NATIONAL NATIVE TITLE TRIBUNAL

***Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People,* [2010] NNTTA 101 (16 July 2010)**

Application No: WF09/30

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

- and -

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

Australian Manganese Pty Ltd (grantee party/Applicant)

- and -

The State of Western Australia (Government party)

- and -

David Stock and Others on behalf of the Nyiyaparli People (WC05/6) (native title party)

FUTURE ACT DETERMINATION

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 16 July 2010

Catchwords: Native title – future act – application for determination for the grant of mining lease – s 39 criteria considered – limited effect on enjoyment of registered native title rights and interests – no effect on sites of particular significance – nature of a future act – future act comprises the grant of mining lease and endorsements and conditions – possible consequence on validity of future act if endorsements and conditions substantially amended after grant – imposition of Government party's extra condition – determination that the act may be done with conditions.

Legislation: *Native Title Act 1993* (Cth), ss 25-44, 31, 35, 36(2), 38, 39, 146(b), 150, 151, 237
Mining Act 1978 (WA) ss 78, 82, 84, 85
Aboriginal Heritage Act 1972 (WA) s 18

Cases:	*Australian Manganese Pty Ltd v Western Australia and Others* [2008] NNTTA 38; (2008) 218 FLR 387
	Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People, NNTT WF09/30, [2010] NNTTA 53 (16 April 2010), Hon C J Sumner
	Dann v Western Australia & GPA Distributors [1997] FCA 332; (1997) 74 FCR 391; (1997) 144 ALR 1
	Evans v Western Australia [1997] 741 FCA; (1997) 77 FCR 193
	FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia, NNTT WF08/32 and WF08/33, [2009] NNTTA 69 (8 July 2009), Daniel O'Dea
	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 on behalf of the Martu Idja Banyjima People v State of Western Australia [2007] FCA 1027
	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 v Thomas [1996] NNTTA 30; (1996) 133 FLR 124
	Western Desert Lands Aboriginal Corporation v Western Australia and Anor [2009] NNTTA 49; (2009) 232 FLR 169; (2009) 2 ARLR 214
	WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333

Solicitor for the native title party:	Ms Kate Holloman, Pilbara Native Title Service
Solicitor for the Government party:	Ms Sophia Woodrow, State Solicitor's Office
Representative of the Government party:	Ms Paola O'Neill, Department of Mines and Petroleum
Solicitor for the grantee party:	Mr Ken Green, Green Legal Pty Ltd

REASONS FOR FUTURE ACT DETERMINATION

Background

[1] On 7 May 2008, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) (NTA/the Act) of a future act, namely the grant of mining lease M52/1043 (the proposed lease) under the *Mining Act 1978* (WA) to Australian Manganese Pty Ltd (the grantee party).

[2] The proposed lease comprises 998.77 hectares located 30 kilometres southerly of Newman in the Shire of East Pilbara and is 100 per cent overlapped by the registered claim of the Nyiyaparli People (WC05/6, registered from 29 November 2005).

[3] The proposed lease is a future act covered by s 26(1)(c)(i) of the Act and unless the right to negotiate provisions of the Act are complied with (Part 2, Division 3, Subdivision P (ss 25-44)) will be invalid to the extent that it affects native title.

[4] The native title party in respect of these proceedings is Mr David Stock, Mr Gordon Yuline, Mr Raymond Drage, Mr Brian Samson, Mr Victor Parker and Mr Richard Yuline on behalf of the Nyiyaparli People (WC05/6) (the native title party).

[5] On 14 December 2009, 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 the negotiation parties had not been able to reach agreement within six months of the Government party giving notice of intention to do the act.

[6] The native title party challenged the Tribunal's power to make a determination on the basis that the grantee party had not negotiated in good faith (ss 31(1)(b), 36(2) NTA). This challenge was rejected and reasons handed down on 16 April 2010 (*Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People*, NNTT WF09/30, [2010] NNTTA 53 (16 April 2010), Hon C J Sumner (good faith decision).

[7] Following amendments to the original directions for the substantive inquiry, the Government and grantee parties lodged statements of contentions and evidence on 25 March 2010 and the native title party lodged a statement of contentions and evidence in the form of an affidavit from Mr David Stock on 27 April 2010.

[8] On 14 January 2010, at the request of the native title party and with agreement of the Government and grantee parties, I directed the appointment of a Tribunal mediation Member under s 150 of the Act to assist parties in resolving the matter by way of agreement. On 16 April 2010, the mediation Member terminated the s 150 assistance as parties confirmed that no agreement could be reached.

[9] At a Listing Hearing on 27 April 2010 the native title party and grantee party confirmed that no agreement could be reached in the timeframe required by the grantee party. All parties agreed that the matter could proceed 'on the papers' without further hearings, with the Government party and grantee party reserving the right to reply to the native title party's contentions by 4 May 2010, and the native title party reserving the right to respond to the reply. A hearing (if deemed necessary by the Tribunal) was listed for the week commencing 10 May 2010. No reply was received from the Government or grantee parties but on 12 May 2010 the Government party (Ms Paola O'Neill of the Department of Mines and Petroleum (DMP)) made submissions about the endorsements and conditions imposed on the grant of mining leases. At the request of the Tribunal further written submissions on this issue were made by the Government party (State Solicitor's Office (SSO)) on 1 June 2010 and by the grantee party on 3 June 2010 which are dealt with in more detail below. No submissions on this issue were made by the native title party. I am satisfied that this application can be adequately determined 'on the papers' (s 151 NTA).

The Government party's evidence and contentions

[10] Government party documentation establishes the underlying tenure on the proposed lease as 100 per cent vacant crown land.

[11] There are no Aboriginal communities identified within the area or in the near vicinity of the proposed lease.

[12] Department of Indigenous Affairs (DIA) documentation provided by the Government party reveals there are no sites registered under the *Aboriginal Heritage Act 1972* (WA) (AHA) overlapping the area of the proposed lease.

[13] There is no history of mining activity over the area except for two exploration licences which were surrendered and two Temporary Reserves which were cancelled and none of which are of any importance in these proceedings. The area of the proposed lease is

totally overlapped by the grantee party's existing exploration licence E52/1658 and partially by a miscellaneous licence L52/105 granted to it in 2007.

[14] The *Mining Act* entitles the grantee party to exercise the rights set out in s 85 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 of that Act. A mining lease is granted for 21 years and is renewable (*Mining Act* s 78).

[15] The grant of the proposed lease will contain the following endorsements (which differ from conditions in not making the lessee liable to forfeiture for a breach of them):

> '1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
> 2. 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.'

[16] The following 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 Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
> 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, DMP 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, DMP for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.
> 7. The rights of ingress to and egress from Miscellaneous Licence 52/105 being at all times preserved to the licensee and no interference with the purpose or installations connected to the licence.'

Government party's submissions on making the standard conditions and endorsements conditions of the determination

[17] The submissions made by the Government party on 12 May 2010 by DMP and on 1 June 2010 by the SSO related to the imposition of endorsements and conditions on the grant of the mining lease. With respect to the imposition of the standard endorsements and conditions the Government party submitted that these should not be made conditions of the Tribunal's determination. In summary, it said that the endorsements and conditions which are provided to the Tribunal are in draft form only and that circumstances may dictate that they be changed prior to the grant being made. If the endorsements and conditions were to be imposed as conditions of the determination then difficulties would arise if they were amended following grant as the grant would not then comply with the Tribunal's determination and there is no mechanism to amend the Tribunal's determination once it is made.

[18] DMP's submissions in relation to this issue are as follows.

> **'1) Departmental Draft Endorsements and Conditions**
>
> **BACKGROUND:**
>
> By way of a general explanation, draft endorsements and conditions (Draft E&C's) are prepared by the Department after the tenement application has been received. Usually, in the initial instance, standard Draft E&C's are applied.
>
> Generally Draft E&C will not be prepared until after the period for Mining Act objections has closed and if required taking into account decisions/directions from the Warden.
>
> Endorsements and conditions are imposed for compliance with:
>
> - Current government policy
> - Statutory requirements of the Mining Act or other legislation
> - Statutory requirements and obligations of other Departments or agencies in relation to the land encroachments (i.e. reserves and FNA's). This is either by :
>   - Applying agreed conditions that are subject to existing MOU's with other departments, or
>   - Direct consultation with other Departments in relation to various reserves.
>
> Reason for changes to the draft E&C from the day they are initially drafted to the final version (upon grant of the tenement) include:
>
> - a change of government which may have resulted in different Draft E&C's due to policy changes.
> - often there is a long period (many years in some cases) between an application (1st Draft E&C) and the grant of the tenement (final E&C), and circumstances surrounding the tenement application change;
>
> *i.e in the case of WF09/01 involving tenements M47/1409 & M47/1411 from the initial Draft E&C to the Final E&C document there was the removal of a condition in relation to "Threatened Ecological Community Buffer Zone". This came about because the original larger foot print of the Buffer zone imposed by the Department of Conservation had been reassess and reduced in size. Therefore the tenements in question now lay outside the buffer zone.*

> It is an accepted process of the Tenure Officer within Mineral Titles to undertake to perform a re-appraisal of the application prior to grant thus revising the Draft E&C's.
>
> Regardless of the above, the Draft E&C's are always revised and amended prior to the tenement being granted.
>
> **ISSUE:**
>
> If as part of the National Native Tiles Tribunal's Determination of an arbitral S35, the E&C are listed and imposed, the potential issue arises if there is a future need to change the E&C (as in the example above).
>
> There is no current mechanism in place that would ensure the Department is not in breach of the Determination as set by the Tribunal if they change the E&C to reflect new requirements. If this was the case there is also no mechanism in place to request the Tribunal alter amend its decision, thus ensuring the Department was not in breach of the Tribunals Determination.
>
> As the requirement to change E&C might not occur until sometime in the distant future (a mining lease is granted for 21 years and is renewable for further periods), this also increase the potential to breach the Tribunal's Determination.
>
> It would be very labour intensive for both the Department and the Tribunal to alter the Determination to ensure no breaches occur. Given that the occurrence of this requirement would most likely be rare, there is a even higher chance that the Department would omit to request the Tribunal to change its Determination.
>
> It is in the Departments' best interest to have E&C that reflect the current Statutory requirements of various legislation of the State.
>
> Under the circumstance it would be in the best interest of both parties not to impose the Draft E&C as part of the Tribunals Determination.'

[19] The Tribunal considered that this submission raised issues which required clarification and to which the other parties should be given an opportunity to respond. The potential issues which arise with the possibility that the draft endorsements and conditions notified to the Tribunal may be changed prior to the grant were raised by the Tribunal with the Government and other parties in email correspondence on 21 May 2010.

> 'The Tribunal is not aware that it has in the past sought to make a condition of a future act determination that the Government party's standard endorsements or conditions be imposed on the grant of a mining tenement. However, the Tribunal has certainly relied on the endorsements and conditions to be imposed on the grant to assess the nature of the future act and determine whether the future act (with the proposed endorsements and conditions) will cause the interference or disturbance referred to in s 237 of the *Native Title Act 1993* (Cth) (expedited procedure) or should be the subject of a determination that the future act may be done. In both types of inquiry the Government party relies on the regulatory regime governing the grant of the tenement including environmental legislation and the *Aboriginal Heritage Act* 1972 (WA) and processes associated with it. The Government party also relies on the endorsements and conditions to be imposed to contend that the effect of the future act on native title rights and interests and sites of particular significance etc will be minimised.
>
> If the endorsements and conditions are subsequently (prior to grant) altered in any significant way then it could be said that the Tribunal has made a determination on the basis of information which is no longer correct.
>
> The Tribunal also understands that a future act constitutes not only the actual grant of a tenement but the endorsement and conditions which are attached to it (see *Dann v Western Australia & GPA Distributors* [1997] FCA 332; (1997) 74 FCR 391; (1997) 144 ALR 1, Wilcox, Tamberlin, RD Nicholson JJ, 8 May 1997). The Tribunal must consider 'the relevant terms and conditions of the licence itself and also the statutory rights and obligations which arise on the grant of such a licence' (per Tamberlin J at FCR 400) (see also *Jack Dann*

& Ors/Western Australia/GPA Distributors Pty Ltd, NNTT WO95/19, [1997] NNTTA 20 (10 June 1997), Hon C J Sumner at pps 10-12).

The Tribunal is, therefore, of the preliminary view that if a substantial change is later made to the endorsements or conditions which were proposed by the Government party at the time of a Tribunal determination then the possibility exists that either:

- the Tribunal has made a determination based on incorrect information as to the future act; or
- the Tribunal has not made a determination in relation to the future act at all because the future act eventually done by the Government party is different from that originally proposed and considered by the Tribunal.

The Tribunal is unaware of any mechanisms under the *Native Title Act* to deal with a situation where the future act proposed by the Government is substantially changed except to recommence the s 29 process.'

[20] The SSO's response of 1 June 2010 made the following additional points.

- The endorsements and conditions which the Government party informs the Tribunal it proposes to impose are necessarily in draft form until the grant of the mining tenement and may be altered at any time prior to grant.
- Factors which can cause changes to the draft endorsements and conditions are:
  - relevant legislative change;
  - major changes to government policy, such as concerning the mining of uranium;
  - changes in the information upon which the draft endorsements and conditions are based, such as changes in tenure or other interests in land as revealed by revisions of the Tengraph system; or
  - new or updated information is provided to the Government party, such as the provision of a program of works/mining proposal by the grantee party.
- At the time of lodging its contentions for a future act determination application the Government party provides the latest draft endorsements and conditions.
- If prior to a determination being made the Government becomes aware of any changes to the draft endorsements and conditions it undertakes to provide a further draft of them to the Tribunal and parties, thus ensuring that a determination is made on the basis of the most current information.
- Any changes made post determination are generally minor and in the Government party's experience generally involves the imposition of more, rather than less, stringent endorsements and conditions.

[21] With respect to the present matter the Government party has advised that it does not intend to alter the draft endorsements and conditions attaching to the grant of M52/1043 in any significant way. The only potential alteration would be to add further more stringent conditions relating to environmental matters. Whether this happens is dependent on the assessment carried out of the grantee party's program of works by the Director of Environment at DMP and any recommendations that further conditions be imposed in accordance with s 84 of the *Mining Act*. Section 84 empowers the Minister to impose reasonable conditions for the purpose of preventing or reducing, or making good, injury to the natural surface of the relevant land or injury to anything on the natural surface of that land or consequential damage to any other land.

[22] The SSO says that the program of works has not been submitted or assessed as yet because the grantee party is only required to provide a program of works/mining proposal for approval prior to commencing any developmental or productive or construction activity. The grantee party's proposal has not reached this final stage yet, even though its general nature and the use of the mining lease area and the nature of the land disturbance is before the Tribunal.

[23] The Government party does not expect the program of works to be provided until after the grant of M52/1043 (should it be granted) and any alteration to the draft endorsements and conditions would not occur until then.

[24] The Government party submits that the imposition of further more stringent environmental conditions (which is the only alteration to the draft which may occur) would minimise and not in any way increase the effect of the future act on the factors in s 39(1)(a) of the Act. Neither would the grant of the proposed lease be significantly different in any material respect from that considered by the Tribunal and upon which the Tribunal's determination is based. The SSO submitted that on the basis of the information provided in relation to the Government party's intentions in respect of the grant of the proposed lease it was not necessary to address the wider legal issues in the Tribunal's email of 21 May 2010. I agree with this submission. On the basis of this information from the Government party I have made this determination on the basis that the above standard endorsements and conditions will be imposed and that any additional conditions will add to, not detract from, the regulatory regime relevant to whether the future act will affect the factors referred to in s 39(1)(a) of the Act.

[25] The Government and grantee parties customarily rely on the terms of a mining lease grant, including endorsements and conditions to be imposed and the related regulatory regime in the *Mining Act* and other legislation to contend that the effect on the grant on the factors in s 39(1)(a) of the Act will be minimised. The draft endorsements and conditions (standard or otherwise) are usually a central element of the Government party's case and it is highly desirable that the Tribunal is aware of the Government party's intentions in this respect at the time it makes a determination. The undertaking given by the Government party will ensure that the evidence is current at that time.

[26] Unless evidence is produced in a particular case to justify making any of the Government party's proposed endorsements or conditions, conditions of the Tribunal's determination, the Tribunal will continue with its current practice of not imposing such conditions but relying on the full circumstances of the grant (including any proposed endorsements and conditions which the Government party undertakes to impose and the general regulatory regime applicable to the grant) in making its determination.

[27] Although there appears to be no practical problem at present, for the reasons already outlined, the Government party may need to consider whether a grant of a mining tenement could validly be made if there were substantial changes to the nature of the grant after a Tribunal determination such as to give rise to the concerns expressed by the Tribunal.

[28] On 3 June 2010, Mr Green for the grantee party provided brief comments on the wider legal issues. With respect to Mr Green's comments on the effect of changes to the Government party's draft endorsements and conditions prior to a determination I am satisfied that this matter is satisfactorily resolved in a practical way by the undertaking in the SSO's letter of 1 June 2010 that the Government party 'undertakes to provide a copy of further updated draft Endorsements and Conditions to the Tribunal and the Parties' where factors emerge which necessitate a change to the draft originally provided.

[29] Mr Green also commented on the Tribunal's understanding that a future act constitutes not only the actual grant but the endorsements and conditions attached to it which the Tribunal said in its email to parties was based on the Federal Court decision in *Dann v Western Australia & GPA Distributors* [1997] FCA 332; (1997) 74 FCR 391; (1997) 144 ALR 1, Wilcox, Tamberlin, RD Nicholson JJ, 8 May 1997 (*Dann*). The grantee party does not agree with the Tribunal's understanding. In summary, Mr Green says that in the case of the grant of a mining tenement under the *Mining Act* the future act is the grant of the relevant

mining tenement subject to any applicable discretions or powers under that Act. By way of example, if at a later time the Minister responsible for the *Mining Act* exercises a discretion to alter an endorsement or condition that action does not constitute a new future act because the original future act (i.e. the grant of the mining tenement in its original form) was at all times subject to that discretion. Mr Green notes that the s 29 notice does not include reference to endorsements or conditions.

[30] The grantee party accepts that the Tribunal may have regard to evidence of the intentions of both the Government and grantee parties (including in relation to the imposition of endorsements and conditions by the Government party) in making the predictive assessment required by s 237 of the Act in the case of an expedited procedure objection inquiry or in considering the effect of a future act on the matters set out in s 39(1)(a) of the Act in a future act determination inquiry. However, he says there is no guarantee that the intentions may not change and if they do it does not mean that the future act which is proposed to be done is different from that which was proposed in the s 29 notice. The grantee party submits that a subsequent change of intention does not render the future act invalid nor does it result in a new or different act because any change is contemplated by the s 29 notice and is within the power of the Minister to make, particularly in relation to the imposition of endorsements and conditions.

[31] While it is not necessary to analyse this issue in detail in these proceedings the Tribunal considers there are arguments to suggest that the validity of a future act could be called into question in circumstances where substantial change was made post grant to the endorsements and conditions (and other aspects of the Government party's regulatory regime) originally considered and relied on by the Tribunal.

[32] The Tribunal reaffirms its understanding that the Federal Court decision in *Dann* provides support for the position advanced in the Tribunal's email of 21 May 2010 where, for example, RD Nicholson J said (at p 411):

> 'To apply the section it is necessary to ascertain the nature of "the act" by having regard to the relevant act. In the case of an exploration licence that will involve regard being had to the terms and conditions of the exploration licence. That in turn requires reference to the *Mining Act* and any legislation affecting directly the content of those rights (for example, as posited in submissions, state legislation making such rights unexercisable in relation to Aboriginal sites within s 237(b)). Only in that way will there be a true understanding of the legal character of "the act" so that it can be assessed in the terms of the section according to its nature.

> In my opinion it would be artificial to restrict the understanding of "the act" in the case of the grant of an exploration licence solely to the terms and conditions spelt out in that licence. The licence is a creature of the *Mining Act*. It can only properly be understood by reading it with that Act.'

[33] However, the Tribunal agrees with the grantee party's submission that it is a matter for the Government party to decide whether the grant of a particular mining tenement is a future act and requires the right to negotiate provisions of the Act to be followed to ensure its validity. Any challenge based on a failure to do so and to the validity of a future act would need to be made in a Court by an affected party.

[34] In summary, the practical issues raised by DMP are resolved by the Tribunal continuing its practice of not generally making the Government party's proposed endorsements and conditions, conditions of a determination. The broader legal issues relating to the potential affect of a substantial change to the intended endorsements or conditions on the validity of a future act is a matter for the Government party to consider but is unlikely to be an issue in practice given the Government party's submissions that any changes which are made are usually of a minor nature and often increase not diminish the regulatory requirements.

Government party's submissions on 'extra conditions'

[35] The Government party has proposed the following four 'extra conditions' on the grant of the proposed lease which are said to be for discussion with the grantee and native title parties. Unlike the standard endorsements and conditions there is no undertaking from the Government party that the extra conditions will be imposed (see below):

- '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, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safe guard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his assessment and written approval; the grantee party must at the same time give to the native title party a copy of proposal or addendums, 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.'

[36] The status of the Government party's extra conditions was the subject of submissions from the Government party affirming that the Government party would not impose them on the grant as a matter of course. In *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia*, NNTT WF08/32 and WF08/33, [2009] NNTTA 69 (8 July 2009) at [22]-[24] (*FMG/Pilbara*) Member Daniel O'Dea considered this issue. In my experience the contentions of the Government party with respect to the extra conditions, in previous matters, have always said that the Government party proposes to impose them as conditions on the grant of the mining lease. Consequently, the Tribunal had, until Member O'Dea's determination, always been of the view that the Government party would impose these extra conditions when indicated in its contentions in future act determinations inquiries.

[37] For example in the case of *Australian Manganese Pty Ltd v Western Australia and Others* [2008] NNTTA 38; (2008) 218 FLR 387 (3 April 2008) I noted that:

- the supplementary (extra) conditions would be imposed by the Government party; (at [22]) and

- it was appropriate to make a determination without conditions because of the Government party's undertaking to impose the extra conditions but 'if the Government party was not going to impose them I would have made conditions to a similar effect' (at [70]).

In the event the grant of mining lease M52/1034 the subject of the Tribunal's determination in *Australian Manganese* – did not include the extra conditions

[38] As explained by Member O'Dea the extra conditions (as opposed to the standard conditions) are not necessarily imposed by the Government party as a condition of the grant but are now only an offer to impose them which needs to be responded to by the other parties. Correspondence from the SSO to the Registrar of the Tribunal of 3 July 2009, which was considered by Member O'Dea says that the extra conditions are not (and never have been) imposed as a matter of course. The letter further says that to the extent that the Government party's contentions may suggest otherwise by saying that the Government party 'also proposes to impose' the extra conditions on the grant, this was unintended. I note in passing that the SSO's assertion that it had never been the Government party's intention to impose the extra conditions as a matter of course needs to be qualified in the light of the clear

assertion by the Government party in *Australian Manganese* that the extra conditions would be imposed which is recorded in the Tribunal's reasons for determination and upon which it relied.

[39] While the Government party's intentions have now been clarified it is regrettable that the Government party's previous contentions on this topic have led to a situation where a grant of at least one mining lease (M52/1034) has been made without the extra conditions that the Tribunal was advised would be imposed by the Government party and which the Tribunal refrained from imposing because of the Government party's undertaking. Consideration of the Tribunal's determination in *Australia Manganese* should have alerted the Government party to the issue and in my view the Government party should have granted M52/1034 with the extra conditions even if it wanted to modify its policy in relation to future matters. The determination of the Tribunal was made specifically taking into account that the extra conditions would, as the Government party advised at the time of the determination, be imposed.

[40] The Government party's position in the present matter is that it would not object to the imposition of the extra conditions by the Tribunal as conditions of the determination should the Tribunal consider it necessary to do so but 'notes that no case for this has been made by the other parties'. For the reasons which follow I consider the extra conditions should be imposed. They partially reflect the proposals and wishes of the native title party and will provide a mechanism to involve the native title party in discussions about the potential impact of mining on the matters referred to in s 39(1)(a) of the Act.

The grantee party's evidence

[41] Proposed mining lease M52/1043 is part of the Davidson Creek Iron Ore Project in the Pilbara area of Western Australia which is an area of intensive iron ore exploration and production. Documentation provided by the grantee party comprises a statement of contentions (GPSC) and supporting evidence including all the documents tendered for the good faith decision which were received without objection from the native title party. Further documents were provided specifically for this determination.

[42] The documents include the Robertson Range Iron Ore Project Mining Proposal M52/1034 (Ecologia environment, December 2007). Following the Tribunal's determination in *Australian Manganese* mining lease M52/1034 was granted to the grantee party on 23 April 2009. It is located some 20 kilometres to the south-east of the proposed lease area.

The Robertson Range Project is closely related to the Davidson Creek Project and has in common miscellaneous licence L52/104 for a haulage road from the mine site to the BHP Billiton Jimblebar siding and thence by rail to Port Hedland. The Robertson Range Project is described in *Australian Manganese* at [6]-[7] and [23]-[25] which is adopted for the purpose of these proceedings.

[43] According to the FerrAus Limited Davidson Creek Iron Ore Project Mining Statement prepared by the grantee party to meet requirements of the *Mining Act* for the proposed lease, iron ore mining will occur by conventional open pit mining practices, with multiple staged pit operations utilizing drill and blast techniques followed by conventional crushing and screening to prepare the product for shipping. The indicative mining infrastructure plan shows the preliminary pit design which, with the associated waste dump, stockpile area, crushing plant and other infrastructure, takes up a substantial portion of the proposed lease area.

The native title party's evidence

[44] The native title party submitted a statement of contentions (NTPSC) and the affirmed affidavit of Mr David Stock dated 27 April 2010 (DS affidavit).

[45] Affidavit of David Stock:

> 'I, David Stock of 12a Becker Court, South Hedland in the State of Western Australia, elder, hereby affirm:
>
> 1. My Aboriginal name is Yantikuji. My skin is Milangka. I am an applicant on the Nyiyaparli native title claim WAD 6280 of 1998 ("the Nyiyaparli claim"). I was born out bush at Roy Hill Station which is in the Nyiyaparli claim area.
> 2. I am a senior law man for the Nyiyaparli people and know the Nyiyaparli traditional laws and customs. I learnt these from my parents and other Nyiyaparli elders. I went through the law during the Japanese War at Marillana in the Nyiyaparli claim area. I later went through a higher stage of the law at Jigalong in Nyiyaparli country. I speak the Nyiyaparli language well.
> 3. Nyiyaparli people are the people who hold rights in Nyiyaparli claim area under our Nyiyaparli traditional laws and customs. I have been taught by the Nyiyaparli elders that all of the area we have claimed in the Nyiyaparli claim has been our Nyiyaparli country since it was created.
> 4. The laws and customs of the Nyiyaparli people have all been set down by the Mangunpa when the world was created, like what other people call the dreamtime. Desert people call it Jukurrpa. The Mangunpa put the law in the Nyiyaparli country. Nyiyaparli people have been taught the laws from the Mangunpa by their elders and have passed it on to their children. This was from long before whitefellas came to our country. Nyiyaparli people have always been taught to follow these laws and still follow them today.

5. These Mangunpa laws tell us what we can do on our country and rules about who can do it and how we do it. These laws put down rules for our ceremonies when boys become men. The Mangunpa laws also tell us such things as our skin groups, who we can marry and who we must stay away from. These are also laws about how we prepare and cook tucker and about times when certain people cannot eat some animals. We still follow and teach our children these ways.

6. Many important places in Nyiyaparli country were made by old spirit people called the Mangunpa. There are stories about these that have been passed down. I also know and can sing songs about such things. Who can learn which stories and songs also depends on the laws about them. Some things can only be learned when you have gone right through the Law. We have always been taught that we must look after these places and respect them. I visit Nyiyaparli country often and check to make sure that such places are fine.

7. Nyiyaparli people have to be descended from a Nyiyaparli person. The Nyiyaparli ancestors we have named in the papers for our claim are the names of the ancestors of Nyiyaparli people today. They all come from families of the Nyiyaparli people who were the people belonging to Nyiyaparli country from when that country was created in the Mangunpa time. This is what we have been taught.

8. My grandfather Minturamunha is one of the ancestors for the Nyiyaparli people. Minturamunha was a Nyiyparli man. My mother and other old people told me about him. He was named after a place called Minturamanha in the Nyiyaparli claim area at Mount Newman. That is now a special place for me. It was handed to me though my mother Walapa who was Minturamunha's daughter. She was a Nyiyaparli woman and taught me many things about Nyiyaparli country.

9. Though I have special places, I am also connected with all of Nyiyparli country and can travel around to other places because I am Nyiyaparli.

10. I have been informed by Kate Holloman, the Nyiyaparli lawyer at Yamatji Marlpa Aboriginal Corporation, also known in the Pilbara as Pilbara Native Title Service (PNTS), that the Company, Australian Manganese Pty Ltd (AMPL) has applied for mining lease M52/1043. I have been told by Kate Holloman that this mining lease application is outside the Jigalong Reserve and near Davidson Creek.

11. I have been right round that Davidson Creek area. That's a place where we hunt all sorts of bush tucker like emu (*Tjarnkuna*), plains kangarro (*Warinpa*), goanna (*Marantu*) and bush turkey.

12. It is getting very hard for us (Nyiyaparli) now to do the things we like to do on country because of all the mining. Sometimes we are not allowed to do the things we like to do like hunting and camping.'

[46] The evidence is uncontested by the Government and grantee parties and I accept it. Mr David Stock is named as one of the persons comprising the applicant for native title on behalf of the Nyiyaparli People. I accept Mr Stock has authority to speak on behalf of the native title party for the area of the proposed lease.

Legal principles

[47] 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*).

[48] Section 38 of the Act sets out the types of determination that can be made being a determination that the act must not be done or may be done with or without conditions. No condition can be imposed entitling a native title party to payments worked out by reference to the amount of profit made, income derived or things produced by the grantee party (s 38(2)).

[49] 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.'

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

[50] The following rights and interests have been registered in respect of the area of the proposed lease (designated Area A on the Register of Native Title Claims):

'(1) The right to possess, occupy, use and enjoy the area as against the whole world;

(2) A right to occupy the area;

(3) A right to use the area;

(4) A right to enjoy the area;

(5) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

(6) A right to control access of others to the area;

(7) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and

(8) A right to control the taking, use and enjoyment by others of the resources of the area.

(9) A right to hunt in the area;

(10) A right to fish in the area;

(11) A right to take fauna; and

(12) A right to take traditional resources, other than minerals and petroleum from the area.

(13) A right to be present on or within the area;

(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;

(16) A right of access to the area;

(17) A right to live within the area;

(18) A right to erect shelters upon or within the area;

(19) A right to camp upon or within the area;

(20) A right to move about the area;

(21) A right to engage in cultural activities within the area;

(22) A right to conduct and participate in ceremonies and meetings within the area;

(23) A right to visit, care for and maintain places of importance and protect them from physical harm;

(24) A right to take flora (including timber);

(25) A right to take soil;

(26) A right to take sand;

(27) A right to take stone and/or flint;

(28) A right to take clay;

(29) A right to take gravel;

(30) A right to take ochre;

(31) A right to take water;

(32) A right to manufacture traditional items from the resources of the area;

(33) A right to trade in the resources of the area; and

(34) A right to maintain, conserve and protect significant places and objects located within the area.'

[51] There is no evidence of any prior extinguishment of native title over any part of the proposed lease area or evidence of any prior interest (such as a pastoral lease) which would have partially extinguished any native title rights and interests. The capacity of the native title party to exercise their native title rights and interests does not appear to have been restricted by activities of other persons such as pastoralists or miners in the past but despite this there is limited evidence of the exercise or enjoyment of native title rights and interests over the proposed lease area.

[52] There is also no dispute that at law the non-extinguishment principle applies to the grant of a mining lease. However, in practice, depending on the nature of proposed activity the grant of a mining lease could for all practical purposes mean that the native title party is unable to enjoy its native title rights and interests over the area where active mining is taking place. This is such a case. The grantee party's proposal is for an open cut mine in the middle part of the proposed lease area. The Government party's first proposed extra condition which I intend to make a condition of the determination will ameliorate this affect to some extent in that access to the balance of the mining lease area is not prohibited. However, I can safely find that over the area of mining activity and in the near vicinity the capacity to exercise and enjoy native title rights and interests will in practice be substantially curtailed for the duration of the mining activity.

[53] The Tribunal's task is to examine the native title rights and interests which are enjoyed by the native title party over the relevant area and which would be affected by the mining proposal. The matter is not considered on a worst case scenario where all the

registered or determined rights are assumed to exist and exercised or enjoyed equally over the whole of the claim or determined area (*Australian Manganese* [36]-[39] and cases cited therein).

[54] The evidence of the actual enjoyment of native title rights and interests by the Nyiyaparli People is quite limited. Mr Stock identifies the 'Davidson Creek area' as 'a place where we hunt all sorts of bush tucker like emu (Tjarnkuna), plains kangaroo (Warinpa), goanna (Marantu) and bush turkey' (DS affidavit para 11). While I can accept that the mining lease falls within the Davidson Creek area as described by Mr Stock, his evidence of the enjoyment of native title rights is quite general and does not indicate the frequency with which the activities are carried out or the number of persons involved. There is nothing which singles out the area of the proposed lease as an area where native title rights and interests are enjoyed to a greater extent than elsewhere in the claim area.

[55] I am satisfied that a number of the claimed rights based on the right to access and use the area will be affected but the only one where the enjoyment of them will be specifically affected based on the evidence of Mr Stock is the right to hunt. In addition to the right to hunt I accept that a number of other claimed rights will be adversely affected including the right to possess, occupy, use and enjoy the area of the proposed lease 'as against the whole world', the right to make decisions about the use of the proposed mining area and the right to control access. Other rights and interests would also be affected but there is no evidence of their actual enjoyment over the area at the present time (such as the right to live, erect shelters and the right to camp). My finding is that the mining lease will have an effect on the limited native title rights and interests which are currently enjoyed in the area.

[56] The native title party proposed a number of conditions to permit access to the mining lease area subject to safety considerations, certain conditions and prohibitions on their activities, and compliance with directions of grantee party officers in relation to the mine operations and health & safety.

[57] In my view the detailed conditions sought by the native title party are not necessary to secure the native title party's reasonable access to the area of the proposed lease. This can be achieved by the imposition of the Government party's first 'extra condition' which will be made a condition of the determination.

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

[58] There is insufficient evidence provided by the native title party about the way of life, culture and traditions enjoyed within the area of the proposed lease to support a conclusion that the grant of the proposed lease will affect the native title party except as already described in relation to s 39(1)(a)(i).

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

[59] Although not providing any evidence specific to this factor, the native title party contends that in the absence of any agreement with the grantee party, 'Nyiyaparli fails to see how the grant of M52/1043 will have a beneficial rather than adverse effect upon the development of any social, cultural and economic structures of Nyiyaparli' (NTPSC para 4.1). The grantee party considers that the effect on the development of the social, cultural and economic structures of the native title party, if any, will be beneficial rather than adverse as development may bring increased community facilities and employment opportunities that would otherwise not be available (GPSC para 7.2). The grantee party contends that social, cultural and economic structure benefits are likely to arise from employment, business development and the development of regional infrastructure such as the proposal for the Jigalong Community's water supply from the grantee party's borefields which are likely to benefit the native title party.

[60] The Tribunal has held that any positive effect of a future act can be taken into account (*Waljen* at 170). However, the development of the facilities and opportunities referred to by the grantee party, and whether the native title party would be in a position to take advantage of them, is not certain at this stage as no final agreement has been entered into. The native title party says that the water supply project to Jigalong community is not related to the grant of the proposed lease and that only a few Nyiyaparli people are resident there (NTPSC para 4.2). The grantee party's borefields have been developed to service both Projects including the Davidson Creek Project and if the Projects proceed I consider that the provision of water to the Jigalong community will be of some benefit to the Nyiyaparli people some of whom at least reside at Jigalong. However, the weight I can give to any potential beneficial effect of the Project is not great given the failure to reach agreement about the Davidson Creek Project and the uncertainty about whether the Projects will be realised.

Section 39(1)(a)(iv) - freedom of access - freedom to carry out rites/ceremonies

[61] The native title party draws the Tribunal's attention to a registered, open access and no gender restriction, ceremonial camp site identified as *Mirrin Mirrin* (DIA site ID 18479) which Tribunal mapping locates approximately 5 kilometres north of the proposed lease and contends that the activities to be conducted under the proposed lease may include impediments to the carrying out of rites and ceremonies in the vicinity of M52/1043 (NTPSC para 5.2). There is no direct evidence from the native title party (Mr Stock) that rites, ceremonies or other activities of traditional cultural significance are currently carried out in or around the vicinity of the proposed lease (including at the *Mirrin Mirrin* site). In any event given its distance from the proposed mining lease area I do not consider that access to the *Mirrin Mirrin* site or the conduct of any ceremonies at it will be restricted by the mining lease grant.

[62] In general, as already explained, access to the area of actual mining will in practice be restricted but continuing access to some of the area at least will be preserved by the Government party's first proposed extra condition.

Section 39(1)(a)(v) - sites of particular significance

[63] There are no Aboriginal sites recorded on the Department of Indigenous Affairs (DIA) Site Register for the purposes of the *Aboriginal Heritage Act 1972* (WA) on the proposed lease area. I accept that the Site Register is not an exhaustive list of all Aboriginal sites and that other sites might exist and be affected by activities on the proposed lease. However, there is no evidence provided by the native title party identifying other sites in the area of the proposed lease. Mr Stock (paras 6 and 9) refers to important and special places in Nyiyaparli country which must be looked after and respected. I can accept that such places exist but there is no evidence of them specifically in or around the proposed lease area. Further, the DIA Site Register refers to three heritage surveys (ethnographic and archaeological) undertaken in relation to other developments which encompassed the area of the proposed lease and which did not identify any Aboriginal sites covered by the AHA.

[64] The evidence of Mr Stock (para 8) suggests that the area described as Minturamanha in the Nyiyaparli claim area at Mount Newman is a place of special significance to him because his father was named after Minturamanha in accordance with the native title party's traditions. Mount Newman is some considerable distance from the proposed lease area and this site will not be affected by the proposed mining operations.

[65] The Tribunal has, on numerous occasions, considered the protective provisions of the *Aboriginal Heritage Act 1972* (WA) (AHA). Pursuant to s 146(b) of the Act 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 [31]–[38], [40]-[41]. (See also the Federal Court dismissal of a native title party appeal from this determination in *Parker on behalf of the Martu Idja Banyjima People v State of Western Australia* [2007] FCA 1027 and *Parker v State of Western Australia* [2008] FCAFC 23; (2008) 167 FCR 340.) These provisions and the grantee party's attitude to Aboriginal site protection were also summarised in *Australian Manganese* at [52]-[54] and I adopt these findings for the purposes of this determination. There is no evidence of any sites of particular significance to the native title party over the relevant area which might be affected and I am satisfied that the processes of the AHA and the Government party's extra condition two will ensure that any sites are identified and any affect on them minimised.

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

[66] The native title party says it communicated its proposals, opinions and wishes to the grantee party in the form of a draft 'Native Title Mining Agreement – Davidson Creek Iron Ore Project' on 22 March 2010 (NTPSC para 7.2). They say that the draft agreement provided for Nyiyaparli's consent to M52/1043 in exchange for the grantee party's commitment to among other things 'a land access protocol; cultural heritage protocol; cross cultural awareness programs to be provided by Nyiyaparli; employment, training and education provisions; business development opportunities; financial benefits and environmental management' (NTPSC para 7.3). The native title party further says they wish to be involved at all stages of the grantee party's mining operations in order to build a relationship with the company and minimise the adverse effect of the grant on their native title rights and interests (NTPSC para 7.4). This involvement should go beyond written notification of any development activity and include the convening of meetings between them and the grantee party (NTPSC para 7.5).

[67] Although the draft agreement of 22 March 2010 is not formally in evidence a draft Land Access Agreement proposed by the grantee party and a precedent mining agreement proposed by the native title party were exchanged as part of the good faith negotiations and are before the Tribunal (see good faith decision at [38] and [47]-[48]). These draft

agreements deal with the sort of topics covered by the native title party's draft agreement of 22 March 2010 and in general terms I can infer that they reflect the sort of topics which the native title party would wish to see in any agreement. The evidence establishes that the native title party is not opposed to mining but only wishes it to proceed if a satisfactory agreement with the grantee party can be entered into. The law is clear that a native title party does not have a right of veto over a mining proposal under the *Native Title Act* (*Australian Manganese* at 407-409 [55]-[57] and 412-413 [71]-[72]). While the Tribunal is obliged to have regard to the native title party's interests, proposals, opinions or wishes, the fact that it has not been able to negotiate an agreement satisfactory to it is not on its own sufficient justification for a determination that the mining lease cannot be granted. If no agreement can be reached the Tribunal must make a determination taking into account the evidence relating to all factors referred to in s 39(1)(a) of the Act (*Western Desert Lands Aboriginal Corporation v Western Australia and Anor* [2009] NNTTA 49; (2009) 232 FLR 169; (2009) 2 ARLR 214 at [162]-[163]).

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

[68] Both the Government party and grantee party have provided information regarding the economic benefits to the community. The Government party contends that the grant of the proposed lease will benefit the State through royalty payments and export income as will likely benefit the local economy in and around the towns of the Shire of East Pilbara and the Pilbara generally.

[69] The grantee party contends that the grant of the proposed lease will assist the local economy by allowing the improved management and development of a local resource and minerals and engaging local communities (including the local Aboriginal community) to provide services for the Project; the State of Western Australia by the payment of royalties; and Australia generally by the earning of foreign capital from the sale of iron ore and enhancing the national tax base (GPSC para 11).

[70] I adopt the Tribunal's findings in *Waljen* at 215-216 on the significance of the mining industry to Western Australia. The Davidson Creek Project involves exploitation of a mineral resource and I accept the Government and grantee parties' contentions as to its economic significance with one qualification. As explained above, it is not clear the extent to which the local Aboriginal community will benefit particularly in the absence of any final

agreement (including financial benefits) between the native title party and grantee party and little weight has been given to this alleged benefit.

Section 39(1)(e) - public interest

[71] The grantee party considers that the use, development and management of a local resource is in the public interest (GPSC para 12). The Government party says the public interest is served by the development of a mine or mines over the area of the proposed lease as a result of the economic benefits on a local, state and national level. I am satisfied that the public interest is served by the development of the proposed mine and its potential economic significance (*Evans* at 214-215 and *Waljen* at 215-216).

Section 39(1)(f) - any other relevant matter

[72] Pursuant to s 146(b) of the Act I adopt the findings in relation to the environmental protection regime in Western Australia.

- *Waljen* (at 212-214) from the heading '(iii) Section 39(1)(a)(vi)' up to the heading 'Evidence'; and
- *Koara 2* (at 24-27) commencing with the words 'Under the *Environmental Protection Act* 1986 (WA)' and concluding with 'other than the Murrin Murrin project'.

[73] The environmental controls imposed by the Government party can be taken into account under this heading because they may assist to ameliorate the effect of the future act on some of the factors in s 39(1)(a). Due to the lack of evidence from the native title party, it is impossible to consider the environmental controls as they relate to the factors in s 39(1)(a) in any specific way. Nevertheless, as with all mining operations, I accept that operations conducted under the proposed lease will be subject to the Government party's overall environmental management regime described previously by the Tribunal (see for example *Waljen* at 212-214 and *Koara No. 2* at 24-27). There is no basis to suggest that the grantee party will not behave in a regular and proper manner and adhere to the endorsements, conditions and extra conditions placed on the grant of the proposed lease.

[74] Furthermore, the Government party's third extra condition which requires the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity will enable the native title party to raise any concerns with the Government and grantee parties. I am satisfied that any

amendment to the grantee party's proposal which increases the footprint of the activity would be covered by this condition.

Section 39(2) – existing non-native title rights and interests

[75] As noted previously, the area of the proposed lease is vacant crown land and as such, there are no relevant non-native title rights and interests in the area except exploration licence E52/1658 held by the grantee party which has involved expenditure by the grantee party to prove up the resource and to which I have had regard.

Conditions

[76] The Tribunal has on a number of occasions considered at length the issue of conditions relating to compensation (see *Australian Manganese* at [64] to [68] for a list of cases and summary) which are adopted for the purposes of this determination. The native title party has not contended that a condition for this purpose should be imposed. There is no evidence to justify a condition for a bank guarantee (s 42(5) NTA) or an amount of money to be paid into trust (s 42(5B) NTA) on account of any future claim for compensation. Any right to claim compensation for the affect of this future act on native title rights and interests could be pursued if the native title party is successful in obtaining a determination of native title.

[77] For the reasons already explained, I propose to impose the Government party's extra conditions but do not consider any others are justified by the evidence. In particular, the evidence of the effect of the future act, the enjoyment of native title rights and interests and other factors in s 39(1)(a) is quite limited in this matter.

Conclusion

[78] 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 generally 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 and I have had only slight regard to this potential.

[79] Importantly the native title party is not opposed to mining. It will have the opportunity to make submissions to the Government and grantee parties on aspects of the Project involving environmental issues and heritage protection.

Determination

[80] The determination of the Tribunal is that the act, namely the grant of Mining Lease M52/1043 to Australian Manganese Pty Ltd, may be done subject to the following conditions:

(1) 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.

(2) 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.

(3) Where, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safe guard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his assessment and written approval; the grantee party must at the same time give to the native title party a copy of the proposal or addendums, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.

(4) Upon assignment of the mining lease the assignee shall be bound by these conditions.

Hon C J Sumner
Deputy President
16 July 2010