 3144.25 hectares located 187 kilometres southerly of Telfer in the Shire of East Pilbara. Most of the subject area falls over Lake Disappointment which is within the Gibson Desert of Western Australia some 320 kilometres east of Newman but approximately 460 kilometres along roads or tracks.

[2] On 17 September 2007, Holocene Ltd was converted to a proprietary company – Holocene Pty Ltd. Holocene Pty Ltd is a wholly owned subsidiary of Reward Minerals Ltd ('Reward').

[3] The proposed lease entirely overlaps the determination area of the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) ('WDLAC'/'the Martu People') ('the native title party'). Native Title Claim No. WC96/78 was registered from 26 June 1996 as the native title claim of the Martu People. On 27 September 2002 they were determined by the Federal Court to hold native title. WDLAC is the registered native title body corporate, being the prescribed body corporate ('PBC') on the National Native Title Register, determined by the Court on 17 July 2003 to hold the native title rights and interests in trust for the common law holders.

[4] On 4 September 2008, being a date more than six months after the s 29 notice was given, the grantee party made an application pursuant to s 35 of the Act for a future act determination under s 38. The application was made on the basis that negotiating parties had been unable to reach agreement of the kind mentioned in para 31(1)(b) of the Act.

Good faith negotiations – jurisdiction

[5] The native title party challenged the Tribunal's jurisdiction on the basis that the grantee party had not negotiated in good faith (ss 31(1)(b), 36(2)). This challenge was rejected on 21 November 2008 and reasons were handed down on 6 February 2009

(*Holocene Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia*, NNTT WF08/27, [2009] NNTTA 8) ('good faith decision').

Directions for the Inquiry

[6] On 25 September 2008 the Tribunal set directions to deal with the good faith challenge and the substantive inquiry. In relation to the substantive inquiry the following contentions and submissions were provided:

Document	Date
Government Party's Statement of Contentions	14 Nov 2008
Government Party's Statement of Contentions in Reply	4 Feb 2009
Grantee Party's Statement of Contentions	20 Nov 2008
Grantee Party's Statement of Contentions in Reply	30 Jan 2009
Parties' Agreed List of Issues	20 Feb 2009
Grantee Party's Written Outline of Submissions for Hearing on 8 April 2009	8 April 2009
Native Title Party's Statement of Contentions	14 Jan 2009
Native Title Party's Rejoinder to Grantee Party's Statement of Contentions in Reply	10 Feb 2009
Native Title Party's Key Contentions and accompanying matrix (untitled)	8 April 2009

[7] I directed pursuant to s 150 of the Act that conferences be held to attempt to resolve matters relating to the inquiry. Separate conferences were convened by an officer and a member of the Tribunal, but no agreement pursuant to para 31(1)(b) of the Act could be reached.

[8] The Tribunal's directions required the parties to confer with a view to agreeing issues before the inquiry, the facts and documents to be relied on, and procedures for the conduct of the inquiry. At the listing hearing on 11 February 2009 the grantee and native title parties reported that agreement had been reached in relation to the native title party's request for an 'on-country' hearing to be attended by only the Tribunal and native title party but be digitally recorded so the grantee and Government parties could subsequently view the recording of the proceedings. The parties agreed that the evidence given on-country would be limited to that which was contained within the affidavit filed by the Martu Elders. I agreed to conduct the inquiry in this way, and a one day on-country hearing was held at the remote community of Jigalong. An independent videographer was engaged to film the hearing. Parties agreed that leave would not be requested for the purposes of cross-

examination. The parties filed an agreed list of issues and agreed list of documents which has been of considerable assistance to the Tribunal.

[9] The on-country hearing, which was scheduled to occur in early March 2009, was postponed due to cyclonic activity in the region, and the hearing was unable to take place until 6 April 2009 when all parties were available. The hearing of final submissions took place in Perth on 8 April 2009 after the grantee and Government parties had viewed the video recording of the on-country hearing.

Government party's evidence

[10] Government party documentation establishes the following underlying tenure on the proposed lease:

- Unallocated Crown Land (100 per cent overlap); and
- Lake Disappointment (Savory Creek) System AW/52 (86.6 per cent overlap). This means that 86.6 per cent of the proposed lease area overlaps the actual Lake with the balance being on an area adjoining the Lake's edge.

[11] There are no Aboriginal communities identified within the subject area or in the near vicinity of the proposed lease. Tribunal mapping indicates the nearest Aboriginal community as Parnngurr (Cotton Creek) some fifty kilometres north westerly of the north western tip of the proposed lease but some 125 kilometres by track.

[12] Department of Indigenous Affairs ('DIA') documentation provided by the Government party reveals one site registered under the *Aboriginal Heritage Act 1972* (WA) ('AHA') overlapping the proposed lease at 100 per cent: Site ID 12103 – Gumbubindil/Lake Disappointment ('the Lake').

[13] Four active exploration licences in the name of the grantee party currently overlap the proposed lease (E45/2801, E45/2802, E45/2803 and E69/2158). There is no mining activity in the area of the proposed lease. A dead temporary reserve, active from 1959 to 1964, overlapped the proposed lease by 100 per cent.

[14] The *Mining Act* entitles the grantee party to exercise the rights set out in s 85 of that Act subject to the covenants and conditions referred to in s 82 and such further conditions and endorsements that the Minister may at any time impose under s 84.

[15] The grant of the proposed lease will contain the following endorsements:

> '1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
> 2. This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of:
>   - Uranium ore;
>   - Iron, unless specifically authorised under Section 111 of the Act
> 3. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.
> 4. The Lessee's attention is drawn to the provisions of:
>   - Water and Rivers Commission Act 1995 and any Regulations thereunder; and
>   - Identification of environmental sensitive wetlands listed within the RAMSAR Convention 1971, ANCA's Directory of important wetlands, the National Estates Register and the Environmental Protection Policies 1999.'

[16] The standard conditions applicable to mining leases will be imposed:

> '1. Survey.
>
> 2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
>
> 3. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.
>
> 4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
>
> 5. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operation and separately stockpiled for replacement after backfilling and/or completion of operations.
>
> 6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DoIR for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.'

[17] The following additional conditions will be imposed to the area of land designated AW/52:

> '7. Written notification, where practicable, of the time frame, type and extent of proposed ground disturbing activities being forwarded to the Department of Water Karratha seven days prior to commencement of those activities.
>
> 8. Any significant waterway (flowing or not), wetland or its fringing vegetation that may exist on site not being disturbed or removed without prior written approval from the Department of Water.

9. The rights of ingress to and egress from the Lease being at all reasonable times preserved to officers of the Department of Water for inspection and investigation purposes.
10. The storage and disposal of hydrocarbons, chemicals and potentially hazardous substances being in accordance with the Department of Water's Guidelines and Water Quality Protection Notes.
11. Measures such as effective sediment traps and stormwater retention facilities being implemented to preserve the natural values of receiving catchments and those of adjacent areas of native vegetation.
12. Groundwater quality monitoring bores being installed, maintained and utilised for water quality monitoring on and near the mine-site and downstream where aquifers are present.
13. Petroleum hydrocarbon and other chemical storage areas being appropriately contained using bunded retention compounds incorporating stormwater disposal and the removal of sediments.
14. All Mining Act tenement activities prohibited within 200 metres of RAMSAR or ANCA listed wetlands unless written permission of Department of Environment and Conversation, in consultation with the Department of Water, is first obtained.
15. All Mining Act tenement activities prohibited within 200 metres of "Conservation" and "Resource Enhancement" Category wetlands unless written permission of the Department of Water is first obtained.
16. Abstraction of groundwater from within 500 metres of a wetland is prohibited unless authorised by the Department of Environment.'

[18] The Government party will impose a further four conditions on the grant of the proposed lease:

- 'Any right of the native title party (as defined in Sections 29 and 30 of the *Native Title Act 1993*) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.
- If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial and cultural data), on the native title party.
- Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental/productive mining or construction activity, the grantee party must give to the native title party a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.
- Upon assignment of the mining lease the assignee shall be bound by these conditions.'

The grantee party's evidence

[19] The grantee party's evidence includes the affidavit of Gregory Rolland Cunnold ('GRC affidavit'), Exploration Manager of Holocene Pty Ltd since July 2005, sworn 19 November 2008 annexing the following documentation:

- Native title determination in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208;
- Map of proposed lease and associated infrastructure and photographs of Lake Disappointment;
- Heritage survey report by Dr Guy Wright dated 7 August 2006 ('the Wright Report');
- Letter from Ngaanyatjarra Council dated 7 November 2006 relating to the Wright Report and consent to interfere with a site under s 18 of the *Aboriginal Heritage Act 1972* (WA);
- Notice under s 18 *Aboriginal Heritage Act 1972* (WA) dated 20 November 2006 and consent under s 18 granted by the Minister for Indigenous Affairs on 23 January 2007;
- Email exchange between Jeremy Maling and Greg Cunnold of 27 May 2008, 3 June 2008 and 16 June 2008 relating to finalisation of the Maling heritage survey report;
- IndiEnergy release to the Australian Stock Exchange in respect of the Lake Disappointment Project dated 31 March 2008;
- Submissions to the Senate Select Committee on Agricultural and Related Industries Inquiry into Chemical and Fertiliser Pricing and Supply Arrangements; and
- Letter from the Western Australian Department of Agriculture and Food dated 28 October 2008.

[20] Additional evidence of the grantee party includes:

- Extracts from a book by Professor Robert Tonkinson (second edition 1991, originally published in 1978) '*The Mardu Aborigines: Living the Dream in Australia's Desert*';
- Internet sourced documents relating to changes affecting the Department of Indigenous Affairs; and

- Affidavit of Dr Michael Ruane, managing director of Holocene Pty Ltd since 2004, sworn 19 February 2009, annexing various market analysis reports pertaining to fertiliser and potash production.

[21] The grantee party proposes to use the area of the proposed lease to extract and process potash (potassium sulphate) from Lake Disappointment. Currently the Lake Disappointment Project ('the Project') on and around Lake Disappointment comprises:

- seven exploration licences already granted to Holocene Pty Ltd – E45/2801 to E45/2803 and E69/2156 to E69/2159;
- two pending exploration licences – E45/3285 and E45/3286 – which were applied for by the grantee party on 14 July 2008;
- the proposed lease; and
- one pending miscellaneous licence L45/172 for the purposes set out below. I note that the miscellaneous licence is currently the subject of proceedings before the 'independent person' in Western Australia following notice of it and objections lodged by the native title party in accordance with s 24MD(6B) of the Act.

[22] Mr Cunnold provided the following uncontested evidence about the Project:

- A Joint Ore Reserves Committee compliant resource of 25 million tonnes of potash has been established within the grantee party's exploration licences over Lake Disappointment.

- That mining is likely to take place on the surface of the Lake by means of a brine collection trench, expected to be 5 metres wide with a depth of up to 3 metres, which will expose the potash bearing brine, facilitating the collection of brine by pumping. A causeway will be built adjacent to the trench for the purposes of excavation and subsequent maintenance and rehabilitation of the trench, pumps and weirs. The length of the trench is a function of the transmissivity of the brine and the brine requirements of the operation. The mining lease area also includes the trench to a distance of approximately 20 kilometres. The brine is to be pumped from the collection trench into a series of evaporation (crystallizer) ponds from which potassium salts (and others) are precipitated. The evaporation ponds are at the end

of the collection trench near the northern shore of the Lake and the exact dimensions may vary subject to the results of a pilot scale operation.

- The final stage ponds are where the potassium salts are collected. The crude salts are harvested using a fleet of harvesters and trucks.

- The refining process will require a bore field for water for the treatment process. The milling of the salt product will require diesel powered generation plants. The plant site would be located on the shore of the Lake close to the evaporation ponds.

- The final product will be transported to Perth via Newman from the Lake to the north along the proposed access road to the Talawana Track which runs through the Martu determination area but which is available for public access.

- It is possible an alternative option of transporting the final product north through the Rudall River National Park to the Telfer Mine Road and then to Port Hedland for sea freight.

- The potash will be sold to national distributors of fertiliser.

- The roads and tracks from the subject area to Newman (including the Talawana Track) will require upgrading and regular maintenance. The Talawana Track will be upgraded to an all weather road with bituminising of some sections and potentially all of it. A new purpose built access road from the Lake to the Talawana Track will be constructed (part of miscellaneous licence).

- The infrastructure on the mining lease area will include the brine trench and service causeway and evaporation ponds on the Lake itself. The process plant and accommodation village will be constructed on the land nearby together with mine and access roads, an administration area, flood protection levy banks, power generation plants and maintenance workshop. Mr Cunnold says that the areas to be occupied by the various facilities within the subject area are: accommodation/administration block (2 hectares maximum); plant/stockpile areas (10 hectares maximum); evaporation (crystallizer) ponds/brine collection trench (9.88 square kilometres); and salt quarantine ponds (10 square kilometres) making a total affected area of 20 square kilometres.

- Other facilities such as access roads, including the access road from the Lake to Talawana Track (4 square kilometres – 20 kilometres by 0.2 kilometres), bore fields and an aerodrome (0.5 square kilometres – 1 kilometre by 0.5 kilometres) are likely to be built on miscellaneous licence L45/172.

- The grantee party proposes to commence mining within 2 years of the necessary approvals and the anticipated lifespan of the Project is 40-50 years.

[23] The Project will require a workforce of approximately 60 people. Employment will be on a fly in/fly out basis unless local people can be employed.

Native title party's evidence

[24] The native title party tendered the affidavit of Teddy Biljabu, Mitchell Biljaba, Billy (Nyaparu) Landy, Timmy Patterson, Bobby Roberts, Brian Samson and Allan Charles ('Martu Elders affidavit'), dated 9 January 2009.

[25] At the hearing in Jigalong on 6 April 2009 Brian Samson and three other witnesses confirmed the contents of the affidavit of the Martu Elders.

[26] The Martu Elders' affidavit annexes the following documentation:

- Lake Disappointment Project Tenement and Plant Location Map;
- Map of mining tenements held by Holocene Pty Ltd in the vicinity of Lake Disappointment;
- Map of registered sites in the vicinity of Lake Disappointment; and
- Letter from Wright Barristers and Solicitors to Teddy Biljabu, dated 27 March 2008 ('the Term Sheet'), previously subject to s 155 confidentiality direction in the good faith hearing (see good faith decision at [16]-[18]).

[27] The native title party's evidence also includes the following:

- 'Statement Regarding the Cultural Significance of Lake Disappointment to its Aboriginal Owners and Related Issues' by Professor Robert Tonkinson (subject to s 155 confidentiality direction) ('the Tonkinson Statement');

- Martu Native Title Claim Connection Report by Robert Tonkinson, Stephen Bennetts and Sarah Bell dated May 2001 (subject to s 155 confidentiality direction) ('the Connection Report');

- Affidavit of Jeremy Maling, anthropologist engaged to conduct heritage survey in May 2008, sworn 6 January 2009 annexing draft heritage survey report the subject of a s 155 confidentiality direction ('the Maling Report');

- Letter from Wright Barristers & Solicitors to Hunt & Humphry dated 10 December 2008 relating to the status of the Project design, specifications and feasibility studies;

- Lake Disappointment Aboriginal Heritage Survey Discussions May 2008 conducted by Jeremy Maling on DVD;

- 'Report of the Review of the Department of Indigenous Affairs', prepared by Dr Dawn Casey PSM FAHA dated April 2007; and

- Financial and ASX documents relating to Reward Minerals Limited for the 2008 and 2009 period.

[28] The s 155 confidentiality directions referred to above provided that the evidence not be disclosed to anyone except counsel, instructing solicitors or expert anthropologist employed by grantee party and Dr Michael Ruane and Mr Greg Cunnold (and later Mr Bill Brooks) of the grantee party and Ms Paola O'Neill of the Government party (Department of Mines and Petroleum). The directions also applied to submissions made by Mr Kenneth Pettit (Counsel for the grantee party) on the Connection Report during the hearing on 8 April 2009. The directions stated that the documents subject of the s 155 confidentiality directions be returned to the native title party or destroyed and their destruction to be verified by affidavit at the expiration of the appeal period. Although the subject of these directions, I have considered it appropriate to refer to some of the evidence covered by them and to that extent the directions are hereby varied. In deciding to include this material I have been influenced by the fact that much of it is already in the public domain in a book written by Professor Robert Tonkinson (*The Mardu Aborigines, Living the Dream in Australia's Desert* (2nd edition 1991)) extracts from which were before the Tribunal. I appreciate that from an Aboriginal perspective the fact that material which is of secret and sacred kind has been made public does not mean that they are happy to see its continuing dissemination.

However given the issues in this inquiry I considered it important to refer publically again to the material in order to ensure that my reasons are fully understood and the factual basis of my determination is clear [*Parker v State of Western Australia* [2008] FCAFC 23; (2008) 167 FCR 340].

On-country hearing on 6 April 2009 at Jigalong

[29] The hearing was conducted under the meeting tree near the Jigalong community office with approximately one hundred people in attendance at the beginning of proceedings. Mr Nyaparu Landy, known as Butler, welcomed the Tribunal onto Martu land and I made opening remarks explaining the purpose of the hearing. All of the deponents of the Martu Elders affidavit gave evidence with the exception of Mr Bobby Roberts who was unable to attend for personal reasons. Six additional witnesses also gave evidence including Mr Baker Lane who participated in the Maling heritage survey in May 2008. A total of twelve witnesses were called to give evidence, being Messrs:

Muuki Taylor	Nyaparu Landy (Butler)	Darson Wumi
Nyari Morgan	Timmy Patterson	Mitchell Biljaba
Wakka Taylor	Baker Lane	Brian Samson
Allan Charles	Peter Rowlands	Teddy Biljabu

[30] Without formally administering an oath or affirmation in each case I sought a general undertaking from persons giving evidence to tell the truth. Section 156(1) permits but does not oblige the Tribunal to take its evidence under oath or by affirmation. The practice adopted here has been used in other hearings and accords with the provisions of the Act relating to the Tribunal's way of operating, in particular the need to be economical, informal and prompt, not be bound by technicalities, legal forms or rules or evidence and to take into account the cultural and customary concerns of Indigenous people (s 109 NTA). Counsel for the native title party, Mr Marshall McKenna, also sought a similar undertaking from each witness prior to giving evidence.

[31] The native title party tendered two additional documents at the hearing in Jigalong: a map of Western Australia showing the Lake Disappointment area which was annotated by several of the witnesses, and a picture of a painting titled *Kartarru and Kalpaa* by Mr Peter Rowlands, contained within a catalogue of art produced by the Martumili Artists. An additional map of the Project area and general surrounds prepared by the Tribunal's

Geospatial Services Section was annotated by one of the witnesses at the hearing and was also admitted into evidence.

[32] The native title party provided interpreters from within the group to assist in the interpretation of evidence given in language and by some witnesses who could not orally communicate in English.

[33] A representative from the grantee company, Mr Bill Brooks, director of Reward, attended the hearing as an observer but, as agreed, no representative for the Government party was present.

Legal principles

[34] I rely on the principles enunciated in the following Tribunal future act determinations:

- *Re Koara People* [1996] NNTTA 31; (1996) 132 FLR 73 (*'Koara 1'*);
- *Evans v Western Australia* [1997] 741 FCA; (1997) 77 FCR 193 (*'Evans'*). Federal Court, RD Nicholson J – an appeal from the Tribunal determination in *Koara 1*;
- *Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274 (*'Koara 2'*) - Tribunal determination following the successful appeal in *Evans*;
- *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124 (*'Waljen'*); and
- *WMC Resources v Evans* [1999] NNTTA 372; (1999) 163 FLR 333 ('*WMC/Evans*').

[35] Section 38 of the Act sets out the types of determination that can be made and relevantly are:

> ***'38 Kinds of arbitral body determinations***
>
> (1) Except where section 37 applies, the arbitral body must make one of the following determinations:
>
> (a) a determination that the act must not be done;
> (b) a determination that the act may be done;
> (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

Determinations may cover other matters

...

Profit-sharing conditions not to be determined

(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or
(b) any income derived; or
(c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.'

[36] Section 39 lists the criteria for making such a determination:

'39 Criteria for making arbitral body determinations

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

(a) the effect of the act on:

(i) the enjoyment by the native title parties of their registered native title rights and interests; and
(ii) the way of life, culture and traditions of any of those parties; and
(iii) the development of the social, cultural and economic structures of any of those parties; and
(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

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

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

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

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

Existing non-native title interests etc.

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

(a) existing non-native title rights and interests in relation to the land or waters concerned; and
(b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

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

Agreements to 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.'

[37] The making of a determination involves the exercising of discretionary power by reference to the criteria in s 39. The Tribunal's task was explained in *Waljen* (at 165-166).

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

[38] The Tribunal's inquiry function is summarised in *Waljen* (at 162-163) and involves, among other things, the Tribunal making a determination based on logically probative evidence and application of the law.

[39] The native title party contends that even though the Tribunal has never determined that a future act must not be done, this is not the inevitable result of an inquiry and it is within the Tribunal's powers to determine that an act must not be done. The Tribunal agrees with this statement which is the basis upon which it has acted since the test cases of *Koara 1* and *Waljen*.

Native title party's contentions on interpretation of *Native Title Act*

[40] The native title party makes a number of contentions based on the importance of protecting Martu native title rights which are of a determined and exclusive nature and include a right to make decisions as to use of country. It says that where it is self evident that determined and exclusive native title rights and important cultural sites will be interfered with the wishes of the native title party should be a paramount consideration. This issue is more fully dealt with below and undoubtedly is one of the central matters for consideration in these proceedings.

[41] In making this contention, the native title party raises a number of issues which require brief preliminary comments. The native title party cites the Preamble to the Act in support of their view that the Martu have a fundamental right to protection of their land and rights:

> 'They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.
>
> ...
>
> The people of Australia intend:
>
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.
>
> ....
>
> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.'

[42] The native title party also relies on the principle, which the Tribunal accepts, that a beneficial construction should be given to the provisions of the Act which are designed to protect native title rights and interests or which otherwise reflect other interests and concerns of native title parties and Aboriginal people so as to give the fullest relief which the fair meaning of the language will allow (*Koara 1* at 81; *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124). As the Federal Full Court recently noted, the right to negotiate regime is an element of the protection of native title, one of the main objects found in s 3 of the NTA and, given its beneficial nature, it is not to be narrowly construed - *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [18], Spender, Sundberg and McKerracher JJ.

[43] The native title party also contends that the underlying principles of the *Racial Discrimination Act 1975* (Cth) ('RDA') are reflected and supplemented in international law. It refers to aspects of a number of international instruments which support the rights of indigenous people in various respects viz the Universal Declaration of Human Rights (United Nations General Assembly 10 December 1948), the Declaration of the Rights of Indigenous Peoples (United Nations General Assembly 13 September 2007) and the Convention concerning Indigenous and Tribal Peoples in Independent Countries

(International Labour Organisation Convention 169 - 7 June 1989). It also refers to Department of Foreign Affairs and Trade publication –'Australia: Seeking Human Rights of All – Celebrating the 60th Anniversary of the Universal Declaration of Human Rights' (9 December 2008) in which the current Australian Government publicly acknowledges the significance of the Declaration on the Rights of Indigenous People for the advancement of their welfare globally. No doubt it would also refer to the fact that on 3 April 2009 the Australian Government made a statement in support of this Declaration.

[44] In one of the early test cases on the right to negotiate provisions of the NTA, the Tribunal gave detailed consideration to the proper approach to its interpretation which has been applied since (*Waljen* at 139-150). The Preamble and a beneficial interpretation (where appropriate) of the substantive provisions of the Act must be considered in the context of the objects and purpose of the Act and its plain meaning. Section 3 describes the main objects relevantly to provide for the recognition and protection of native title (s 3(a)) and to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings (s 3(b)). The Tribunal has held that the Act attempts to strike a balance between native title rights and the interests of the broader community (*Waljen* at 149). It has pointed out that the rationale for the right to negotiate provisions is generally freehold equivalence and that mining grants can be made over freehold land (*Waljen* at 150). These purposes are also apparent from the Preamble.

[45] The Tribunal has also said that the Act was enacted with the knowledge of the importance of the mining industry and that the right to negotiate provisions were intended to deal with the ongoing grant of mining titles (*Waljen* at 150).

[46] The native title party contentions are not entirely clear about the use it says the Tribunal can make of the various positive statements in international instruments applicable to the rights of indigenous people. The general proposition is that international instruments cannot be relied upon unless they have been enacted into the domestic law. This has been the case for instance with the RDA which gives effect to International Covenant on the Elimination of all Forms of Racial Discrimination. While the Declaration on the Rights of Indigenous Peoples is now endorsed by the Australian Government, there is no specific legislation which gives effect to it. The Tribunal is of the view that the use which can be made of international instruments is as an aid to the interpretation of statutes where the terms of the statute are ambiguous. It is, however, generally inappropriate to rely upon an

international instrument for such a purpose when the relevant instrument had not been ratified by or entered into by Australia or such acts were not in contemplation by Australia at the time when the provisions in question were enacted. In any case there is no relevant ambiguity in s 39 of the NTA and thus these are not matters which can directly impact on the Tribunal's deliberations in this inquiry.

Interaction between the *Racial Discrimination Act* and the *Native Title Act*

[47] The native title party seeks to invoke the RDA to say that the same rights which are accorded to private landholders under s 29(2) of the *Mining Act* should be accorded to the Martu as holders of exclusive native title. Section 29(2) of the *Mining Act* says that a mining tenement may not be granted over certain private land except with the consent of the owners or occupiers being that which is in regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation, land under cultivation; a cemetery or burial ground; a dam, bore, well or spring; has a substantial improvement; is within 100 metres of any of the above; or which is a separate parcel of land of an area of 2000 square metres or less, unless the grant relates to land at least 30 metres below the surface. Land the subject of a determination of native title is not encompassed by the definition of private land in s 8 of the *Mining Act*.

[48] The native title party says that s 10 of the RDA means that the holders of exclusive native title should be allowed the same rights and protection as are given to holders of freehold land. As s 29(2) of the *Mining Act* gives ordinary freeholders a veto over mining on areas of special value to them, the same right should be given to native title holders in case of areas of value or significance to them such as culturally significant areas or sites. The native title party says it would be repugnant to everything that the RDA and the international covenants relating to the rights of Indigenous people stand for if an area of utmost cultural significance such as Lake Disappointment could not be protected. The NTA is said to be expressly subject to the RDA.

[49] The Tribunal has previously considered the interaction between the NTA and the RDA (*Western Desert Lands Aboriginal Corporation v State of Western Australia* [2008] NNTTA 22; (2008) 218 FLR 362) ('*WDLAC/Kitchener*').

[50] While s 7(1) of the NTA says that it is to be read and construed subject to the provisions of the RDA s 7(2) makes clear that this only means that the provisions of the RDA apply to the performance of functions and exercise of powers conferred or authorised by the NTA (for instance by the Tribunal) (s 7(2)(a)) and to ensure that any ambiguous terms are construed consistently with the RDA (s 7(2)(b)). The High Court has said that the general provisions of the RDA must yield to the specific provisions of the NTA in order to allow those provisions a scope for operation (*Western Australia v The Commonwealth* (1995) 183 CLR 373 at 484).

[51] In this inquiry the Tribunal is concerned with the provisions of the NTA which must be followed to ensure the validity of a grant which affects native title. The actual grant of the mining lease is made under the *Mining Act*. If there are requirements under that or other State legislation which must be followed before a grant can be made either because of the direct operation of the State legislation or by virtue of other legislation such as the RDA which may apply to its operation this is not a matter for the Tribunal. Any such issues will need to be pursued before an appropriate court.

[52] The Tribunal accepts the grantee party's submission that s 29(2) of the *Mining Act* does not in its terms apply in this case. Even though the native title party is probably an owner or occupier of the subject area (*WDLAC/Kitchener* at 380-381 [43]-[44]) the categories of activity for which consent is required are not established on the facts of this case. There are also no ambiguities in the relevant provisions of the NTA which would require resort to the RDA to resolve them.

The 'Term Sheet' agreement of 27 March 2008

[53] The relevance of the 'Term Sheet' agreement entered into between the native title and grantee parties as part of the good faith negotiations became an issue in this inquiry. The agreement was documented by correspondence dated 27 March 2008 from Wright Barristers and Solicitors acting for the grantee party to Teddy Biljabu, Chairman of WDLAC and letter in response from Mr Biljabu of the same date (good faith decision at [16]-[21]). Mr Wright referred to it as 'in principle' agreement. The Term Sheet has been tendered by the native title party.

[54] The key aspects of the Term Sheet (excluding details of the specific commercial terms which are covered by a confidentiality direction pursuant to s 155 of the Act) are:

- The native title party agrees, either by way of an Indigenous Land Use Agreement or a s 31 agreement or both, to the grant of the proposed lease and miscellaneous licence L45/172 to the grantee party and furthermore agrees to the extension or renewal of eight exploration licences associated with the Project and the grant of other (unidentified) mining leases and tenements for the purposes of the Project.

- The native title party agrees to facilitate the development and commissioning of the Project subject to reasonable environmental and Aboriginal heritage protection measures including by arranging and conducting archaeological and ethnographic Aboriginal surveys of the Project tenements.

- The grantee party will reimburse the past negotiation costs of WDLAC with respect to the Project and pay certain future costs of the negotiation.

- The grantee party will pay WDLAC a specified agreed sum 'upon execution and registration under the *Native Title Act* of the Agreement'.

- The grantee party will pay WDLAC a specified agreed sum 'upon Holocene obtaining all necessary approvals to commence mining operations on M45/1171 and L45/172 (including approvals under the *Mining Act 1978* (WA) and consent under s 18 of the *Aboriginal Heritage Act 1972* (WA)).

- The grantee party will pay a specific agreed value based royalty to WDLAC in relation to potassium sulphate and other minerals derived from the Project mining leases in each financial year.

- Upon execution of the agreement Reward will issue to WDLAC 7,000,000 options to acquire fully paid ordinary shares in Reward exercisable at $0.50 within four years of the execution of the agreement.

[55] Mr Biljabu's correspondence noted that the commercial terms were an acceptable outcome to Stage 1 of the negotiations. WDLAC were authorised to include those terms in a binding agreement subject to completion of the authorisation process relating to those matters affecting native title (i.e. obtaining informed consent as to the tenements proposed

to be granted and the activities proposed to be conducted); an acceptable outcome to Stage 2 of the negotiations; and a resolution of the WDLAC Board approving the final terms of the agreement. It is common ground that none of these things happened and no final agreement was reached.

[56] The Term Sheet agreement was the subject of public announcements and statements including to the ASX. The grantee party has tendered an ASX Release of 31 March 2008 from Mr Joe Procter of IndiEnergy described as the exclusive commercial advisor for the Martu People entitled "Traditional Owners Fully Support Reward Minerals Limited Lake Disappointment Potash Project'. The release in summary says:

- The agreement paves the way for a comprehensive mining agreement allowing Reward full access to test and ultimately develop their existing potash development.
- Martu fully supports Dr Michael Ruane, Managing Director of Reward, in his endeavours to accelerate the project to reach its full potential in a timely fashion.
- Mr Proctor says that the agreement comprises excellent commercial terms accepted at a full country meeting and that generous indigenous equity is the way of the future in mining negotiations.
- A joint statement from WDLAC Chairman Mr Teddy Bilajbu, Community Leader Mr Brian Samson and WDLAC Chief Executive Mr Clinton Wolf which endorsed the Project in positive terms.

[57] The native title party tendered a Reward Minerals Ltd ASX Release of 31 March 2008 'Commercial terms agreed with Martu for Lake Disappointment' which identified the commercial terms as agreed cash payments, a production royalty and an allocation of 7 million unlisted options in Reward exercisable at $0.50 with an expiry date of four years, representing 10.31% of the fully diluted capital of the company. It further said that the terms agreed are subject to project development approval from the Martu and usual statutory authorities.

[58] The grantee party says it does not rely on the Term Sheet and that it is not relevant to the Tribunal's consideration, in the substantive hearing. The grantee party says that the good faith negotiations were confidential and without prejudice and that the Term Sheet

letter of 27 March 2008 was marked confidential and without prejudice. It says that the without prejudice privilege cannot be waived by one side only and that the disclosure of the Term Sheet was for the purpose of the negotiation in good faith hearing to decide whether the Tribunal had jurisdiction to conduct the inquiry and does not constitute a waiver of the privilege in a substantive arbitration. It says that this accords with previous authorities: *Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi People); Valerie Holborow & Ors (Yaburara and Mardudhunera People) and Wilfred Hicks & Ors (Wong-goo-tt-oo People),* NNTT WF02/17, WF02/18 and WF02/27 [2003] NNTTA 4 (21 January 2003), Hon C J Sumner at [23].

[59] The native title party seeks to rely on the Term Sheet as relevant to whether the Tribunal should impose conditions on the determination for the payment of certain monies by the grantee party and for the native title party to acquire shares in the grantee party and/or Reward. It also says that the fact that the level of benefit or compensation in the Term Sheet agreement is no longer available is a factor that can be taken into account in determining whether or not the future act may be done.

[60] In my view the Term Sheet agreement is covered by the without prejudice privilege attached to the negotiations with the exception of the public announcements that were made in relation to it and which were made with the consent of both parties. These are admissible for the purpose of establishing the fact of the in principle agreement and some of its terms.

Martu native title determination

[61] The parties agree that the registered native title rights and interests are set out in the determination of native title made by the Federal Court (Justice French) at Parnngurr (Cotton Creek) on 27 September 2002 ('the Martu determination') (*James & Ors on behalf of the Martu People v State of Western Australia* [2002] FCA 1208):

> '(1) The nature and extent of the native title rights and interests held by the common law holders in the determination area are:
>
> (a) the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others, including:
>
> (i) the right to live on the determination area;
>
> (ii) the right to make decisions about the use and enjoyment of the determination area;
>
> (iii) the right to hunt and gather, and to take the waters for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs;

(iv) the right to control access to, and activities conducted by others on, the land and waters of the determination area;

(v) the right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs; and

(vi) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the determination area;

(b) the right to use the following traditionally accessed resources:

(i) ochre;

(ii) soils;

(iii) rocks and stones; and

(iv) flora and fauna

for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs; and

(c) the right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.'

[62] The determination covers an area of over 136,286 square kilometres and includes the subject area. It is agreed that the Tribunal may accept the facts set out in the Martu determination judgment. These include:

'5 The connection of the Martu People to their country is shown in the report prepared by Professor Robert Tonkinson, Professor of Anthropology at the University of Western Australia, Mr Stephen Bennetts, an Anthropological Consultant at the Centre for Anthropological Research at the University and Ms Sarah Bell, a Research Officer at the University of Western Australia. The report which was delivered in May 2001 was commissioned by the Ngaanyatjarra Council acting on behalf of the applicants. In the report it is said:

'*The claimants are among a number of Western Desert peoples who maintain a very strong cultural base in their traditional laws and customs, and have retained close connections to their lands despite many decades of change stemming from the advent of Whites and the powerful impacts of governmental policies and practices. Because the frontier of contact between Whites and Aborigines continued in their lands until as recently as the 1960s, these groups are able to describe and demonstrate in great detail their laws and customs. Their religiously based traditions are embedded in a wealth of cultural elements: mythology, story, song, ritual, the features of the landscape, and secret-sacred paraphernalia – all of which contribute to a vibrant religious life that connects them to their creators and their homelands.'*

6. The claimant group numbers 1,600 people whose territories lie on the western side of the Western Desert surrounding Lake Disappointment and straddling the Tropic of Capricorn. Most of them live at Parnngurr, Punmu, Kunawariji and at Jigalong. Jigalong is just outside the claim boundary but it has been an important centre for many claimants at some stage over the past fifty years. Two hundred of them still live there.

> 7. Over thirty of the Martu people travelled by road from the Western Desert and Eastern Pilbara in June 1996 to deliver their application to the main registry of the National Native Title Tribunal in Perth. They also presented the Tribunal with sand from their country, on the understanding that it was to be returned when a determination of their native title claim was made. As the report asserts:
>
>> '*This symbolic gesture was a demonstration of the claimants' strongly-held belief in their ownership of their traditional territories'*.
>
> After making the determination I propose to make today, and before adjourning, I will invite Mr Graeme Neate, the President of the National Native Title Tribunal to return the sand to the Martu people in a Piti or traditional wooden dish.
>
> 8. The anthropological report shows there was a gradual migration of Western Desert People from the desert heartland to the fringes as a consequence of the spread of European settlement. But this resulted in only a brief period of physical absence of the claimants from their traditional territories. Through the cultural mechanism of dream-spirit journeys, they kept contact with and responsibility for their countries while physically elsewhere. That is what they had always done in the desert where such absences were sometimes forced by lack of water and/or food resources in their core territories. Their hunter gathering activities continued and they went back into the desert from time to time so they did not lose contact. There was no serious cultural break with their traditional roots. The return of people to live on the country has supported the maintenance of law and custom among them. They remain one of the most strongly "tradition-oriented" groups of Aboriginal people in Australia today partly because of the protection that their physical environment gave them against non-Aboriginal intruders. It is not a welcoming environment for those who do not know how to locate and use its resources for survival. Of great importance is the continuing strength of their belief in the Dreaming.'

Contentions on s 38 future act determination

The agreed list of issues is:

- Grantee party contends for a determination that the act may be done subject to conditions (as set out in grantee party's Statement of Contentions in Reply dated 30 January 2009).
- Government party contends for a determination that the act may be done, and at this stage reserves its position regarding the grantee party's proposed conditions.
- Native title party contends for a determination that the act must not be done with or without the grantee party's proposed conditions.

[63] A schedule of conditions proposed by the grantee party was provided with the Statement of Contentions in Reply (30 January 2009). They are based on conditions determined by the Tribunal in *Koara* 2 (at 278) and summarised as follows:

- The native title party's right of access is not to be restricted except in relation to the parts of the mining lease actually being used for exploration or mining or for safety or security reasons.

- No mining on exclusive zones identified in Mr Maling's affidavit.

- Grantee party to give notice of grant to the native title party.

- Compliance with the *Aboriginal Heritage Act*.

- The conduct of an archaeological survey over the non Lake area i.e. the area already covered by the ethnographic surveys of Dr Wright and Mr Maling.

- The conduct of the survey to be done by a Site Survey and Clearance Team with up to three Martu persons in a professional efficient manner and in accordance with the established guidelines. The grantee party will pay the reasonable fees and expenses of the Martu nominees.

- Procedures for the conduct of the survey.

- No exploration or mining to be carried out on sites identified except with the consent of the native title party or pursuant to s 18 of the *Aboriginal Heritage Act*.

- Consultation with the native title party in relation to stone artefacts or human burials.

- The erection of signs to identify sites other than the Lake itself on the mining lease area unless otherwise agreed by the grantee party and native title party.

- Grantee party to pay the reasonable costs of filming Nyaparu Williams and Mark Jeffries about their stories in relation to the mining lease area if they are part of the survey team.

- Notice of any application under s 18 of the *Aboriginal Heritage Act* to the Aboriginal Cultural Heritage Committee to be given to the native title party and Government party.

- Consultation with the native title party if requested by them about the proposals the subject of the s 18 notice.

- The provision to the native title party of the notice and recommendation of the Aboriginal Culture Heritage Committee to the Minister and

- The native title party to be informed of the Minister's s 18 application decision.

- The engagement of at least two Martu monitors to oversee ground disturbing construction within the mining lease.

- The grantee party to give the native title party a reasonable opportunity to perform a ceremony on the mining lease before commencement of mining.

- A copy of the Mining Proposal to be given to the native title party including certain specified details relating to it.

- Consultation with the native title party prior to lodging a Mining Proposal.

- Consultation with the native title party about upgrading the Talawana Track.

- Government party to provide an opportunity to the native title party to make submissions to it and the Environmental Protection Authority on whether it wishes the mining proposal referred to the EPA and to advise the EPA of the proposal.

- The maintenance of a recruitment and training policy and program which subject to the requirement of the grantee's business and availability of native title holders is designed to provide employment opportunities for native title holders.

- The recruitment and training policy involves a regular exchange of information between the grantee party and native title party on employment and training opportunities for Martu people and an obligation to consider applications fairly and objectively having regard to the attributes of the person and requirements of the grantee party's business.

- The recruitment and training policy must also include exchange of information relating to business and contracting opportunities and include an obligation to give contract work to Martu entities after fair and objective consideration having regard to the capacity to perform the work and requirements of the grantee's business.

- Cultural awareness training for the grantee party's employees involving the native title party.

- Establishment of a Liaison Committee of two persons nominated by each of the grantee party and native title party, which must meet at least once each quarter. The purpose of the committee is to provide a forum for the exchange of information on matters of importance to each party in relation to the mining operations and the employment and training policy and to co-ordinate the development and implementation of the cultural awareness program. The grantee party is to provide information about the number of Martu people employed by or involved in contracts with the grantee party.

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

[64] The Tribunal's task is to examine the effect of the proposed mining activities over the area of the proposed lease on the enjoyment of the native title rights and interests of the native title party. Although by definition the native title party is WDLAC, it is self-evident that the Tribunal is concerned with the effect of the act on the Martu native title holders. The issue is considered by examining the evidence relating to the actual exercise or enjoyment of the rights in the relevant area not by reference to a worst case scenario which assumes the existence and enjoyment of all the registered native title rights equally over the whole of the determined area including the particular locality under consideration (*Waljen* (at 166-167); *WMC/Evans* (at 339-341); *Australian Manganese Pty Ltd v State of Western Australia & Others* [2008] NNTTA 38; (2008) 218 FLR 387 ('*Australian Manganese/Nyiyaparli*') (at 400-403 [36]-[39]). The Tribunal is directly concerned with the effect of the future act which is the grant of the proposed lease, but this effect must be considered in the context of the whole Project which would involve mining operations on the surface of the Lake (trench, evaporation ponds etc) and infrastructure on the edge of the Lake (accommodation village etc) within the subject area as well as an airstrip, the access road and the upgrading of the Talawana Track which are outside it. Most of the proposed lease covers the surface of Lake Disappointment and is where the actual mining operations would take place, the balance of it being a relatively small area near the edge of the Lake. The evidence is considered under each of the determined native rights bearing in mind that the evidence is often relevant to more than one of the rights and more than one of the s 39 criteria.

[65] There is no dispute that the non-extinguishment principle applies to the grant of a mining lease but that native title rights which are inconsistent with the grant will be suspended for the duration of the lease (s 24MD(3)(a) NTA).

Right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others, including the right to control access to, and activities conducted by others on, the land and waters of the determination area.

[66] The agreed list of issues is:

- All parties agree that as a matter of law the Martu possess and occupy the area of the mining lease. The parties agree that the rights to possess, occupy, use and enjoy the land and waters of its determination to the exclusion of others, including the right to control access to, and activities conducted by others, on the area of the mining lease will be affected. The parties are not agreed as the extent of physical use or enjoyment on the area of the mining lease.

- The native title party contends that the granting of the mining lease will have a detrimental effect on Martu authority and culture.

- The grantee party and Government party contend that there is no effect on culture or authority; alternatively the effect if any is not substantial.

[67] With respect to the extent of the current use or enjoyment of native title rights, most of the evidence is found in the following parts of the Martu Elders affidavit:

> '18 The Martu have lived around the Lake for generations. The Martu go to the Lake, mostly the western and northern parts at least once or twice every year to make sure our sites are looked after, to keep our Law strong and to teach our young ones about their country. The Martu go to the Lake usually during winter months.
>
> 19 We do not go to the south or east part of the Lake. The Martu cannot walk over these areas, no one can. Many people believe it is dangerous to fly over the Lake.
>
> 20 The Martu know which parts of the Lake are safe to go to and which are not. The Lake is an area where we and other Martu go to hunt for rabbits, emu, bush turkeys and kangaroos. It is also an area which has bush foods like quandong and bush berries. We take our young ones to the Lake to teach them to hunt and find foods. We are able to live off the land around the Lake as we have done since the beginning of time. Lake Disappointment itself has little if any food on it, depending on the seasons and the water in Lake Disappointment.

> 21 The Martu are also working with the Department of Environment and Conservation in relation to a land management plan for the Lake, and will next year be going to the Lake more often to do work cleaning up and maintaining the wells and water holes, burning the bush around Lake Disappointment to manage the country and to put up signs and fences to protect various important sites.'

[68] In addition at the Jigalong hearing there was some limited evidence to the same effect from some of the witnesses. Brian Samson spoke of visiting the Lake with his children two years ago, Allan Charles said he visits 'that place every year' and Timmy Patterson said he goes out there in a car but did not specify the frequency of those visits. Nyaparu Landy Butler spoke of looking after Martu land by visiting sites, caring for the land and 'burning up the country again for the next season and all that'.

[69] The Martu Elders' description of infrequent visits to the western and northern parts of Lake Disappointment on at least one to two occasions each year of some Martu does not suggest intensive access particularly to the subject area. The oral evidence given in Jigalong confirms that the Lake (or at least parts of it) is a dangerous place and needs to be avoided. That evidence supports the grantee party's contention that the native title party has not traditionally accessed or used the surface of the Lake. There is very little evidence that the current access extends to the surface of the Lake including the area of the proposed lease.

[70] I am satisfied that the physical use and enjoyment of Martu native title rights do not currently occur over the surface of the Lake and probably never have done to any great extent. There is no evidence that the activities deposed to by the Martu Elders take place specifically on the area of the proposed lease which covers the land beyond the edge of the Lake. However, even if some of the activities deposed to were to take place over the area of the proposed lease, the restrictions on them from the grant of the mining licence need to be considered taking into account that there is generally a very large area around the edge of the balance of the Lake where the activities will not in any practical way be affected. The Canning Stock route runs for some 30 kilometres to the western side and in the general vicinity of the Lake area and provides access to the native title party for the enjoyment of their native title rights.

[71] The native title party says that the exclusive right to control the activities of others over the proposed lease would be lost. That is acknowledged by the grantee party, but it can be accepted that the native title party will continue to control access to, and activities

conducted by others over, the proposed lease with the exception of the grantee party and its officers, employees, agents, contractors and invitees.

[72] *Right to live on the determination area.* The Parties agree that the right to live on the area of the lease will be affected, but the Martu do not live on the area. Although the Martu Elders say that they have lived around the Lake for generations there is no evidence that this is the case at present and particularly there is no evidence that they have lived specifically in the subject area (i.e. on the surface of the Lake, any islands or the area of the proposed lease on the edge of the Lake).

[73] *Right to make decisions about the use and enjoyment of the determination area.* The parties agree that the native title party's right to make decisions in relation to the area of the proposed lease would be abrogated.

[74] *Right to hunt and gather, and to take the waters for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs.* The parties agree that the right would be affected, but Martu People do not presently do those things in the area of the mining lease. As discussed the evidence from the Martu Elders of these activities does not relate specifically to the mining lease area but the area of Lake Disappointment generally.

[75] *Right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and custom.* This right is discussed below under s 39(1)(a)(v).

[76] *Right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the determination area.* The agreed list of issues is:

- The parties agree that this right will not be directly affected by the doing of the act.
- There is an issue as to whether this right will be indirectly affected, through other Aboriginal people potentially entering and working on the area of the mining lease without the permission and/or against the wishes of the Martu.

[77] In my view even if other Aboriginal people were to be employed on the Project this would not directly or indirectly affect this right. The fact of them being employed on Martu land could not in any way be used to say that they are traditional owners of the area.

[78] *Right to use ochre, soils, rocks and stones and flora and fauna for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs*. The parties agree that the right would be affected, but the Martu People do not presently do those things in the area of the mining lease.

[79] *Right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters*. The parties agree that the right is affected, but the Martu People do not presently do those things in the area of the mining lease.

[80] *Minerals*. The parties agree that the Native Title Party has no right to the minerals. The native title party contends that the taking of minerals affects, amongst other things, the native title party's right of exclusive possession.

[81] With respect to this criterion generally (excluding issues relating to the significance of Lake Disappointment and the impact on the Martu People's culture and authority in relation to it) I agree with the Government and grantee parties that the effect on the physical enjoyment of these rights will not be substantial. The subject area is very small compared to the areas over which the native title rights are capable of being enjoyed on the whole of the Martu determined lands. In the general area of Lake Disappointment the enjoyment of them is infrequent. I accept that the capacity to access the Lake Disappointment area for these purposes even on the basis outlined is important to the Martu, but the evidence does not suggest that the mining activities will interfere with the capacity physically to enjoy this right except possibly to a minor extent. It is also true that the upgrade of the Talawana Track and access road will improve access to the area and the capacity to exercise the rights on a more regular basis.

Section 39(1)(a)(ii) – way of life, culture and traditions

[82] The agreed list of issues is:

- The native title party contends that a determination that the act can be done will have a detrimental effect on the way of life, culture and traditions of the Martu community.

- The grantee party contends that the act will not detrimentally affect the way of life, culture or traditions of the Martu.

- There is an issue as to whether the development of the project absent the approval and support of the Martu and without a relevant sense of Martu "ownership" will undermine their traditional authority structures and their culture.

[83] The strength of Martu traditional culture and connection to country is described in the Martu consent determination judgment which is accepted by all parties. In addition the 'Connection Report' prepared by Professor Tonkinson and others was before the Tribunal as was Professor Tonkinson's Statement regarding the cultural significance of Lake Disappointment which was prepared for the purpose of these proceedings

[84] The first part of Professor Tonkinson's Statement (para 2) provides a summary of the Martu traditional social structure, culture and attachment to land reflecting the contents of the Connection Report and includes:

> 'Martu today continue to see both human and spiritual realms as part of a wider cosmic order, a totality that includes the all-powerful spiritual beings of their Dreaming. The major components of this order are characterised at base as being in harmony, and their religion teaches them that, for the maintenance and reproduction of the cosmic order, human actions are absolutely essential. Like most Australian Aboriginal peoples, the Martu believe that, during the world-creative activities of all the ancestral Dreaming beings, all the structural and legal essentials of life were laid down, and in a kind of contract, these beings demanded from their human descendants two big things: obedience to the dictates of 'the Law' and the faithful performance of rituals, which together will guarantee the continuing flow of enabling powers into the human realm, thus assuring the ongoing fertility of all living things and the continuance of Martu society. The Dreaming's blueprint is clear and, as embodied in Martu Law, it has demanded only an unquestioning assent to its terms, as just briefly outlined.'

The affidavit of the Martu Elders provides more contemporary confirmation of the position:

> '12 Our culture is a living culture. In our songs and in our spirit we go to the land. The Martu are still traditional aboriginal communities, with most Martu living on their traditional lands and speaking language. We still practice our traditions and laws and teach our young ones their culture, which sets their obligations to the land and to their people. We know and sing our song lines and dances. We still hunt and get food from our lands, and take care of our lands and sites, as required by our law.
>
> ...

> 14 We work very hard to retain our culture, to teach our young ones about culture and our Law. Our culture and our Law come from the land. The Martu are part of the land and the land is part of the Martu. If we give away our land, then we lose our culture, there would be nothing left but a shadow of our culture. Every bit of the land that is taken away from us means that we lose that little bit of our culture, of our soul.
>
> 15 The land was made by the Dreaming being and we look after it with ceremonies and songs. The Martu have always cared for their land. We do this by actions and ceremonies and songs and our beliefs. Burning is an important activity to clear land and grow new bush food. Burning flushes out goannas, snakes, lizards and other animals. Water holes need to be looked after.'

[85] Despite some difficulties in communication at the Jigalong hearing, I am satisfied that the evidence given particularly from Messrs Nyari Morgan, Muuki Taylor and Wakka Taylor was a powerful endorsement of the strength of feeling about Martu culture. The Martu People's traditional strong affiliation to the land reflected in the Martu Elders' evidence, the Connection Report and Professor Tonkinson's Statement and the importance of the Dreaming, songs, stories, law and custom relating to it are not as I understand it in dispute in these proceedings.

[86] The native title party contends that if the proposed lease were to be granted without the permission of the Martu People, the authority of Martu culture and a sense of pride in their community will be undermined and, as a result, the social and cultural structures of the native title party will suffer. The grantee party says that because of the strong culture of the Martu People it is unlikely that mining on the land and in the location proposed will have an adverse impact on the culture of the native title party.

[87] The grantee party correctly says that there is no specific evidence that Martu authority will be affected by the Project if it goes ahead without this consent and, accordingly, it is difficult to make a finding about whether the authority will be diminished and what the consequences of that might be. There is evidence that authority to do certain things rests with senior Martu people including those with special responsibility for Lake Disappointment or by way of general Martu community meeting. However, beyond that, the native title party's contention amounts to a general assertion which cannot support a finding of the kind suggested. Even if it could be said that authority was adversely affected, this would need to be viewed taking into account that entry upon and interference with the Lake had been agreed to by the Martu for exploration purposes and mining.

[88] Leaving aside the issues relating to Lake Disappointment itself, I accept for the reasons already given that the grant of the proposed lease will not detrimentally impact on the way of life, culture and traditions of the native title party in any substantial way. The effect of the future act on Lake Disappointment, however, does have relevance to this criterion because of the importance of the Lake to the Martu and its connection to their way of life, culture and traditions in a spiritual way and otherwise.

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

[89] The agreed list of issues is:

- The native title party contends that the doing of the act will have a detrimental effect on the social, cultural and economic structures of the Martu.
- The grantee party and Government party contend the act will assist in the development of the Martu's social and economic structures through employment training and contracting opportunities and the upgrading of the Talawana Track.
- The native title party disputes that the act will have a discernible benefit in the development of the Martu's social and economic structures.

[90] The effect on Martu cultural structures is in this case inextricably bound up with the importance of Lake Disappointment which is dealt with below.

[91] The Tribunal has held that any positive effect of a future act can be taken into account (*Waljen* at 170) and this issue is dealt with below in relation to the economic and other significance of the act (s 39(1)(c)). There is no evidence of any economic structures of the Martu which could be affected in an adverse way.

[92] With respect to the Martu's social structures the Tribunal, as a specialist tribunal, is aware that mining along with other non–indigenous activities has had a serious detrimental effect on traditional Aboriginal society. I doubt whether, as a general proposition, this would be seriously contested. However there is no specific evidence before the Tribunal relating to this factor.

[93] While the Project is a reasonably substantial one involving the employment of 60 persons (some of whom would fly in/fly out), infrastructure and increased travel on Talawana Track it does not involve a very large mine, with a very large work force and

permanent town close to an Aboriginal community where the possibility of detrimental interaction between mine workers and Aboriginal people might occur. The subject area is some 50 kilometres from Parnngurr (along tracks about 125 kilometres) and 195 kilometres from Jigalong (along tracks about 330 kilometres). The amount of non-indigenous traffic on Talawana track will undoubtedly be increased and at its closest point is some 25 kilometres from Parnngurr. There are restrictions on entry to both Jigalong and Parnngurr. It is likely there will be some social interaction between the Martu and grantee party employees but I can see no reason for this to have a negative impact on the Martu People's social structures. As a specialist body the Tribunal is also aware that in more recent times there is a much greater awareness in the mining industry of the importance of conducting their activities in a manner which minimises negative impacts on existing Indigenous communities. I have no reason to believe that the grantee party would not act in a socially responsible manner in this respect.

[94] If there were major concerns about the effect of the Project on social structures and relevant evidence relating to it, conditions could be crafted to minimise activities or contact which could have this effect.

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

[95] The agreed list of issues is:

- The native title party contends that the doing of the act would have a detrimental impact on these matters.
- The grantee party and Government party contend that the doing of the act would improve access for the Martu to Lake Disappointment and improve freedom to carry out rites and ceremonies at the Lake.
- The grantee party denies that the Martu access or carry out rites in the area of the proposed lease.

[96] The native title party's freedom of access to the subject area will be affected in the way already described.

[97] The grant of the proposed lease would not confer on the grantee party the right of exclusive possession to the subject area, and one of the additional conditions proposed by the Government party preserves the native title party's right of access, except where the grantee party's operational reasons require that access is restricted. This point is further recognised by the grantee party by its proposed condition that the right of the native title party to access or use the area of the proposed lease will only be restricted to those parts which are actually used for exploration or mining operations. These conditions attempt to maintain Martu access to the area to the greatest extent possible and may or may not be of importance depending on the nature and scope of mining operations and the level of existing access enjoyed. In this case the conditions would be of little significance as the evidence only suggests minimal access to the subject area and would in any event only be a relatively minor amelioration of that impact.

[98] There is limited evidence that the native title party conducts rites and ceremonies in the Lake Disappointment area on an annual basis associated with their dreamtime, using ceremony and songs, but nothing to suggest that this activity actually occurs on the surface of Lake Disappointment or in the proposed lease area on the edge of the Lake.

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

[99] The question to be considered is whether there is an area or site of particular significance (being that which is of special or more than ordinary significance to that native title party) that will be affected by the future act (*Cheinmora v Striker Resources NL & Ors* [1996] 1147 FCA 1; (1996) 142 ALR 21 at 34-35). The Tribunal will have to make a value judgement about whether, from the native title point of view and according to their traditions, the area or site is special or different from other land in respect of which native title parties say they have native title rights and interests. This interpretation is consistent with the view that all of a native title holder's land is significant to the native title holder, but that persons may speak of areas or sites that are of 'particular significance' in accordance with their traditions (*Waljen* at 173-174).

[100] The principal relevant area or site is Lake Disappointment (variously referred in language as Gumbubindil or Kumpupintil).

[101] The agreed list of issues relating to the native title right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs is:

- The parties agree that the mining lease is within the area of Lake Disappointment which is a site under the *Aboriginal Heritage Act 1972* (WA) ('AHA') and area of significance to the Martu under their traditional law and custom.
- The native title party contends that it is a site of profound cultural significance.
- The grantee party does not agree that level of significance of the site.
- The parties agree that the right to maintain and protect sites will be affected.

[102] The agreed list of issues filed specifically in relation to this criterion is:

- The parties agree that Lake Disappointment is a "site" under the AHA. The native title Party further contends that the whole of Lake Disappointment is a site of profound significance and that traditionally, Lake Disappointment is regarded as an area of great danger.
- The grantee party contends that, for the Martu:

  (a) areas of Lake Disappointment other than the southeast sector and certain islands are not dangerous to enter;

  (b) the southeast sector of Lake Disappointment and certain islands within the Lake are of greater significance to the Martu than other parts of the Lake, including the area of the mining lease; and

  (c) entry by Martu or other individuals upon the proposed lease area would not endanger the welfare of other Martu people.

[103] The grantee party, quite properly in my view, conceded that Lake Disappointment is a site of the kind referred to in s 39(1)(a)(v) being an area or site of particular significance to the native title party in accordance with their traditions. Despite this concession and the necessary finding which flows from it that the Project will affect a site of particular

[104] There is a considerable amount of evidence bearing on the significance of Lake Disappointment and the attitudes of the native title party to mining on it of the kind proposed by the grantee party.

[105] ***DIA site register.*** Lake Disappointment is a recorded site on the Department of Indigenous Affairs Site Register for the purposes of the AHA and wholly overlaps the subject area (Site ID 12103 – Gumbubindil/Lake Disappointment). The site is described as a ceremonial and mythological site on the permanent register with closed access and no restrictions.

[106] The dimension of the site is depicted on maps, including one prepared by the Tribunal's Geospatial Services Section which estimate that the total area of the registered site is 3,758 square kilometres. The Lake Disappointment registered site comprises the main lake (over which the mining operations will occur), a considerable number of smaller lakes and a larger area of land around the lakes themselves. The Geospatial Services Section estimates the total area over the main lake to be 1,178 square kilometres.

[107] A 'closed' site is one that the Aboriginal Cultural Material Committee ('ACMC') set up under the AHA has determined requires written consent prior to anyone viewing the site file information. No restrictions relates to whether there are restrictions on access to the site based on gender.

[108] The fact that a site is recorded on the Register may not, of itself, be sufficient to enable a finding that it is a site of particular significance to a native party. However, the fact that the site is classified as closed access and described as ceremonial and mythological suggests that it is of special significance.

[109] ***Statement of Professor Tonkinson.*** The Tonkinson Statement contains evidence of the cultural significance of Lake Disappointment to the native title party. Some parts of this Statement have previously been published by Professor Tonkinson including the following description of Lake Disappointment:

> 'In the case of Gumbubindil, however, no Mardu ever set foot near it, because to them it is the home of the dreaded *Ngayunangalgu* (will eat me). These cannibal beings, which dwell in their own complete world beneath the lake and emerge to attack human trespassers, are mythologically and totemically important to the Mardu. They are involved in certain curative magical activities ... but a strong fear of them keeps Mardu well away from their habitat.' (*The Mardu Aborigines: Living the Dream in Australia's Desert* (2nd edition) by Robert Tonkinson, p 27)'

[110] Although Professor Tonkinson's Statement was the subject to an agreed confidentiality direction, for the reasons explained above I am of the view that some aspects of it should be referred to. Professor Tonkinson says:

> '*3. The significant of Lake Disappointment in Martu culture*
>
> For the various groups of Martu whose homelands surrounded this huge salt lake, Kumpupintil (Lake Disappointment) was culturally very significant as the home of the cannibal beings known at the Ngayunangalku (see, for example, Tonkinson 1978/91:26-7). While doing fieldwork at Jigalong, I was repeatedly told by Martu adults about these fearsome beings, who lived under the surface of the lake in their own world, complete with sun, moon and stars, and would kill and eat any humans silly enough to stray onto its surface. People travelling in the vicinity of the lake would be alert and watchful, and spoke quietly or whispered, lest the Ngayunangalku detect their presence and attack them. If smoke was seen coming from the direction of the lake, instead of heading that way to make contact, as they would normally do, people headed away from the smoke. Numerous stories were told to me about a person or people who had been foolish enough to trespass, and the tragic result that ensued. The powers of the Ngayunangalku included the ability to bring down any aeroplane that flew low over the lake, and there were stories of Ngayunangalku-inflicted crashes on the lake surface.
>
> ...
>
> Traditionally, the salt lake Kumpupintil would almost certainly have constituted by far the largest no-go area in the Martu homelands, which cover a huge area on the western side of the Western Desert. Since the 1980s, three communities have been established in the Martu homelands to the north of the lake: Parnngurr, Punmu and Kunawarriji (see map in Tonkinson 1978/91: 176). Tourist traffic on the Canning Stock route has greatly increased in the last decade, taking thousands of people around the north-western edge of Kumpupintil. Many of them would have set foot on the surface of the lake, and while I cannot recall any Martu telling stories about such intruders coming to grief at the hands (and teeth?) of the Ngayunangalku, I did not attempt specifically to elicit such information from any Martu.'

[111] Professor Tonkinson also expresses some opinions which the grantee party says the Tribunal should disregard. He says he is surprised that the Martu would have agreed to the Project given what he knows about their fear of the Ngayunangalku concluding that there must have been inadequate consultation with Martu Elders. He finds it impossible to believe that most middle aged and older Martu would have acquiesced to anyone going onto the lake surface or the level of disturbance caused by the Project. He also expressed surprise about the designation of the discrete no-go areas and the large no-disturbance area on the surface of the Lake given that he understood the entire surface of the Lake to be undifferentiated and to comprise the roof of the Ngayunangalku universe. He points, among

others, to one possible explanation being tensions between traditional male leadership and younger Martu who deal with whitefella business and suggests that there may have been inadequate consultation about the Project. He suggests that more information could be obtained about the circumstances in which the no-go areas were determined and the basis for them.

[112] I agree with the grantee party's submission that Professor Tonkinson's opinions about what he would expect the Martu currently to think of the Project should be given little weight. The research on which he relies was conducted prior to publication of the 1st edition of his book in 1978. It is now clear that the views of some Martu Elders and the Martu community generally, as expressed through two community meetings, are that they are prepared to contemplate mining on parts of the Lake. With one exception (Mr Baker Lane) the 2008 Maling survey party was prepared to fly in a helicopter over the Lake and said that they want Martu monitors to be present when ground disturbance occurs. The evidence of some Elders at Jigalong that they are opposed to mining is consistent with Professor Tonkinson's view. But that must be balanced against other evidence which shows that this is not a case of absolute prohibition on mining by current Martu Elders, as demonstrated by the Term Sheet agreement and the willingness of Martu to continue to negotiate with the grantee party (Martu Elders affidavit para 10).

[113] ***Martu Connection Report***. The grantee party says that the assertions of the native title party about the 'profound significance' of Lake Disappointment must be seen in the context of the Connection Report. First, it says that the Lake is not specifically included among sites which are referred to as powerful. This reference occurs in discussion about the need to propitiate spirits by calling out to them, and two powerful and sacred sites (not including Lake Disappointment) are mentioned as places where this occurs. The sites mentioned are not the only ones where this ritual is necessary but are given as examples. This reference on its own does not lead to a conclusion that the Lake is not an important place. Second, the grantee refers to small secret-sacred sites which may also be storage places for secret-sacred paraphernalia, access to which is forbidden to all but initiated men. Lake Disappointment is not mentioned as one of this type of site. While it is clear that the Lake does not fall within this category of site as no gender restrictions apply to it, there is ample other evidence of its importance to the Martu.

[114] Third, the grantee says the Connection Report refers to sites which have totemic significance. Lake Disappointment is mentioned as one of many sites and the story relating to it is only cited as an example. There is no mention of it being profound or otherwise exceptional. Again, I do not think this example justifies a downplaying of the importance of the site. On this issue the Connection Report discusses the Martu's beliefs about conception and Dreaming beings, and an example is provided from Professor Tonkinson's book which can be repeated here as it has already been publicly recorded. A senior Martu Lawman, now deceased, who is the father of some of the claimants is descended from the Ngayunangalku cannibal beings who are his ancestral totem. A species of snake is his conception totem. A strand of hair from the beard of a Ngayunangalku fell into the dry bed of Kupayura (Savory Creek). The hair eventually turned into a snake which the senior Lawman's mother speared with her digging stick while out hunting. Later, she vomited after eating some of the snake and realised it must have been a spirit child, her son in snake form announcing its arrival to its parents. In my view, this story indicates the importance of the site to Martu Dreaming.

[115] Fourth, the grantee party says that there are other sites referred to in the Connection Report related to the Ngayunangalku, including Savory Creek. In my view, that is of little importance in determining the significance of Lake Disappointment.

[116] Fifth, reference is made to a 'powerful site' (Durba Hills) (Mr Pettit's words) which was entertained by the Martu for mining or petroleum production. In my view this is not an accurate interpretation of the Connection Report. The heritage survey was carried out in relation to the Savory Creek and Durba Hills *area* (my emphasis). However this cannot be interpreted to mean that there was approval to explore or mine on an actual site of significance. Indeed the Connection Report points out that the consultants on this survey gave instructions on how to avoid possible burial sites and other sites of significance. In my view, this reference can only be used to support a finding that the Martu are not necessarily opposed to mining on their country not that they customarily approve it in relation to sites of special significance to them.

[117] Sixth, reference is made to the plethora of stories in relation to the Martu and sites that relate to them, and again reference is made to the cannibal story being shared with two other sites. In my view, this information does not enable an inference to be drawn that Lake Disappointment is of less importance just because it has features which are shared with

other sites. Rather, it supports a finding that there are large numbers of sites important to the Martu on their land. I am satisfied that Lake Disappointment is one of them.

[118] Seventh, the grantee party says that the Lake is not an increase site (or japiya). Rather it is a baby japiya which it is said are less powerful than japiya. There can be no doubt that increase sites are very special places to the Martu and that there are restrictions on who can visit them and under what circumstances. Although referred to as 'baby japiya', Lake Disappointment is a site related to fertility rights. The Connection Report describes these sites (of which Lake Disappointment is an example), as places where spirit children are believed to reside and women who desire to conceive can visit such places. Evidence of this kind emphasises the significance of the site to the Martu.

[119] Eighth, the Connection Report refers to the Martu's desire to exercise their responsibilities for maintaining and protecting places of 'abiding cultural importance' to them. Lake Disappointment is not included as an example of such a site. I do not place any weight on this reference as only two sites that were in fact destroyed by mining companies are mentioned in this context.

[120] Ninth, the grantee party refers to examples in the Connection Report which the Martu had designated no-go areas for mining and tourists on the grounds of cultural, physical and spiritual damage. Lake Disappointment is not included. Again these references do not purport to be an exhaustive list of areas or sites which the Martu have designated as no-go areas.

[121] Tenth, the grantee party points to areas which are restricted to men only and an exception to the general Martu culture of inclusivism. The Lake is not given as an example of such a place. The grantee party says that, although not specifically referred to, the Lake is a place where there is no total exclusion of certain persons even to the dangerous part but is an area to which people can have access subject to appropriate warnings and announcements such as sending up smoke.

[122] In my view, the matters in the Connection Report pointed to by the grantee party do not support the proposition that Lake Disappointment does not have special qualities or is not a special place in Martu traditional culture. To the contrary I think it reaffirms the importance of the site to the Martu. What the Connection Report shows is that, consistent with other evidence, it is not a site which requires the total exclusion of certain categories of

people unless accompanied by certain rituals or senior men nor is it a site from which women are excluded. It may be that, prior to this proposal, the Martu did not need to consider who may access the area because traditionally there was no question of Martu visiting the surface of the Lake. There also does not appear to have been any proposals in the past to mine over the Lake which would have required Martu to confront the issue of mining on it in the context of the traditional importance of it as described in Professor Tonkinson's studies. The grantee party is correct in saying that Lake Disappointment was not an area that contemporary Martu People regarded as so important that mining would not be considered under any circumstances. It is not a site of such power or danger that mining could not be contemplated. Nevertheless, I am satisfied that the evidence overwhelmingly established it as a very important place in Martu culture and tradition.

[123] ***Dr Guy Wright Report.*** The site survey was conducted by Dr Guy Wright on or around 28 June 2006 in accordance with a Land Access Agreement entered into on 2 February 2006 that, among other things, allowed for the grant of certain exploration licences which comprise part of the Project. The eight Aboriginal men, who I can safely infer are Martu, who took part in the survey included Brian Samson and his son. Brian Samson is identified in the Connection Report as one of the persons having responsibility for the Lake Disappointment area. Dr Ruane and Mr Cunnold on behalf of the grantee party also participated. The grantee party's exploration program involved the probing of sediments in the Lake using a helicopter lifting a geoprobe. The geoprobe would retrieve a 42 millimetre diameter core containing lake sediment and brine. In addition a small trench would be dug in the Lake manually with a shovel to a depth of approximately 1 metre. This activity would involve four people, including the helicopter pilot, geologist, hydro-geologist and their assistant. The grantee party provided a map indicating where the drill holes would be made in a 5 kilometre by 5 kilometre grid over the Lake.

[124] During the consultation I am also satisfied that Dr Ruane and Mr Cunnold explained to the Martu informants more details of their proposal to establish a potash extraction facility at Lake Disappointment. They said if the initial exploration samples showed sufficient potash to make an economically viable operation, the grantee would consider taking the Project to the next step. That would involve a relatively small trench and pond about the size of a swimming pool to test the viability of the operation. Dr Ruane and Mr Cunnold also described the eventual scope of the Project to the survey party in similar

terms to that which is currently proposed, including digging a substantial trench of about 2 metres in depth and 2 metres in width and up to 15 kilometres long into the Lake with a dirt track next to it for maintenance.

[125] Dr Wright confirms that Lake Disappointment is well-known as an important site of religious significance to the Martu people and refers to the work of Professor Tonkinson and the reports on which the registration of the site was based. He says that the key issue of the heritage consultations was whether or not any disturbance to any part of the Lake would be acceptable in any circumstance and if, any disturbance were to be acceptable, to ascertain some understanding of what levels of disturbance and the circumstances on which the disturbance may be acceptable could be gained

[126] At the conclusion of the survey, Dr Wright reports that the Martu men felt it would be worthwhile to discuss the issue more broadly within the Martu community to see if there was any support for the exploration program. The Martu men sketched a map on an aerial photo that was subsequently formalised by the Ngaanyatjarra Council (a native title representative body then acting for the native title party) and attached to Dr Wright's report. On 7 November 2006 Ngaanyatjarra Council advised the grantee party that a meeting of Martu people convened by WDLAC at Punmu on 11-14 October 2006 approved the grantee party's work programme over areas identified in the map attached to Dr Wright's report. The letter advised that WDLAC consented to an application under s 18 of the AHA for the purposes of geoprobe drilling and hand trenching over substantial parts of the Lake (principally to the north and west); geoprobe drilling only in an area which was another substantial part of the Lake to the south-east. Access to certain hatched areas identified in the map was not consented to. Apart from one hatched area on the western side of the Lake the hatched areas were all within the area where drilling only was permitted on the south and east side of the Lake. The letter specifically says that the consent is for the limited purposes specified and that no consent is given for any other purpose. If any further exploration activity is proposed then this would need to be the subject of further consultation with the Martu. On 23 January 2007 the Minister granted, pursuant to s 18 of the AHA, consent for use of the land for these exploration purposes subject to a number of conditions.

[127] The Martu Elders affidavit evidence is that they consented on the basis that disturbance to Lake Disappointment would be minimal:

> '33 This was agreed to because the Martu were of the view that the disturbance to the Lake by exploration drilling would [be] very small and the period when men would be on the Lake would be very short. We were told by Holocene that the size of the drills was small and were very light and the work would be done by dropping the drills onto the Lake surface from a helicopter to collect samples. People did not walk onto the Lake surface and did not drive any trucks or cars onto the Lake surface.'

[128] I can accept that the exploration program was confined to the activities as described, but the Martu Elder's evidence does not reflect the fact that it must have been known to the Martu that exploration may lead to a proposal to mine. Although there is no specific evidence of what happened at the community meeting which approved the exploration, I can infer that WDLAC as the native title party (assisted by the Ngaanyatjarra Council) would have carried out its legal obligations to consult with the native title holders in a proper manner (see *Native Title Prescribed Bodies Corporate Regulations* para 5 which imposes certain obligations on PBCs to consult and obtain the consent of the common law holders before making any decision, or doing any act that would affect native title rights or interests). I can safely infer that some detail of the eventual proposal to mine which had been given to the survey party would have been provided to that meeting. In any event it is quite clear that the survey party itself was aware of key elements of the grantee party's mining proposal on Lake Disappointment at the time they decided to refer the exploration proposal to the community meeting.

[129] ***Maling Report***. A second heritage survey was commissioned by the grantee party in May 2008 specifically in relation to the proposed lease and pending miscellaneous licence L45/172 following the Term Sheet agreement. The outcome of the survey was documented in the ethnographic survey report prepared by Mr Jeremy Maling of Anthropos Australis Pty Ltd. The Martu consultants were organised by WDLAC. Mr Maling said that the survey was conducted with the co-operation and involvement of selected representatives of the Martu native title holders.

[130] The evidence relating to this survey is contained in the affidavit of Mr Cunnold, the affidavit and report of Mr Maling and a DVD which records the discussions of the Martu consultants with Mr Maling and the visit by helicopter to the survey area being the proposed access track and over the area of the Project, including Lake Disappointment. There were eight Martu consultants: Mark Jeffries, Nyaparu Williams, Peter Jeffries, Clarence Jeffries, Carlson Jeffries, Rodney Wumi, Roderick Samson and Baker Lane.

[131] The Report identifies two Aboriginal ethnographic sites pursuant to the AHA located within the survey area; the registered site - Lake Disappointment - and an additional site (yet to be registered with the DIA) which does not overlap the subject area.

[132] The Martu consultants confirmed the Aboriginal ethnographic values of the entire registered site for Lake Disappointment. They agreed to the Project proceeding on the area that had previously been approved for geoprobe drilling and manual trenching (that is avoiding the south-east area and one hatched area to the north-west). The Project does not cover the areas of the Lake that were identified in the Wright Report as being areas which should be avoided. In addition the Martu consultants did not want any mining or activity on the islands. Mr Cunnold agreed that the evaporation ponds could be built around one of the islands that is on the mining lease area, something that was acceptable to the survey party.

[133] The Maling Report also said that any further works would require additional consultation and Aboriginal ethnographic survey; that two Martu heritage monitors were required to be present during ground disturbing activity; that an archaeological survey of the Project area should be carried out and additional ethnographic consultation conducted if stone artefacts or human burials were found.

[134] An issue arose about the draft status of the Maling Report. Mr Maling said it was a draft because it had not yet been approved by WDLAC or a general Martu community meeting. Not a great deal turns on this issue. What is known is that the Maling survey party approved mining with conditions, but that final approval to mining was not given by a Martu community meeting. There is evidence from Mr Teddy Biljabu that a meeting of Martu people at Parnngurr supported the survey party's findings. The details of this meeting are not in evidence but it supports a finding that the Martu approval of the Maling Report extended beyond the survey party.

[135] ***Martu Elders evidence***. The Martu Elders affidavit contains the following evidence relating to sites including particularly Lake Disappointment.

> '3 A map is attached as "M2" which shows all registered Aboriginal sites on and near the Lake Disappointment and shows the mining tenements held by Holocene. There are many more important sites in the area apart from the registered sites.
>
> 11 The Lake Disappointment country, which includes the lake itself and the country around the lake (**Lake**) has long been an area that is special to the Martu. Our song line goes all around and through Lake Disappointment. This song line connects to the other lakes, Lake Dora and Lake Waukarlycarly. All the country is connected by our dreamtime.

.....

[Paragraphs 18, 19, 21 are quoted in paragraph [67] above.]

22 There are areas on or near the access track to Lake Disappointment that Holocene want to build that contain burial remains. We know of burials during our life time in this area and we do not want these areas to be disturbed. These areas will be identified by future surveys to be done for this purpose. The access track must not be developed until these surveys are done.

...

26 The whole of Lake Disappointment is a sacred site under Martu culture. The Lake also contains other sites that are special and are shown on the map (M2).

27 Big parts of Lake Disappointment are dangerous and there are areas on and around the Lake that must not be disturbed. The Martu have already told Holocene that none of the islands can be disturbed and Holocene agreed that they would not do so. This was said by Mr Cunnold to Jeremy Maling and to the Martu who were present during the 2008 survey.'

[136] ***Jigalong evidence.*** The evidence of Martu people at Jigalong confirms what is said in the Martu Elders affidavit about the strong connection to the dreamtime through stories and songlines in and around Lake Disappointment, other lakes a considerable distance from it and Savory Creek which runs into it from the west.

[137] Several of the witnesses used the term 'ngulu' meaning secret and sacred to refer to the Lake and some songs which are only for older males. Mr Muuki Taylor expressed the view that the Dreaming or 'Jukurrpa' would be lost if mining were allowed. Similarly Mr Nyari Morgan testified that mining cannot interfere with 'ngulu' in Lake Disappointment. Consistently with the evidence of Professor Tonkinson a number of witnesses spoke of devils ('Nyagunangalku'), spirits and cannibals which I take to mean the same beings, who live below the surface of the Lake and are considered dangerous.

[138] The issue which was less clear is the extent to which it is currently regarded as a dangerous place. Most of the witnesses at Jigalong referred to Lake Disappointment as a dangerous place but with some qualifications. Mr Landy (Butler) testified that although the Lake is dangerous, some parts are safe. Mr Allan Charles said the Lake was a safe place but that 'we don't trust it much'. Mr Teddy Biljabu said it was very significant and very dangerous to Martu People. On the other hand the affidavit of the Martu Elders states that some parts of the Lake are safe and some are not (para 20).

[139] There is evidence of the supposed danger associated with Lake Disappointment in the attitude of some Martu to flying over it. Traditionally Professor Tonkinson outlines the power of the cannibal beings as able to cause aeroplane crashes over the Lake. The Martu

Elders (para 19) express similar sentiments when they say that many people believe it is dangerous to fly over the Lake. The oral evidence given by Mr Morgan as to a magnetic pole in the centre of the Lake which causes a fear of flying supports this view. It is also clear that the one consultant who refused to fly over the Lake, Mr Baker Lane, refused due to a fear that 'something might happen to him in a spiritual way'.

[140] Mr Maling's affidavit (para 15) notes that all of the consultants engaged in the 2008 heritage survey 'expressed apprehension about flying over' the Lake. While that evidence is not contested, the reality is that seven of the survey consultants (i.e. all except Mr Baker Lane) flew over the Lake but declined to land on it. The DVD of the survey trip does not throw any light on this issue. Although there is considerable discussion between Mr Maling and the consultants about the conduct and location of the survey including helicopter stopping places there appears to be nothing recorded in relation to this issue from any of the consultants. I think that if it were a major issue there is likely to have been a lively discussion about it which would have been recorded. The conclusion is that while some Martu consider it dangerous for traditional reasons to fly over the Lake others including seven of the men who participated in the survey did not have a level of apprehension based on tradition that precluded them from doing it.

[141] ***Spiritual connection.*** Mr McKenna relies on the Statement of Professor Tonkinson who has noted that members of the native title party visit Lake Disappointment spiritually from remote locations for the purposes of conducting rituals even if not physically present at the site. Professor Tonkinson speaks of the role that certain senior men play in non physical treatment of ailments and the importance of stories relating to it. One of these is related to Lake Disappointment. The heart is magically removed from the body of a sick person and transported by a bird spirit to Lake Disappointment for the cannibal beings to repair it and return to the ill person while he is asleep. In the Dreaming the man who removes the heart are friends and allies of the cannibals and safe from attack. In my view not only does this material confirm the importance of spiritual matters to the Martu and reflect their strong and complex mythology, it also demonstrates the interconnectivity of the Lake with Martu culture and tradition generally. The extract from Professor Tonkinson's book (at pp 116-177) also refers to the unseen or spiritual as just as real as the visible and physical in Aboriginal understanding, and no distinction is made between natural and spiritual realms. This is a strong element in Martu culture and ritual. Mr Landy (Butler) also gave oral

evidence of conducting annual ceremonies focused around the songlines of Lake Disappointment which can be conducted at a law ground in various locations throughout the determination area without being physically present at the Lake. The whole of the evidence leaves no doubt that the Lake is of spiritual significance to the Martu including the surface of the Lake which traditionally was not visited. The nature of the stories associated with the Lake itself and presence of spirit beings is testament to this significance. The evidence also establishes that this spiritual significance extends to areas around the Lake because of the Dreaming stories associated with it and such places as Savory Creek which runs into it. The affidavit of the Martu Elders (para 45) talks of a ceremony that can be conducted to prepare the spirits for persons entering upon the Lake and effectively make the area safe. It is of course true that the importance of the spiritual connection to the Lake needs to be viewed in the context that the Martu are not now totally opposed to mining on the Lake provided acceptable terms can be agreed and have a ceremony which could alleviate their concerns to some extent.

Aboriginal Heritage Act

[142] The Tribunal has on numerous occasions considered the protective provisions of the AHA. I adopt the Tribunal's findings in *Waljen* on this topic (at 209-211). I also adopt the findings of the Tribunal in *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner at [33]-[38], [40]-[41] and other cases referred to therein which describe the regulatory regime for the protection of sites. In summary, the AHA provides for the protection and preservation of a wide range of Aboriginal sites (s 5) and objects (s 6). It is an offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site (whether on the Register or not) (s 17) without authorisation (s 18), and that offence is punishable by fine or imprisonment or both. If Ministerial consent to disturb a site is sought under s 18 of the AHA, the ACMC requires the applicant to outline the nature and extent of consultation with key Indigenous stakeholder groups (which include native title parties), outline strategies to minimise impacts on sites and complete a declaration that it has read and understood any heritage survey report tendered in support of the application. Applications will not be considered by the ACMC until sufficient information has been submitted by the applicant.

[143] It is a defence to a prosecution under the AHA if the person charged can prove that he or she did not know, and could not reasonably be expected to have known, that the place was a site covered by it (s 62). Obviously this defence would not be available to the grantee party. The standard endorsement on mining leases draws the grantee party's attention to the AHA. Furthermore, the second and third supplementary conditions to be imposed by the Government party would require the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes; and requires notice of any s 18 application. The native title party would be in a position at his point to consider their attitude to the proposal and decide to support or oppose it, check that it is in conformity with previous understandings, inform the grantee party of any areas of concern and make submissions to the ACMC. The grantee party contends that, on the basis of the two heritage surveys, the Martu have indicated that parts of the Lake can be disturbed, that this disturbance will require s 18 approval and that the native title party would then have the opportunity to make submissions on their concerns about it to the ACMC and Minister.

[144] The native title party says the grantee party's attitude indicates an insensitive attitude to the importance of the responsibilities of the Martu to look after sites and adopts a minimalist attitude to their protection. Compliance with the AHA does not necessarily lead to adequate protection of sites as interference with them is a possible outcome of its processes. The native title party relies on the '*Report of the Review of the Department of Indigenous Affairs*' prepared by Dr Dawn Casey and dated April 2007 (at 82) in which the DIA acknowledges an inability to effectively monitor or enforce the State's heritage protection regime stemming from a lack of resources (taken from 'Submission by the Department of Indigenous Affairs to the Functional Review Committee Established to Review The Department of Indigenous Affairs, 2006, p 57). This report makes seven recommendations specifically with respect to heritage and culture including the provision of additional resources as well as an improvement in investigation and enforcements procedures (p 86-87). The grantee party considers that the report is irrelevant and outdated and does not take into account the significant changes to the regulatory regime that have occurred since the report. I agree with the grantee party that in the circumstances of this case this report is of no assistance to the Tribunal. The most efficient and well resourced site protection system will not mean that the Project can proceed without interference with

an Aboriginal site of particular significance to the native title party. However, if the Project were to proceed, I think the measures to involve Martu in consultation about it mean that there is a low likelihood that conditions will be breached.

[145] There can be no question that the grantee party fully understands its obligations under the AHA and that it has complied with them to date. I am satisfied that it will continue to do so. The grantee party has agreed to conduct its operations in accordance with the findings of the 2008 Maling heritage survey report, having addressed these requirements in its proposed conditions. In appropriate cases the Tribunal can take into account the operation of the AHA in making a determination about this criterion and leave the issues arising under s 39(a)(a)(v) to the State regime. However, in my view, to do so in this case in relation to Lake Disappointment would be avoiding the Tribunal's responsibilities to properly consider this issue. This is a case where the facts are all well known. What the grantee proposes to do on Lake Disappointment is reasonably clear. The grantee party cannot comply with the AHA by planning its operations in a way that avoids the site, and approval will be needed under s 18 before mining commences. The State regulatory regime cannot be relied on to make a finding that the Project will not affect Lake Disappointment because either it can be avoided or the Minister will not approve interference with it.

[146] There is evidence of a considerable number of registered sites on Martu land in the general area of Lake Disappointment and the Talawana Track. I am satisfied that these should not be directly interfered with by the Project. There is evidence of burial sites which could be affected by the Project (see Martu Elders' affidavit para 22) and archaeological sites. This has been recognised by the grantee party, and an archaeological survey has been proposed as part of its condition following the recommendation of the Maling Report. I am satisfied that the grantee party is aware of its responsibilities not to disturb these sites without consultation with the Martu and following the procedures in the AHA. I am satisfied that those procedures should make it unlikely that these sites will be affected by the Project, at least not without the approval of the Martu.

[147] ***Conclusions in relation to s 39(1)(a)(v)***. The main area of dispute is about the level of significance of Lake Disappointment. The native title party position is that it is of profound cultural significance and danger. The grantee party says that it is of special significance but not of such a level that mining cannot be contemplated in relation to it even

without the formal consent of the Martu. It says that parts of the Lake are less significant than others and that there is no danger in entering them.

[148] There is little doubt from the evidence of Professor Tonkinson that traditionally Lake Disappointment has a very high level of importance to the Martu. This is consistent with the views expressed at the Jigalong hearing by, in particular, Messrs Nyari Morgan, Wakka Taylor and Muuki Taylor all of whom are Elders who lived in the desert until they were approximately 20 years old. I think there is a case to say that traditionally in the past the Lake's surface at least was regarded as dangerous and a place to be avoided even if the surrounds were not as secret or sacred as some other sites to which access was restricted to persons of one gender or without certain rituals being followed. However this matter must now be considered from the perspective of the traditions as currently held and practised by the Martu even if there has been some modification of past ways. The fact that the Martu are prepared to contemplate mining on the site, even though not yet finally approved, can be contrasted with sites which are still complete no-go areas. The contemporary position is that the areas proposed for mining are not so dangerous or culturally significant that no interference or presence on them can be permitted. Both heritage surveys were carried out by Martu men and included at least some persons with special responsibility for the area. Even if their clearance of the area could be said only to have been done by a small group and there was no final approval of the second survey, it is acknowledged that Martu community meetings endorsed the exploration activity and then the Term Sheet agreement in the knowledge of what areas would be disturbed if mining went ahead. There is no evidence that the community meetings were not properly convened or conducted or were so procedurally defective that they did not reflect contemporary Martu views.

[149] However, the contemporary Martu view that mining on Lake Disappointment could be contemplated on acceptable terms does not mean that the Lake is not of great significance to them. Although it is not so sacred or dangerous that it needs to be avoided in all circumstances, the evidence overwhelmingly establishes it as an important place which is integrated into Martu culture and connection to country generally. It is the home of important spirit-beings. It has Dreaming stores related to it. It is part of Dreaming stories which extend to other lakes on Martu country. The surface of the Lake was traditionally dangerous and parts of it remain so. The evidence at Jigalong confirmed the evidence of the Martu Elders about its importance. The references to ngulu**,** Jukurrpa and the Dreaming

associated with the Lake from these witnesses all confirm the significance of the site, as do the references in the Connection Report and Professor Tonkinson's Statement. I am satisfied that Lake Disappointment not only formally falls within s 39(1)(a)(v) as a site of particular significance but that it is of very great significance to the Martu despite the contemporary qualification that mining on part of it could be contemplated on acceptable terms.

[150] The grantee party has argued that the mine will not affect a large area of the Lake ('a minute fraction' in Mr Pettit's words). The facts gleaned from Mr Cunnold's affidavit and the Tribunal's Geospatial Section which prepared the map that was in evidence is that the total area of the registered site is 3,758 square kilometres which includes a substantial area round the Lake and smaller ones which are a part of the registered site. According to Mr Cunnold the total Lake area (including a number of smaller lakes) is 1,600 square kilometres. The Geospatial Services Section says that the size of the main Lake (which is where the mining lease is to be located) is 1,178 square kilometres. The s 29 notice shows the size of the mining lease area to be 31.44 square kilometres of which Mr Cunnold says 20 square kilometres will be directly affected by the mining operations.

[151] For the purposes of considering the grantee party's main argument, I note 86.6 per cent (27.23 square kilometres) of the mining lease area covers the actual main Lake which is approximately 2.3 per cent of its area. Despite what is a proportionately small area of interference, the percentage calculation does not provide an accurate picture of what will happen on the ground. In my view, the disturbance to the Lake from the proposed mining (even taking into account the size of the main Lake, which in my view is the relevant area) will not be minimal. The evaporation ponds and brine trench with a potential to extend for some 20 kilometres with the accompanying infrastructure and activities in collecting the potash salts means that there will be considerable interference to it.

[152] There is some evidence explaining why the registered site area encompasses a much greater area than the Lake itself (see Martu Elders' affidavit para 11). It may simply be a buffer zone around the actual Lake or it may be that the areas around the Lake are significant in their own right. If the latter, then the access road and accompanying infrastructure on the Miscellaneous Licence will also be interfering with the site. However my specific concern is with the effect of the proposed mining operations on the Lake. In my

view, they are more than minor works and would cause more than an incidental interference with the Lake.

[153] Even though all parties agreed that the disturbance to the area would eventually be reversed by rehabilitation and natural means, the fact that the Project would last for up to 50 years also means that its impact on the site would not be minimal.

Section 39(2) criteria – existing non-native title rights and interests and use of the land

The agreed list of issues is:

- The parties agree the area of the proposed mining lease is the subject of exploration licences held by the grantee party, and that the grantee party and members of the public access the Talawana Track and Canning Stock route which run near to the mining lease.

- The parties agree that it is desirable to upgrade the Talawana Track.

Section 39(1)(b) – interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land

[154] The agreed list of issues is:

- The parties agree that the native title party is prepared to consider the act but only on terms acceptable to the Martu, including terms as to 'ownership' of the project (by way of participation in equity).

- The parties agree that one of the reasons for the native title party's opposition to the doing of the act is because of a failure to agree acceptable terms.

- The native title party contends that the mining lease should not be granted unless the grantee party has developed a satisfactory working relationship with the Martu (including demonstrating respect for Martu, their traditions and culture) and is prepared to enter into an agreement with the native title party that provides for the protection of Aboriginal heritage, the proper regulation of the proponent's activities, appropriate involvement of the Martu and reasonable benefits and compensation, including relevant 'ownership' of the project.

- The grantee party denies there has been any lack of respect, and denies respect is relevant, and says the native title party has no right of veto, cannot rely at all on alleged inadequacy of commercial terms and cannot rely on the terms previously negotiated.

[155] I have already considered the history of the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the relevant land (as expressed in the Term Sheet agreement of 27 March 2008 insofar as relevant) and the results of the heritage surveys over Lake Disappointment. Relevant evidence is also contained in the Martu Elders affidavit:

> '10. The Martu are still willing to talk to Reward about the Project on the basis of the Term Sheet and do not understand why they will not talk to us.
>
> ...
>
> 13. As a community everyone has a right to be involved in decisions affecting our community and our lands, but especially those people connected to the Lake Disappointment country. There are many other Martu people who have to be consulted about things affecting Lake Disappointment and all of Martu have to be consulted about things affecting our land and our communities. That is why it is necessary to arrange and hold meetings when all the Martu can attend and have their say. In this affidavit we set out our views not the views of all the Martu, as we have not had the opportunity to discuss this affidavit with our community, as is required by our law. We are arranging a meeting to do so.
>
> ...
>
> 16. But the Martu also know that we have to live in a world with white men and white men's law. We know that to protect our land, sometimes we have to give up a little bit even if it affects our culture and law. But the white man cannot have all our land. We give them a little bit but no more. We let go of a fingernail, and it hurts us, but we do this so we do not have to lose an arm. So we agreed to let Holocene to come onto parts of our land, but no more, so we could protect and save all the other parts of our land. This is the price we must pay to protect our culture and our Law for the future of the Martu.
>
> 17. But we are only willing to give up land if we are satisfied that we know where and how the miner is working and we are able to control those activities under Martu Law. We must also be given what we think is fair compensation for giving up our land and for the effect on our culture. Otherwise we will not agree to give up the land.
>
> ...
>
> 23. We are angry that Holocene's lawyers have said that under the white man's law any compensation for the loss of part of our land "will be small".
>
> 24. The Martu fought long and hard to have the white man recognise what the Martu have always known – that the land is Martu land. The native title determination was the white man's law finally recognising this fact.
>
> 25. From what Holocene's lawyers are saying, the land can be taken away again against our will and for small compensation. They don't seem to respect Martu law and the effect of the Project on Martu and their culture.
>
> ...

28. The Martu believe that if there is trust and respect between the Martu and miners, shown by the involvement of the Martu in all decisions about the land by negotiated heritage and access protocols, the use of Martu monitors to oversee land disturbance and the like, and fair compensation is paid to the Martu for the use of Martu land, then agreements can be reached. But this is a complex process and goodwill is needed to agree all the details so that Martu can finally decide if they are willing to agree to a Project.

29. Holocene and Reward thought that the payment to the Martu of the money and royalties and other compensation and shares set out in the Term Sheet was fair compensation when they agreed to the Term Sheet. It was very important that we would get royalty payments and shares in Reward as we would own part of the Project and share in its success and we would keep a share of the land. This made it easier to agree to allow Holocene to build the Project on our land and to accept the effect on Martu culture.

30. Now Holocene and Reward are saying that they will not give us a royalty or shares in Reward and that Holocene and the Government only have to pay very small compensation because they think the land is worth so little. This is a white man's attitude and completely ignores the impact on Martu culture by the mining activities, particularly as this will happen without our approval. The Martu have rights including the right to decide who comes onto the land and who uses the land. We will lose this right and also the right to use the land to hunt and find food around the Project. Everyone but the Martu will be making money from the Martu land.

31. If there is no trust and respect, if there is no Martu involvement and no fair compensation paid to the Martu, then the Martu will not agree to mining on Martu land. We do not understand why Reward agreed to the compensation in the Term Sheet and now think they can go ahead without paying the compensation and against our wishes.

...

36. At the time that the 2008 Survey was done, as explained above, the Martu were willing to compromise their position and to allow the potash Project to proceed, but only because we thought fair compensation had been agreed and only in the areas that the Martu said could be used and only with the full involvement of the Martu during construction and operations to ensure that there was no more interference than was acceptable.

37. To the Martu, this is the only way to protect our culture and Law for the future. The Martu have responsibility for the Lake, we must care for the Lake and by doing so, for all Martu. We do this by practising our Law and with ceremonies and songs. The Martu think long term, for our future generations, not just the next 20 or 30 years.

...

42. The Martu will work with Holocene and Reward about jobs for the Martu.

43. The Martu know which parts of the Lake are safe and which are not. We will not work on those areas that are not safe.

44. We want jobs for our people, but more than that, we want contracts for our companies, like our trucking company, and we want contracts to build and maintain the roads and track. This will give us independence, experience and a future, so we can develop our communities and offer our young people a future on their country. We want our boys and girls to go to University and learn trades to be able to work for and help their people. We want to use any money that we get from this Project to do these things for our people. We though all this would be discussed as part of the Stage 2 of our negotiations with Holocene and Reward and be part of our agreement.

> 45. The Martu want to do a ceremony at the Lake before any mining starts so that we can make sure the spirits understand who is coming onto the Lake and that they will respect our culture and Law. This will protect the workers on the Lake and all those who go there for the mining and for our people.
>
> 46. We also want Reward to make sure that there are signs near our sites telling white men that they are not to go there. We want our sites to be protected and we want to be consulted about where signs and fences should be put and how the company will carry out its operations.
>
> 47. The Martu need to be consulted about the Lake and the mine because the Martu are responsible for the Lake. It is part of us; it is our culture and our Law. We should be told exactly where Holocene plans to mine, the location of its plant, camp, trenches and ponds. Holocene must respect our sites and those areas that we have told them are not to be disturbed. This is all explained in the 2008 survey. In the end Martu need to be told about all aspects of the Project and operations before we can decide whether we are prepared to agree to it going ahead.'

[156] The Martu Elders' affidavit evidence clearly supports the agreed concession that the native title party has made that they are not opposed to mining over parts of the Lake but only wishes mining to proceed on terms acceptable to it.

[157] Despite this, oral evidence given by almost all the witnesses in Jigalong suggests opposition to mining over Lake Disappointment. A number of witnesses when asked if they had a choice between mining and no mining said they would choose no mining. Teddy Biljabu, former chairperson of WDLAC, was the only witness who spoke of mining as being 'bad in one way and might be good in another' but said that unless there is a 'decent agreement that satisfies the people', mining over Lake Disappointment is 'no-go'. He said the problem with going ahead was because the price had gone down and there was no deal on the table at present. The other witnesses were not asked to clarify if they would consent to mining if terms considered acceptable to the Martu People were agreed by the grantee party.

[158] In my view what was said at Jigalong on this topic does not contradict what is quite apparent from the rest of the evidence, namely that the Martu People would agree to mining on acceptable terms.

[159] The grantee party says that opposition to mining was not a factor raised by the native title party until after negotiations dissolved, pointing to the positive nature of the IndiEnergy's ASX press release of 31 March 2008. I accept that this is the case, but also accept the Martu Elders reasons for now declining their consent as set out in their affidavit. For them it is one thing to enter negotiations in contemplation of mining which involved

certain benefits and other terms, but quite another to consent to it when an acceptable and beneficial agreement could not be reached.

[160] With respect to its initial consent to enter into negotiation the native title party refers to its obligations under s 31 of the NTA to negotiate in good faith with the grantee and Government parties to suggest that it was obliged to negotiate about mining over the Lake. In my view this is not a factor the Tribunal should have regard to. Paragraph 31(1)(b) of the Act imposes an obligation on all negotiation parties to negotiate in good faith. I agree that if a native title party refuses to negotiate at all then it would be in breach of that obligation and the Tribunal could consider this as a factor in deciding whether the other parties had fulfilled their obligation. However, the fact that a native title party must negotiate in good faith does not mean that it must capitulate on issues of importance to it to reach agreement, just as a grantee party is not required to agree. What a native title party needs to do in good faith negotiations is to behave in an appropriate manner, explain its position and listen to and consider what the Government or grantee party proposes. If it has a view that a site is of such a special character that it will not contemplate mining over it, and explains its reasons for holding that view, it is entitled to express the view, stand by it and take that position to inquiry if the Government and grantee parties decide to proceed with the proposal. In my view, this is a case where the native title party decided to continue negotiations in the knowledge that the Lake would be disturbed by the Project but also in the knowledge that, if agreement were reached, the Project would proceed in an acceptable manner and substantial benefits would flow to them.

[161] The grantee party relies on '*Australian Manganese/Nyiyaparli*' at 408-409 [57] to contend that the Act does not give the native title party a veto over mining. The relevant parts of the *Australian Manganese/Nyiyaparli* decision at 407-409 [55]-[57] and 412-413 [71]-[72] are:

> '[55] The evidence of any interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the area of land the subject of the proposed lease can be gleaned from the Mining Agreement which was being negotiated between the native title party and grantee party. The negotiations took place over a period of some months and substantial agreement had been reached on a number of matters. The agreement was comprehensive and dealt with many of the issues which the Tribunal is aware are customarily found in mining agreements of this kind, viz – environmental protection, a cultural heritage management plan including provision and payment by the grantee party for site surveys, a coordinating committee comprising representatives of the grantee party, native title party and Jigalong community to facilitate consultation between them, employment, training and business opportunities and plan, cross cultural education, control of liquor and guns, removal of employees in

certain circumstances. The draft agreement also provided for benefit payments to be made to a charitable trust nominated by the native title party and Jigalong community. Although there was no final agreement the grantee party had offered percentage payments based on the production value of iron ore or iron ore products or a percentage of the value of royalties paid to the Government party in the case of other minerals. Mr Murray Meaton of Economic Consulting Services was engaged by the native title party to assess the financial benefits package offered. He considered that over the 10 year life of the mine the total value of the package, based on value of production, was between $4.25 million and $5.45 million. He also recommended a payment of $100,000 on signing the agreement which it appears was agreed to by the grantee party. As already indicated, negotiations then broke down principally because the Jigalong community were not satisfied with the compensation package (see good faith decision).

[56] It is quite clear that the native title party is not opposed to mining as such but only wishes it to proceed if a satisfactory agreement can be reached. This view is expressed in the native title party's contentions (4 February 2008):

> '10 It is clear that there is a genuine Australian public interest in Aboriginal Communities, be they Native Title groups or residential communities such as the Jigalong Aboriginal Community, aspiring to and achieving self-determination in relation to the management of their traditional lands or homelands. In this situation, both the Nyiyaparli people and the members of the Jigalong Community have evinced a strong preference that this project not proceed until the GP has developed with them a sustainable and respectful working relationship, given effect by the terms of a mutually beneficial agreement. In circumstances where agreement has been close to being reached, and the NTP has indicated a strong preference for the act to not proceed without such agreement it is reasonable for the Tribunal to consider making a determination that the act must not be done in the interests of promoting the NTP's rights and aspirations toward self-determination.'

[57] This submission from the native title party that the Tribunal should make a determination that the act may not be done solely because no agreement has been reached is tantamount to suggesting that they have a veto over the proposal. This is clearly not the law. The policy objectives explained by the Prime Minister the Hon Paul Keating, (Second reading speech on the Native Title Bill 1993, Hansard, House of Representatives, 16 November 1993 p 2877) include that the right to negotiate procedures did not involve the exercise of a veto by native title parties. As explained, the Tribunal may make a determination that the future act not be done based on the evidence and a consideration of and balancing of the factors in s 39 of the Act. However, it would be an improper exercise of its power to make such a determination solely on the basis that an agreement satisfactory to the native title party had not been reached and that this adversely affected their aspirations to self-determination. Although no veto is involved I have taken into account that there is the capacity, as already explained, for the native title party to have its interests considered by way of submission to the ALT, Minister for Indigenous Affairs and Minister for State Development.

...

[71] In weighing the various factors which the Tribunal is required to take into account I have had regard to the fact that the current enjoyment of some of the registered native title rights and interests will be curtailed during mining but that on the evidence provided this will not be a significant impact. Further, there is insufficient evidence to say that areas or sites of particular significance will be interfered with by the proposed mining activity. I am satisfied that economic benefits will flow from the mine but that the extent of these flowing to the native title party in the absence of agreement with the grantee party is not clear.

> [72] Importantly the native title party is not opposed to mining. It had almost reached a comprehensive agreement with the grantee party which would have provided considerable financial benefits to them. Failure to conclude agreement was not because of any action from the grantee party but because the Jigalong community (principally) and the native title party, decided the benefit package was inadequate. While the native title party does not have a veto over the proposal it will have the opportunity to make submissions on aspects of the project involving environmental issues and heritage protection. Given the Government party's regulatory regime and conditions it intends to impose I am satisfied that no conditions need to be imposed.'

[162] There is no dispute that the NTA does not give native title parties a right of veto. However the Tribunal does have the power to determine that the act must not be done based on the evidence in particular cases. In my view the facts of the present case are distinguishable from those considered in *Australian Manganese/Nyiyaparli*. There are a number of common elements such as negotiations about a comprehensive agreement which broke down; the acceptance of mining if a satisfactory agreement could be reached; and (apart from the question of special sites) no significant impact on the enjoyment of native title rights or other matters in s 39(1)(a)(i)-(v). The major distinguishing feature is that in *Australian Manganese/Nyiyaparli* there was no evidence that any site of significance would be interfered with. The evidence only established the possibility that such a site or sites existed on the mining lease area. In those circumstances, the Tribunal determined that the provisions of the AHA could be relied upon. I accept that the Tribunal cannot make determinations that the act must not be done solely because no agreement has been reached or because to do otherwise would affect a right to self-determination (as was alleged in *Australian Manganese/Nyiyaparli*). However, the fact that a native title party is not opposed to mining but has not reached a satisfactory agreement in relation to it does not automatically justify a determination that the act may be done. In the present case the Tribunal is dealing with a future act which will directly affect a site of particular significance to the Martu and that is an important matter to be weighed in the balance.

[163] A further relevant factor relates to the weight to be given to the native title holders' interests, proposals, opinions or wishes in relation to the management, use or control of the land where native title is determined and the native title holders have the right to possess, occupy, use and enjoy the land to the exclusion of all others. In my view, the fact of a determination of exclusive native title rights of a substantial kind does increase the weight that can be given to this criterion. It cannot be of such weight applied in a standard way that it would be tantamount to a veto to be applied in all cases. In cases where the future act would have little impact on the enjoyment of native title rights and no interference with sites

of particular significance, the weight given to such a determination will be less, perhaps much less. As a general proposition, there is a difference between making a future act determination over an area of exclusive possession and making a determination over an area where the right to exclusive possession has been extinguished and the capacity to exercise or enjoy other native title rights is seriously attenuated because of the exercise of non native title rights, such as pastoral interests which may have existed since the early days of European settlement.

Section 39(1)(c) – economic or other significance

[164] The agreed list of issues is:

- The grantee party and Government party contend that:

  (a) This will be the first mining operation in Australia to supply potash to the domestic market. The high cost of potash to Australian farmers due to limited supply and competition is a matter of national interest;

  (b) Mining operations on the mining lease will generate taxation revenue, employment and have other 'multiplier' effects on the economy;

  (c) The granting of the mining lease will provide employment, training and contracting opportunities for local Aboriginal people; and

  (d) The grant of the mining lease is part of the general significance of the mining industry.

- The native title party contends that:

  (a) The grantee party 'evidence' in respect of benefits is self-serving and unsubstantiated. The mining of potash will have no greater significance than the mining of any other resource;

  (b) The lack of any real or proportionate benefit accruing to the native title party is a factor against approving the grant; and

(c) The failure of the grantee party to propose conditions as to compensation in view of the previous offer by the grantee party should be a factor against approving the grant.

[165] It is the economic or other significance of the future act itself which must be considered under this criterion and not its contribution to the maintenance of a viable mining industry overall, although this can be considered under s 39(1)(f) (*Waljen* at 175-176).

[166] Mr Cunnold deposes to the following:

- There is no current domestic supply of potash and Australia imports around 500,000 tonnes per year.
- The current proposal is based on an initial output of Potassium Sulphate of 200,000 tonnes per year at an ex gate value of $100 million producing royalties to Western Australia in excess of $5 million per annum. This would require approximately 60 personnel employed on a fly in/fly out basis unless engaged locally as proposed in the grantee party’s conditions. It is hoped that the operation can be expanded increasing revenue to over $250,000 per annum.
- Although it is difficult to quantify, there should be substantial taxation revenue for the Commonwealth and Western Australia.
- There is currently considerable concern about the high cost of fertilizers. Submissions to a Senate Select Committee on Agricultural and Related Industries inquiry into pricing and supply arrangements in the Australian and global fertilizer market have pointed to problems of limited supply and lack of competition.
- The Western Australian Department of Agriculture and Food supports the Project. A letter dated 28 October 2008 from the Director General of Department of Agriculture and Food, Ian Longson, says that the Project would be of significant economic benefit to Australia’s balance of payments situation if it enabled Australia to be self sufficient in its potassium requirements. Mr Longson also says that at current prices farmers are cutting back on the fertilizer they are applying causing a reduction in crop and livestock yields and consequent reduction in farm income and Australian exports. He also says that there would be significant economic,

employment and taxation revenue multipliers that would accrue to the community if the Project proceeds.

[167] Mr McKenna says the grantee party's professed economic benefits are 'vague expectations' based on 'speculation' given that a feasibility study with respect to the Project has not been conducted nor has adequate technical data been collected. The native title party also says the supposed economic benefits in this case should carry less weight than if there was a concrete proposal to mine based on feasibility studies and other factors that would result in a bankable project status. The supposed economic advantages purported by the grantee party will not be of any major benefit to the native title party and '[e]veryone but the Martu will be making money from the Martu land' (Martu Elders affidavit para 30).

[168] The facts established by Mr Cunnold's evidence have not been contradicted by the native title party and must be accepted. Even though some of the assumptions made by the WA Department of Agriculture and Food are in excess of his current estimates, this does not undermine Mr Cunnold's evidence or the grantee party's basic contention in relation to this topic.

[169] The grantee party concedes that there are no project design or specification documents yet and that adequate technical data including close spaced drilling and onsite pilot scale evaporation trials will be necessary before this can be done (Wright Barristers and Solicitors' letter dated 10 December 2008). It also says that no feasibility studies have yet been commissioned and the information provided is based on Mr Cunnold and Dr Ruane's experience in the mining industry in general and salt and potash production in particular. The grantee party currently has sufficient funds to assess feasibility and to establish the Project's financial parameters and bankability. If studies indicate the Project would not be feasible, the grantee party says it will not conduct major activities over the proposed lease. The evidence is not clear as to whether this means that the Project would be abandoned and no mining will occur over the area at all or that some activities (presumably further exploration) might continue or whether the Project might be put on hold until financial or economic circumstances improve. If the determination were to be that the act may be done with conditions this issue could be explored further and conditions considered to deal with the situation where the mining lease was granted but development activity postponed.

[170] The affidavit of Dr Ruane (paras 10-12 and 18-20) sworn 19 February 2009 suggests a downward trend in potash prices, the grantee party's share prices and potential difficulties in finance raising in light of the current global economic downturn. Despite this situation the grantee party confirmed at the hearing that it still intends to proceed with the Project.

[171] I do not accept the native title party's contentions that the Project is entirely speculative. There is enough evidence (including financial commitment) from the grantee party to establish a reasonable prospect of the Project going ahead. If it does there is the potential for benefits to the Australian and Western Australian economies. If the feasibility and technical studies do not support the Project's viability and it is abandoned then self evidently there would no effect on native title rights or interference with Lake Disappointment.

[172] Because this is not expected to be a large mine earning billions of dollars in export income and employing large numbers of people, it cannot be given the greatest weight conceivable. Nevertheless it is potentially of considerable importance in providing import replacement and a product that will assist to maintain food production in Australia. I do not discount the weight which can be given to it by virtue of its unconfirmed status to any great extent, but it is a minor consideration in the difficult task of weighing up the competing considerations.

[173] With respect to the economic or other significance to the local Aboriginal people and the related issue of any positive effect on the development of the Martu's economic structures, the grantee party refers to its proposal to upgrade the Talawana Track and the employment, training and contracting opportunities which will be available. In addition the access road to the mine from the Talawana Track may also provide some benefit to the Martu. It is not entirely clear from the evidence whether this will be a road the Martu can use but for the purpose of considering this issue I have assumed that it will be. For all practical purposes, the local Aboriginal people are the Martu although the Tribunal is aware members of other claim groups reside at Jigalong.

[174] The Martu Elders agree to the grantee party's plan to upgrade the Talawana Track but want appropriate consultation about the upgrade and the route it takes to ensure site protection, including the avoidance of burial grounds. They also want a say in the route of the access road as it passes near burial sites (Martu Elders affidavit paras 39-40). A desire

for jobs, contracts and further training is also expressed by the Martu Elders (paras 42-44) who want to see benefits from the Project to assist their young people to further their education.

[175] With respect to the upgrade of the Talawana track and the access road I accept that, while these works are not likely to be of any direct economic significance to the Martu, they are of other significance and a benefit by increasing ease of access to Parnngurr, Lake Disappointment and the Canning Stock route and surrounds and can be taken into consideration to some extent. However, I do not give great weight to a coincidental benefit of this kind given the Martu's wishes relating to the use of the subject area.

[176] The grantee party's proposed conditions provide a process whereby Martu people can be informed of employment and contracting possibilities and given a reasonable opportunity to apply for them. These conditions would have the potential to provide some benefit to the native title holder but the nature of them by no means guarantees this result. Again, while I have had regard to this potential benefit, it is not something to which I attach great weight in the overall circumstances of the case.

[177] It is accepted by all parties that the native title party will be entitled to compensation for the effect of the grant on their native title rights on the basis set out below. However compensation cannot be seen as an economic benefit. Rather, it is a legal entitlement to be recompensed for the loss or damage suffered. At common law compensation seeks to restore plaintiffs to the position they occupied before the wrong (*Haines v Bendall* (1991) 172 CLR 60 at 63). In the present case, which would involve a lawful act, compensation would be for any loss, diminution, impairment or other effect of the act on native title rights and interests (s 51 NTA) and as explained below would be assessed pursuant to s 123 of the *Mining Act*. Whether under the common law or legislation the principles relating to compensation are essentially the same. It does not constitute a benefit, economic or otherwise.

[178] I accept the native title party's contention that the benefit, economic or otherwise, to the Martu People from this Project is not likely to be very great. They are limited to the possibility of some of them being employed and their businesses engaged in work contracts and an upgraded road.

Section 39(1)(e) – public interest

The agreed list of issues is:

- The grantee party and Government party contend that if the project goes ahead, there will be improved access to Lake Disappointment and along the Talawana Track which will benefit the Martu people.

- The native title party contends that public interest requires that the rights of the Martu should be given precedence over the economic interests of the grantee party and any economic benefit to the broader community.

[179] The native title party says that there is no public interest in the development of this resource but that it is only a grant to a private interest, being a company and its shareholders. In my view this contention is based on too narrow an interpretation of the meaning of this criterion. There can be a public interest in a project that is privately owned if it has economic, employment and revenue benefits which can in turn enhance the capacity of governments to provide essential public services. The Project has the potential to provide benefits of this kind to the extent already described.

[180] The Tribunal accepts that there is a public interest in a thriving mining industry in Western Australia and Australia (*Waljen* at 215-216; *Evans* at 214-215) and that this grant has the potential to enhance it.

[181] The native title party makes what it describes as a 'nice point' by suggesting that the upgrade of the Talawana Track is the subject of a separate approval process and that the suggested benefits in relation to it would not result from the Tribunal's determination in this matter. In my view, the Tribunal is entitled to have regard to infrastructure which benefits the native title party and arises from the grant of the mining lease even if not specifically authorised by it. Self-evidently, if the mining lease is not granted the approvals of the track upgrade will not proceed.

[182] The native title party contends that it is in the public interest for the rights of the native title party to be given precedence over the economic interests of the grantee party and economic benefits to the broader community. The Tribunal accepts that, in the abstract, it is possible to say that there is a public interest in a mining grant being refused depending on the circumstances such as the size, economic potential and location of the mine. To take an

extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth. Likewise there would be public interest considerations against mining on the Burrup Peninsula if this involved the destruction of large areas of petroglyphs or rock carvings which are of high heritage value not just to Aboriginal people but the general community. Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people.

[183] I am satisfied that the public interest would be served by this mining development however this interest must be balanced against the interests of the native title party and their wishes in relation to the interference with an important traditional site.

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

The agreed list of issues is:

- The parties agree that the grantee party has invested substantial time and resources in seeking to progress this project.

- The parties agree the proposed act will have reversible impact on the physical environment and agree that the proposed project life is up to 50 years.

- The native title party contends that the commercial prospectively of the grantee party's project has not altered substantially or at all from the position prior to the entry into the Term Sheet in March 2008.

[184] I accept that it is appropriate to have regard to the previous expenditure of the grantee party in relation to the Project (*Waljen* at 176). The grantee party has expended approximately one quarter of a million dollars in payments to the native title party for meetings and heritage surveys in addition to high cost exploration programmes in relation to the Project. The grantee party contends that this was done on the basis that the native title party consistently advised that it did not object in principle to the Project. I have already dealt with the attitude of the native title party to the use of the land. Although I am not convinced that the native title party's agreement to exploration constituted an in principle agreement to mining, I accept that the Term Sheet agreement indicated a readiness to proceed with it, albeit subject to final agreement from stage two of the negotiations.

[185] Under this criterion the Tribunal can have regard to the environmental protection regime of the Government party described in *Waljen* (at 212-214) and *Koara 2* (at 292-295), the findings of which are adopted. The environmental controls imposed by the Government party can be taken into account because they may assist to ameliorate the effect of the future act on some of the factors in s 39(1)(a).

[186] The affidavit of Mr Cunnold (para 23) deals with some environmental issues including rehabilitation of the mine site at the conclusion of mining operations and compliance with the *Mining Act* and any conditions under the *Environmental Protection Act*. The conditions to be imposed on the mining lease and the environmental protection regime would require infrastructure on the Lake and its edge to be removed when the Project is completed. Furthermore, the Government party's third supplementary condition would require the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity. I am satisfied that any amendment to the grantee party's proposal which would increase the footprint of the activity would be covered by this condition. The grantee party's conditions would expand on those proposed by the Government by requiring consultation between the grantee and native title parties; by providing an opportunity for the native title party to make submissions to the Government and the Environmental Protection Authority on whether the Project should be referred to the EPA and advice to the EPA of the proposal. These conditions would enable the native title party to raise any concerns with the grantee party and government agencies.

[187] Rehabilitation of the proposed lease area would enable the native title party to again exercise native title rights in relation to the subject area, although that would not be of great significance given the current level of enjoyment of those rights. In practice this would mean restoration of the full right to access the area and control of persons who come to it. Because the agreed reversible impact to the physical environment would only occur after 50 years, it is not, in my view, a factor that should be given a great deal of weight in these proceedings. For the whole of this time there would be development on Martu land that would have a considerable impact on the surface of the Lake and on the spiritual relationship of many of the Martu to it.

[188] The other matter to which the native title party says the Tribunal can have regard under this criterion is their current opposition to mining based on the fact that there has been a failure to agree acceptable terms. This is disputed by the grantee party. For the reasons

which are further explored below, I consider the Tribunal can take this matter into account in the manner described.

Conditions

[189] The agreed list of issues is:

- The grantee party proposes the conditions in the Schedule to the grantee party's Statement of Contentions in Reply dated 30 January 2009.

- The native title party contends that the Tribunal should determine that the act cannot be done and that it cannot be done even on the basis of the proposed conditions.

[190] The grantee party says that the conditions it proposes address the evidence and concerns of the native title party. The native title party opposes these conditions and argues that they are one sided and afford benefits to the grantee party without significant benefit to it.

[191] Paragraph 38(1)(c) of the Act gives the Tribunal a very wide discretion to make a determination than an act may be done subject to conditions to be complied with by any of the parties. The discretion must be exercised by reference to the criteria set out in s 39 and is controlled by the subject matter, scope and purpose of the Act (*Evans* at 201; *Koara 1* at 93). There is no legal impediment to imposing the conditions proposed by the grantee party. However the question of how far this power extends to permit conditions for monetary payments which are in the nature of compensation is an issue in these proceedings.

Conditions for 'compensation'

[192] The agreed list of issues is:

- The grantee party contends that, in the course of deciding whether the act can be done, it is beyond the jurisdiction of the Tribunal, and it is otherwise improper, to take into account any offer of payment or lack of offer of payment. The native title party contends to the contrary.

- The native title party contends that the Tribunal has jurisdiction to impose conditions as to payment of money by the grantee party to the native title party (other than to the extent excluded by section 38(2) of the Act).

[193] With respect to a condition for the payment of money the native title party contends:

> '8. While the Native Title Party reiterates its primary submission that in the circumstances of this matter the application should not be granted without the Native Title Party's informed consent, the Native Title Party disputes the Grantee Party's contention that the Tribunal does not have the power to impose conditions that require the payment of money by the Grantee Party to the Native Title Party. In this regard, section 38(2) expressly prevents the Tribunal from imposing conditions requiring payments by reference to profits, income derived or production. However, it does not prevent the Tribunal from imposing other conditions requiring the payment of money (or the provision of equity) by the Grantee Party to the Native Title Party. If Parliament had intended that the Tribunal should not have any power to impose conditions as to payment, there would be a full stop after the word "payments" in section 38(2).'

[194] The Tribunal has on a number of occasions considered at length the issue of conditions relating to compensation for future acts. The Tribunal's views are summarised in *Australian Manganese/Nyiyaparli* at 410-411 [64]-[66].

> '[64] The Tribunal has on a number of occasions considered at length the issue of conditions relating to compensation. I commend the following material to the native title party's representatives and other persons representing native title parties in negotiations about the grant of mining tenements and any subsequent future act inquiry:
>
> - *Waljen* at 177-205;
> - *Western Australia v Evans & Ors* [1999] NNTTA 231; (1999) 165 FLR 354 (at 364-373, [24]-[42] and cases cited therein (at para [25]) including *Western Australia v Thomas* [1999] NNTTA 99; (1999) 164 FLR 120 (*Anaconda 1*));
> - *Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia*, NNTT WF03/2, [2003] NNTTA 82 (9 July 2003), Hon C J Sumner at [58]-[60], [98];
> - *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100; (2005) 196 FLR 319 at [37]-[38]; and
> - C J Sumner, Deputy President, NNTT, 'Getting the most out of the future act process'. Paper presented to the AIATSIS 2007 Native Title Conference, Cairns, 7 June 2007, pp. 36-43 (www.nntt.gov.au).
>
> ...
>
> [66] In summary:
>
> - the Tribunal has no power to make a determination containing a condition for the payment of compensation to a native title party.
> - the Tribunal is specifically precluded from making a determination with a condition that royalty type payments be made (s 38(2)) (although the parties can voluntarily enter into such an agreement if justified on the evidence (s 33(1))).

- the Tribunal, if justified on the evidence, can impose a condition which requires the grantee party to secure a specified amount of money by a bank guarantee in favour of the Registrar of the Tribunal (s 41(3)). (The bank guarantee condition provision was inserted by the 2007 amendments to the Act in lieu of a provision which provided for an amount to be paid into trust by a grantee party.)

- monies secured by a bank guarantee are dealt with in accordance with s 52 depending on whether or not a determination of native title or a determination of compensation is made.

- A determination of compensation under the Act can only be made by a Court following a determination that native title exists.

- in Western Australia, whether compensation is determined under the Act or by direct operation of the *Mining Act* the underlying principle is the freehold equivalence test which entitles a native title party to compensation if it is available to holders of freehold title and which is assessed according to the principles applicable to them. In Western Australia this means s 123 of the *Mining Act* which provides**:**

▪ minerals are the property of the Crown and that no compensation is payable:
  - for permitting entry on the land for mining purposes;
  - in respect of the value of any mineral;
  - by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or
  - in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms (s 123(1).

▪ the owner and occupier are 'entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining' (s 123(2)).

▪ the amount payable under s 123(2) may include compensation for:

(a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
(b) damage to the natural surface of the land or any part of the land;
(c) severance of the land or any part of the land from other land of, or used by, that person;
(d) any loss or restriction of a right of way or other easement or right;
(e) the loss of, or damage to, improvements;
(f) social disruption;
…
(h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining, and where the use for mining purposes of aircraft over or in the vicinity of any land (whether or not private land) occasions damage that damage shall be deemed to have been occasioned by an entry on the land thereby affected (s 123(4)).

[67] It is quite clear that the existing state of the law does not permit a condition to be imposed by the Tribunal for payment to be made for compensation based on the market capitalisation of the grantee party (or as has been previously argued based on expenditure on mining operations – *Anaconda 1* at 86-90) as such an amount would bear no relationship to the criteria in s 123 of the *Mining Act*.'

[195] The grantee party correctly points out that in this case the native title party would be entitled to compensation pursuant to s 123 of the *Mining Act* and by direct operation of the *Mining Act* without resort to the similar compensable interest test in s 24MD(3) of the Act

because the Martu as determined exclusive native title holders fall within the definition of 'owner' in the *Mining Act* (*WDLAC/Kitchener* at 380-381 [43]-[44]). By virtue of s 125A of that Act, the compensation is payable by the grantee party. The grantee party also says that, although the land the subject of the Martu determination is not private land as defined in the *Mining Act,* by operation of the *Racial Discrimination Act* the provisions of s 35 of the *Mining Act* apply to them such that no mining operations can commence until compensation is either agreed or determined in accordance with the *Mining Act*. On this basis the grantee party also argues that there is no basis for imposing a bank guarantee condition.

[196] In my view the law relating to the powers of the Tribunal to impose conditions for the payment of monetary amounts is clear. For the reasons summarised above in *Australian Manganese/Nyiyaparli,* it is not within the Tribunal's power to impose conditions of the kind sought by the native title party for the awarding of compensation or payments in the nature of compensation. It can be accepted that the Tribunal has power to direct the payment of monies to the native title party for matters which it must attend to under conditions such as the conduct of heritage surveys or attendance at liaison committee meetings. However once a payment or benefit is properly identified as compensation the Tribunal has no power to impose provision of it by way of condition. Its powers are limited to imposing a condition for bank guarantee in favour of the Registrar of the Tribunal (s 41(3)) to secure monies on account of any future determination of compensation made by a Court.

[197] The native title party has submitted financial documentation including ASX information, the grantee party's 2008 quarterly and interim financial reports and two articles evidencing high potash prices. These are provided to support its case that the grantee party thus has the capacity to meet the requirements of a condition for at least the cash payments and equity in the grantee party, as circumstances have not changed significantly since the negotiations in 2008. Dr Ruane contested this evidence and pointed to the general decline in the share market since mid 2008, the decline in Reward's share price and the deterioration in the world economic outlook and the availability of debt financing. I agree with the grantee party that this evidence is not relevant to the imposition of conditions for compensation. The proposal for cash payments, royalties and equity in Reward can properly be characterised as compensation conditions which the Tribunal has no power to impose. In

addition there is the direct prohibition in s 38(2) of the Act, which the native title party acknowledges, on imposing a condition requiring royalty type payments.

[198] The native title party cites the grantee party's contention that the amount of compensation will be small to argue that this is a factor which the Tribunal can take into account to determine that the act may not be done. This contention is dealt with elsewhere, but I observe that, because of the paucity of judicial authority on the topic, it is not clear what the amount of compensation would be for the doing of this future act. It is conceivable however that in relation to a site of such importance special factors such as the Martu's relationship (spiritual or otherwise) to the land may make compensation for all loss and damage arising from the mining more than would be awarded to a normal freeholder.

[199] With respect to a bank guarantee condition, if there had been a determination that the act may be done I would have sought further submissions on this topic. On the face of it, if the grantee party is correct in its interpretation of the effect of s 35 of the *Mining Act* (namely that mining cannot proceed until the issue of compensation is resolved), there would be little utility in imposing such a condition.

Conclusion

[200] The weighing of the various factors involved in exercising the Tribunal's discretion under s 38 of the Act has not been an easy task.

[201] If it were confined only to a consideration of the effect of the act on native title rights and interests and other factors listed in s 39(1)(a) without the need to consider s 39(1)(a)(v), then a conclusion that the act may be done would be the likely outcome. The evidence does not disclose that there will be any substantial effect on these other matters, either directly in relation to the proposed lease or to its immediate environs. The evidence of the potential economic significance and public interest in the act proceeding would support a determination that the act may be done with some conditions, even over the opposition of the native title party. Opposition to the grant of the mining licence based on the interests, proposals, opinions or wishes of the native title party in relation to the use of the land would in this context be of less weight. As already explained the facts would be similar to those in the *Australian Manganese/Nyiyaparli* case where a determination that the act may be done was made. On this scenario the native title party would have the benefit of an upgraded Talawana Track and improved access to the general area for the purpose of

exercising their native title rights. The disadvantage to them would be a minor impact on those rights over the limited area of the mining lease. However that is not the situation here.

[202] The main issue in this case involves considering the effect of the Project on a site of particular significance (Lake Disappointment), particularly in the context of the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land.

[203] It is possible to imagine a scenario where good faith negotiations on a without prejudice and confidential basis take place and there is nothing before the Tribunal about the content of those negotiations i.e. a situation which is most common where negotiations occur to resolve a dispute but fail and an independent arbiter must make a decision without having regard to what passed between the parties during the negotiations. In that scenario, the Tribunal would be faced with considering the facts especially about the significance of the site unencumbered by the knowledge of the in principle agreement and some of the circumstances in which it was made and the terms of it. Again, on that scenario the task would be simpler. However, in the present case the Tribunal has a different situation before it. Not only is there evidence about the in principle agreement but, unlike most cases where without prejudice negotiations break down, the Tribunal is tasked with making a determination having regard to a specific statutory requirement to take into account the interests, proposals, opinions or wishes of one of the parties in relation to the management, use or control of the land over which the proposed development is to occur.

[204] The agreed issues referred to above identify the following contentions in relation to the relevance of the Term Sheet agreement and the benefits to the native title party which were part of it. The parties agree that the native title party is prepared to consider the future act but only on terms acceptable to it and that one of the reasons for their opposition is the failure to agree acceptable terms. The native title party contends that the mining lease should not be granted without an agreement demonstrating a satisfactory working relationship with and respect for them and agreement on protection of heritage, regulation of the grantee party's activities, appropriate involvement of the Martu and reasonable benefits and compensation including relevant 'ownership' of the Project.

[205] The grantee party denies any lack of respect or that such respect is relevant but, most importantly, says the native title party has no right of veto and cannot rely on an alleged inadequacy of commercial terms or terms previously negotiated. It says that it is beyond the jurisdiction of the Tribunal and otherwise improper to take into account any offer of payment or lack of offer of payment.

[206] The grantee party also makes the following points:

- The grantee party says that the native title party's in principle consent to mining (for exploration in 2006 and mining in 2008) which occurred after exhaustive inquiry and negotiation, full inspection and full community meetings is highly relevant. Indeed, it is the principal hurdle for the native title party in now resisting a determination that the act may be done.

- The native title party cannot rely on the fact that the Tribunal has no power to make a condition requiring the payment of compensation or to impose conditions reflecting the previous agreed commercial terms. The grantee party says that the native title party will be entitled to compensation according to law, and that the amount of compensation (whether small or not) that is ultimately determined is irrelevant to the Tribunal's determination. The fact that the native title party now cannot get money or other benefits which they regard as adequate from the procedures of the Act is not something which is relevant.

- The current opposition of the native title party to the mine is solely because acceptable commercial terms are no longer on the table. Their change in attitude is not based on concern about the effect of the act on the s 39(1)(i)-(v) factors and particularly the cultural significance of Lake Disappointment but on the failure to agree acceptable commercial terms There is no reason by virtue of Martu culture, tradition or way of life why the Project cannot proceed.

- The native title party not only does not have a veto but that their wishes cannot be 'paramount'.

[207] The native title party makes the following further points:

- Their wish is that their culture and their right to preserve their land be respected. Their current opposition to the grant is a most powerful factor for the Tribunal to take into account given the cultural significance of Lake Disappointment.

- The in principle agreement was only a step on the way to reaching final agreement which never eventuated and should not now be used to undermine the native title party's current position relating to its interests, proposals, opinions or wishes in relation to the use of the land in the light of the significance of the Lake.

- The fact that they were prepared to negotiate an agreement which involved interference with a traditional site of considerable importance to them other than on terms acceptable to them should not now be used to downgrade their current wishes in relation to the use of the land.

- The fact that the Term Sheet agreement is not on the table and the native title party will only receive what the grantee party asserts is a small amount of compensation under the *Mining Act* is a relevant factor which the Tribunal can take into account.

- Although the reasons for their change of heart about the Project are relevant, the major factors relied on by them are the impact on Martu rights, law, culture and particularly on Lake Disappointment.

[208] Although the specific details of the Term Sheet benefits are not before the Tribunal the general fact that cash payments, royalties and equity in Reward were part of the in principle agreement is in evidence as a result of the public announcements made about them with the approval of both parties.

[209] I make the following findings with respect to the relevance or otherwise of the evidence which is before the Tribunal about the Term Sheet agreement. Under s 39(1)(f) of the Act the Tribunal can have regard to both the fact of the Term Sheet agreement and the known details of the benefits proposed in it in the following way. The fact of the in principle agreement and heritage surveys that were carried out as part of the negotiations are relevant including to assist in the assessment of the level of significance of Lake Disappointment. I also think the level of benefits contemplated by the in principle

agreement are relevant to explain the context in which the native title party was prepared to enter into negotiations and contemplate disturbance of a site of considerable importance to them.

[210] The evidence of Professor Tonkinson supports a finding that traditionally the Lake is an area where no interference would be contemplated by the Martu. The evidence at Jigalong of the traditional importance of the site, especially from Messrs Nyari Morgan, Muuki Taylor and Wakka Taylor, traditional Martu Elders who lived in the desert until approximately 20 years old, reinforces Professor Tonkinson's view. The Martu Elders' affidavit also provides evidence for this point of view. Even though subsequent events confirm that parts of Lake Disappointment are not of the highest level of significance and mining can be permitted on acceptable terms, it is still a very important place for the Martu. The whole of Lake Disappointment is a place of special significance to the Martu in accordance with their traditions and parts of it are of the highest significance and danger to them.

[211] The Martu community along with many Aboriginal communities throughout Australia are in transition from a traditional society to one which accommodates the reality of living among a dominant culture that has little in common with their traditions. As part of this accommodation, the Martu are prepared to contemplate activity on their land which traditionally they would not have agreed to in return for benefits of an appropriate kind. In my view, negotiations about mining on part of Lake Disappointment falls into this category.

[212] The grantee party says there is now no cultural impediment to the future act being done. In my view that is too simplistic a characterisation of the situation. In reality, the issue is more nuanced. It involves the native title party in a compromise which would have seen them give up some of their traditional culture and way of life (including as a result of interference with a place of great importance to them) in return for benefits which would see them and particularly their children involved in the mainstream economy. As a result of the breakdown in negotiations, this compromise is no longer available. They were willing to make serious sacrifices in relation to the integrity of their culture and traditions with prospects of gaining benefits from the Project that assist them to achieve their long term goals of employment, business opportunities and economic advancement. The approach of the Martu Elders is very candidly set out in paragraph 44 of their affidavit about the Project. They express a desire for benefits which will enhance their community and provide jobs and

educational opportunities for their young people. This is not a group of people who expect their culture to be frozen in time. There is a process of adaption to and involvement in the mainstream economy happening to the Martu. But the tenor of their evidence is that they want this to happen in a way that pays respect to their culture and traditions as far as possible.

[213] The Tribunal as a specialist Tribunal is aware that under the right to negotiate it is common place for agreements to be entered into with mining companies that provide for milestone cash payments prior to productive mining and royalty type payments during production. These payments may bear no relationship to and (depending on the circumstances) may be considerably more than the legal entitlement to compensation. The agreement which was being negotiated in the *Australian Manganese/Nyiyaparli* case (at [55]) (see details in paragraph [161] above) is of this kind. Section 33 of the Act also specifically sanctions the possibility that agreement between a native title and grantee party may include royalty type payments.

[214] The clear inference from the evidence is that the native title party would not have permitted exploration or entered into negotiations beyond what it was required to do as part of its obligation to negotiate in good faith, or would not have continued to negotiate, if the only result was going to be a legal entitlement to compensation and not the other benefits that were clearly in contemplation. The expectation of the Martu and their negotiators during the negotiations would have been that, in return for mining on a place that is very special to them, benefits of this kind could be negotiated. What they now say is that the substantial interference with one of their important traditional sites is not acceptable in the light of the limited benefits available to them i.e. effectively for the upgrading of a road and the possibility of some employment and business opportunities.

[215] It is accepted that a native title party under the Act does not have a veto in the sense that they can say ‘no’ to a development proposal and have the Tribunal automatically accept that view no matter what the circumstances. However, they are entitled to say ‘no’ and to have the Tribunal give considerable weight to their view about the use of the land in the context of all the circumstances. In my view this is such a case.

[216] In my view the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the Project proceeding.

[217] In coming to this conclusion I have not ignored the fact that the grantee party has invested considerable time, effort and money in attempting to advance this Project. My determination is no adverse reflection on the grantee party. It negotiated in good faith and complied with the AHA. There is also no evidence that it treated the native title party with disrespect. Despite this negotiations broke down without a final agreement. The Tribunal had to determine the matter by reference to the criteria in the Act. The native title party (as was the grantee) were entitled to take different positions in the inquiry than they adopted during the negotiations.

Determination

[218] The determination of the Tribunal is that the act, namely the grant of mining lease M45/1171 to Holocene Pty Ltd, must not be done.

Hon C J Sumner
Deputy President
27 May 2009