NATIONAL NATIVE TITLE TRIBUNAL

***Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia* [2013] NNTT 9 (1 February 2013)**

Application No: WF2012/0014

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

- and -

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

Backreef Oil Pty Ltd (first grantee party/first applicant)

- and -

Oil Basins Ltd (second grantee party/second applicant)

- and -

JW (name withheld) and others on behalf of Nyikina and Mangala (WC1999/025) (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE SUBJECT TO CONDITIONS

Tribunal:	Helen Shurven, Member
Place:	Perth
Date of decision:	1 February 2013 (Corrigendum dated 7 February 2013)
Hearing dates:	On the papers

CORRIGENDUM

Correction to the Future Act Determination made on 1 February 2013, at:

- paragraph 71, page 30, the words ‘As the native title party has party elected not to address the issue’ are corrected to read ‘As the native title party has elected not to address the issue’

- Annexure One, Condition 1.1, definition of ‘Exploration’, the words ‘Without limiting the foregoing, any activity or thing authorities to be done’ are corrected to read ‘Without limiting the foregoing, any activity or thing authorised to be done’

- Annexure One, Condition 1.1, definition of ‘Native Title Claim’, the reference number ‘WAD6099/’ is replaced with ‘WAD6099/1998’

- Annexure One, Condition 2.2, the words ‘of the Native Title Party’ are corrected to read ‘if the Native Title Party’

- Annexure One, Condition 5.3(a), the words ‘up to eight (8) Native Title Party for each day of the survey’ are corrected to read ‘up to eight (8) members of the Native Title Party for each day of the survey’

- Annexure One, Condition 5.8, the words ‘Within 90 days or receiving the HIA Notice’ are corrected to read ‘Within 90 days of receiving the HIA Notice’

- Annexure One, Condition 7.3, the words ‘as a result of the conduct of a conduct of a Field Inspection or Work Program Clearance Survey’ are corrected to read ‘as a result of the conduct of a Field Inspection or Work Program Clearance Survey’

Helen Shurven
Member
7 February 2013

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FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE SUBJECT TO CONDITIONS

Tribunal: Helen Shurven, Member
Place: Perth
Date of decision: 1 February 2013
Hearing dates: On the papers

Catchwords: Native title – future act – application for determination for the grant of a petroleum exploration permit – s 39 criteria considered – effect on registered native title rights and interests – effect of acts on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – any other matters the Tribunal considered relevant – whether a conjunctive determination should be made – determination that the act may be done subject to conditions.

Legislation:

Native Title Act 1993 (Cth), ss 24MD(3), 26(1), 26D(2), 28, 29, 30(1), 31(1), 35, 36(2), 38, 39, 109(3), 151(2), 155, 162(2), 237(c)

Aboriginal Heritage Act 1972 (WA), ss 16, 18

Petroleum and Geothermal Energy Resources Act 1967 (WA), ss 15(1), 38, 39(1), 42A, 50(1), 51(2), 53(3), 91B(2), 95

Petroleum and Geothermal Energy Act 2000 (SA), ss 35(1), 65

Mining Act 1978 (WA), ss 8, 67, 75(7), 111A

Cases:

Arc Energy NL & Kimberley Oil NL/Western Australia/Ngurrara Peoples and Nyikina & Mangala Peoples [2004] NNTTA 22

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

Australian Manganese Pty Ltd/Western Australia/David Stock and Ors on behalf of the Nyiyaparli People [2010] NNTTA 101

Backreef Oil Pty Ltd and Oil Basins Ltd/JW (Name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia [2012] NNTTA 98

Cheinmora v Striker Resources NL (1996) 142 ALR 21

Crowe v Western Australia (2008) 218 FLR 429

Evans v Western Australia (1997) 77 FCR 193

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia [2011] NNTTA 80

Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd (1998) 163 FLR 274

Moore v Mungeranie (2005) 193 FLR 62

Nyikina & Mangala Peoples/Western Australia/Rey Resources Ltd [2007] NNTTA 78

Otto Oil Pty Ltd/Western Australia/Nyikina & Mangala and Rubibi People [2004] NNTTA 34

Re Koara People (1996) 132 FLR 73

Re Warden French; Ex-parte Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315

Re Warden Calder; Ex-parte Cable Sands (WA) Pty Ltd (1998) 20 WAR 343

Western Australia/Derrick Smith & Others on behalf of the Gnaala Karla Boodja People/South Coast Metals Pty Ltd [2000] NNTTA 239

Western Australia v Hayes (2001) 163 FLR 384

Western Australia v Thomas (1996) 133 FLR 124

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

WMC Resources v Evans (1999) 163 FLR 333

Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2); Brendan Wyman & Ors (Bidjara People)/Queensland [2012] NNTTA 101

Representatives of the grantee parties:	Mr Chris Humphry, Hunt and Humphry Ms Melissa Watts, Hunt and Humphry
Representatives of the native title party:	Ms Tina Jowett, Windeyer Chambers Ms Jacki Cole, Kimberley Land Council Mr Reece O'Brien, Kimberley Land Council
Representatives of the Government party:	Mr Domhnall McCloskey, State Solicitor's Office Ms Rosie Emms, Department of Mines and Petroleum

REASONS FOR DECISION

Background

[1] On 30 January 2008, 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 petroleum exploration permit application 5/07-8 EP ('the proposed permit') to Backreef Oil Pty Ltd and Oil Basins Ltd ('the grantee parties'). Such grants are made pursuant to the *Petroleum and Geothermal Energy Resources Act 1967* (WA) ('PGERA').

[2] The proposed permit comprises 5,061.5 square kilometres, being 61 graticular blocks, located between Lake Daley and Lake Paterson in the Shires of Derby-West Kimberley and Broome, and includes the entire town site of Derby. Part of the proposed permit is also located within State Internal Waters. The s 29 notice gives the following description of the proposed permit:

> The north western corner (Lat 17° 04' 54.99'' S, Long 123° 10' 04.52'' E – GDA94) of the application is situation approx 57km north west of Derby. From this point the application extends approx 124 km in an easterly direction (Lat 17° 39' 54.97'' S, Long 124° 20' 04.51''E – GDA94) and then from this point approx 18 km in a southerly direction to the south eastern corner (Lat 17° 49' 54.98'' S, Long 124° 20' 04.52'' E – GDA94). From this point the application extends approx 80 km in a westerly direction to (Lat 17° 44' 59.55'' S, Long 123° 34' 35.26''E – GDA94).

[3] At the conclusion of the s 29 notice period (30 May 2008), the Nyikina and Mangala native title claim (WC1999/025 – registered from 28 September 1999) overlapped the proposed permit area by 67.23 per cent, and was on the Register of Native Title Claims. The claim remains on the Register. The Mawadjala Gadjidgar native title claim (WC2011/003 – made on 7 April 2011 and registered from 23 June 2011) also overlaps the proposed permit area. However, it was not made 'before the end of 3 months after the notification day' of 30 January 2008. Therefore, the applicant for that claim is not a 'native title party' in respect of these proceedings (see ss 29(2)(a) and (b) and s 30(1)(a) of the Act).

[4] To the extent the Nyikina and Mangala claim overlaps the proposed permit area, the registered native title claimant is the native title party in respect of these proceedings: see s 29(2)(b)(i). The proposed permit is a future act covered by s 26(1)(c)(i) of the Act and so, unless there is compliance with s 28, the act will be invalid to the extent that it affects native title. Section 28(1)(g) of the Act provides that such an act will be valid to the extent it affects native title if a determination is made under ss 36A or 38 that the act may be done, or may be done subject to conditions being complied with.

[5] On 29 May 2012, being a date more than six months after the s 29 notice was given, the grantee parties made an application pursuant to s 35 of the Act for the Tribunal to make a determination under s 38 of the Act ('the s 35 application'). The application was made on the basis that the negotiation parties had been unable to reach agreement of the kind mentioned in s 31(1)(b) of the Act. On 7 June 2012, I was appointed by then Deputy President John Sosso as Member to conduct the inquiry into the s 35 application.

Good faith negotiations – power to conduct inquiry

[6] The native title party challenged the Tribunal's power to make a determination under s 35 of the Act on the basis that the grantee parties had not negotiated in good faith: ss 31(1)(b), 36(2). After conducting an inquiry into the matter, I reached the conclusion that the grantee parties had negotiated in good faith with the native title party as required by s 31(1) of the Act, and handed down reasons on 6 September 2012: see *Backreef Oil Pty Ltd and Oil Basins Ltd/John Watson and Ors on behalf of Nyikina and Mangala/Western Australia* [2012] NNTTA 98 ('good faith decision').

The Inquiry

Directions for the inquiry

[7] Following the good faith decision, the Tribunal issued directions on 12 September 2012 for the substantive inquiry. These directions, required: the grantee and Government parties to provide the Tribunal and other parties with submissions by 19 October 2012; the native title party to provide submissions by 15 November 2012; and a hearing to be conducted, if necessary, in the week commencing 10 December 2012. The grantee party's submissions were received on 18 October 2012 and the Government party's submissions were received on the following day.

[8] On 6 November 2012, the native title party wrote to the Tribunal requesting an extension to directions on the basis that counsel had been briefed to prepare its submissions but was unable to travel to Broome to collect evidence until 15 November. After consultation with parties, I varied directions to permit the native title party to provide its submissions by 10.00am on 3 December 2012 (Western Standard Time). These directions contemplated that

a hearing, if necessary, would take place before the end of the year. The native title party's submissions were not received by the time and date specified in the directions. However, the native title party advised later on 3 December that the required materials would be provided to the Tribunal and the other parties by 5 December 2012.

[9] While acknowledging the inconvenience caused to the Tribunal and the other parties by the native title party's delay, I varied directions to allow the native title party to provide its submissions by noon on 5 December 2012. These were not received until 2.43pm, with the final document provided to the Tribunal by email at 5.01pm. It is also understood that the native title party informed representatives for the grantee and Government parties that two of the documents forming part of the native title party's submissions would not be provided to them until they gave their consent to proposed s 155 non-disclosure directions in relation to the documents.

[10] On request of the grantee parties, I convened a directions hearing the following day to assist me to decide whether the native title party's submissions should be accepted and to consider the proposed non-disclosure directions. At the directions hearing, the grantee parties submitted that the native title party's submissions should not be accepted due to its failure to comply with Tribunal directions, though the Government party reserved its position until it had seen all of the documents. While I am conscious of the views expressed by the grantee parties regarding the native title party's failure to comply with directions, I decided that to disallow the late submissions would on balance cause undue prejudice to the native title party, and I varied directions accordingly. As there were no objections in principle to the making of non-disclosure directions in relation to the documents withheld by the native title party, those directions were also issued. I discuss the subject matter and terms of the non-disclosure directions later in this determination. The remaining documents were provided by the native title party to the other parties on 6 December 2012.

[11] On 12 December, the grantee parties proposed that the Tribunal make further directions allowing the Government and grantee parties to reply to the native title party's contentions and permitting each party to submit a proposed minute of determination. I issued directions to that effect on 13 December 2012. Replies to the native title party's contentions were received from the Government and grantee parties on 17 December, and the grantee parties provided their proposed minute of determination prior to the listing hearing on 18 December. I discuss the terms of the minute later in this determination.

[12] At the listing hearing, parties agreed that the matter should proceed 'on the papers' pursuant to s 151(2) of the Act. As I was satisfied that the issues could be adequately determined on that basis, I informed parties that I would proceed to make a determination. During the listing hearing, counsel for the native title party requested the opportunity to seek instructions on and respond to the minute of determination proposed by the grantee parties. As there was no objection from the other parties, I granted leave to the native title and Government parties to respond by close of business on 20 December 2012, which was subsequently extended to 21 December. On 20 December, the Tribunal received the Government party's response. However, the native title party's response was not received until 3 January 2013. This response contained revised conditions based on the Standard Heritage Protection and Native Title Agreement ('HPA') prepared by the Kimberley Land Council ('KLC') for the consideration of the Tribunal and parties. Although the native title party's response was received out of time, counsel asserted that the document had, in fact, been sent by email to the Tribunal and the other parties on the compliance date of 21 December, and I accept the document on the basis that it appeared technical issues may have delayed or diverted its delivery.

[13] On 3 January 2013, I extended leave to the grantee and Government parties to file submissions regarding the filing of the native title party's proposed conditions. Submissions were received from the Government party and the grantee parties on 7 January 2013. While the grantee and Government parties did not object to the acceptance of the native title party's proposed conditions, the submissions were directed to the substance of the proposed conditions. Though I had initially sought the views of the grantee and Government parties as to whether I should accept the native title party's proposed conditions, I have nevertheless taken these submissions into consideration and refer to them later in this determination. Parties were advised on 7 January 2013 that the material would be accepted as all parties had then had an opportunity to present their views on the conditions, and no objections to that approach were forthcoming from any party.

Government party contentions and evidence

[14] The Government party provided the following contentions and documentary evidence:

- Government Party Contentions re s 39 NTA Criteria, dated 19 October 2012 ('GVP Contentions');
- Government party documents, provided 19 October 2012 (GVP 1-29);
- Government Party Reply to Objector's Contentions, dated 17 December 2012 ('GVP Reply');
- Government Party Contentions as to the Minute of Determination Proposed by the Grantee Party, dated 20 December 2012 ('GVP Contentions re Minute of Determination');
- Government Party Contentions concerning the filing of the native title party's proposed conditions, dated 7 January 2013.

[15] Government party documentation establishes that the underlying tenure of the area subject to the proposed permit is as follows:

- 12 parcels of private land, each between 5.1 and less than 0.1 per cent;
- 33 Crown reserves, including –
    - CR51146 (for harbour purposes) at 25.1 per cent;
    - CR1834 (for the use and benefit of Aborigines) at 4.5 per cent;
    - CR21474 (for the use and benefit of Aboriginal inhabitants) at 0.2 per cent;
    - CR39130 (for the use and benefit of Aboriginal inhabitants) at less than 0.1 per cent; and
    - CR40277 (for the use and benefit of Aboriginal inhabitants), managed by Pandanus Park (Aboriginal Corporation), at less than 0.1 per cent;

- Six pastoral leases, including -
    - H649773, Yeeda, at 24.1 per cent;
    - 3114/594, Meda, at 16.9 per cent;
    - 3114/1271, Blina, at 2.2 per cent;
    - I087500, Liveringa, at 0.5 per cent;
    - 3114/1008, Mowanjum (Indigenous held), at 10.3 per cent; and
    - 3114/480, Mt Anderson (Indigenous held), at 0.1 per cent;
- Two general leases at 3.4 and 0.4 per cent;
- Six historical leases, each between 16.9 and 0.1 per cent;
- 45 parcels of vacant crown land, each between 0.5 and less than 0.1 per cent; and
- 33 road reserves, each at less than 0.1 per cent.

[16] Government party documentation also establishes that the area within the proposed permit is currently subject to the following mineral tenure:

- eight exploration licences, each at between 0.4 per cent and 8.2 per cent;
- four general purpose leases, each at less than 0.1 per cent;
- one miscellaneous licence, at less than 0.1 per cent; and
- seven mining leases, each at less than 0.1 per cent.

[17] No submissions were made as to the extent to which the above tenure falls within the claim/permit area overlap. On visual inspection of the maps provided by parties, of the more significant leases in terms of size, it appears that Yeeda falls wholly or largely within the claim/permit overlap, and Meda falls wholly or largely outside the claim/permit overlap. In addition, it appears that mineral exploration and mining licences do not extensively cover the permit area, and there was no guidance as to the extent to which they fall into the claim/permit overlap.

[18] An extract of the Aboriginal Sites Database maintained by the Department of Indigenous Affairs ('DIA') pursuant to the *Aboriginal Heritage Act 1972* (WA) ('AHA') provided by the Government party indicates that the following registered sites are located within the proposed permit:

- Site ID 1019 – Unguia – open access – no restriction – ceremonial;
- Site ID 1020 – Derby Pioneer Cemetery – open access – no restriction – skeletal material/burial;
- Site ID 12390 – Djuru – open access – no restriction – mythological;
- Site ID 12391 – Bindjarnurru – open access – no restriction – ceremonial, mythological;
- Site ID 12392 – Maradja – closed access – no restriction – ceremonial;
- Site ID 12393 – Kunumudj – open access – no restriction – ceremonial, mythological;
- Site ID 12394 – Boorulla – open access – no restriction – water source;
- Site ID 12423 – Ngarinyin Law Ground – closed access – no restriction – ceremonial;
- Site ID 12687 – Fitzroy River – open access – no restriction – mythological;
- Site ID 13240 – Derby Leprosarium – closed access – no restriction – ceremonial, mythological, skeletal material/burial;
- Site ID 14029 – Derby – open access – no restriction – artefacts/scatter;
- Site ID 17269 – Old Derby Police Gaol – open access – no restriction – historical;
- Site ID 17270 – Old Derby Police Gaol Maladji – open access – no restriction – mythological; and
- Site ID 17443 – Meda Dune – open access – no restriction – artefacts/scatter, grinding patches/grooves.

[19] The DIA extract also indicates that there are a further 14 'other heritage places' recorded within the proposed permit.

What is the future act?

[20] The grant of a petroleum exploration permit under the PGERA authorises the holder of the permit, subject to the PGERA and in accordance with the conditions to which the permit is subject, to explore for petroleum and to carry on such operations and execute such works as are necessary for that purpose in the permit area: s 38(1) PGERA. Section 15(1) of the PGERA provides that, subject to the PGERA and any condition referred to in s 91B(2), the authority conferred by s 38 is exercisable on any land within the permit area, whether Crown land or private land or partly Crown land or partly private. The grant of a petroleum exploration permit is for an initial term of six years and is renewable for two further terms of five years each: ss 39(1) and 42A PGERA.

[21] The Government party states (at GVP Contentions, paragraph 35) that it proposes to impose on the permit the standard conditions identified in GVP 11 of the Government party's list of documents as follows:

> (a) The permittee will be required to undertake, within the permit boundary, each component of the work program in the designated year, or earlier, and failure to do so may result in cancellation of the permit.
>
> Permit holders are expected to fulfil the minimum work commitment for the first two years without variation. This is known as the firm commitment phase. The balance of the work program may be renegotiated based on, or taking into consideration, the results of prior exploration.
>
> Surrender of the permit in good standing may be agreed by providing all conditions relevant to the year in which the surrender is sought have been met, in addition to the submission of all reporting, data and outstanding fees.
>
> (b) Permittees may apply at any time for a variation or suspension of permit conditions on the grounds of *force majeure*. *Force majeure* refers to an event or effect that cannot be reasonably anticipated or controlled via experience or care. Commercial circumstances that are common risks in the industry would not normally be considered as a basis for *force majeure*. Factors such as changes in oil prices, difficulty in attracting farm-ins, disappointing drilling results, poor quality seismic data or the failure to prove up a prospect would not normally be considered *force majeure* grounds. Such factors may influence the perceived commercial viability of an activity, but would not normally prevent the explorer from adhering to their bid commitment.
>
> When applying for a suspension of permit conditions, permittees may also request an extension of the permit term and these will be assessed on a case-by-case basis.
>
> (c) Where a permittee has been unable to prove up a prospect to meet a drilling commitment, the permittee may apply for a variation or suspension of permit conditions to commit to more appropriate exploration work. Only where a permittee has demonstrated a significant attempt to meet their work program commitments would a variation or suspension be considered.
>
> (d) The American Petroleum Institute's well classification is used as a general guide to determine whether a well has sufficient exploration component to meet a work program commitment.

The first appraisal well in a permit on the extension of a discovery made in an adjacent permit will be accepted as an exploration well. Similarly, a well drilled on the unproven extension of an accumulation from an adjacent permit will be accepted as an exploration well.

(e) Permittees may seek at any time to have an alternative work activity credited as meeting a work program commitment. Whether an alternative work activity meets a work program commitment will be considered on a case-by-case basis, with the criteria for approval being to ensure that the alternative work activity is a similar technique and meets or exceeds the objective of the original work commitment.

(f) Permittees will be required to comply with the provisions of the relevant Acts, the Regulations and Directions issued under the Acts, and with any special conditions associated with the permit area.

(g) Applications for operational activities proposed by all title holders will be subjected to stringent geological and geophysical assessments taking into consideration potential adverse impacts upon existing resources. Each activity will be considered on a case-by case basis and take into account possible interference with surrounding operations before approvals are issued. In this assessment, production and discovery will be prioritised over exploration.

[22] I note that these conditions are largely relevant to the grantee parties fulfilling their bid and exploration obligations, rather than being of any significance to the protection of the rights and interests of the native title party. I turn to this point later in this determination, on the issue of imposing conditions.

[23] In its initial contentions, the Government party proposed that the Tribunal also impose on the proposed permit the following four 'extra conditions' ('Extra Conditions') if justified by substantial, credible evidence from the native title party, regarding the effect of the proposed permit:

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 petroleum title is not to be restricted except in relation to those parts of the land which are used for exploration or production 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 the grantee party submits to the Executive Director**,** Petroleum Division**,** Department of Mines and Petroleum a proposal to undertake an exploration or production 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 operations and related infrastructure**,** including proposed access routes.

4. Upon assignment of the petroleum title the assignee shall be bound by these conditions.

[24] However, in light of the contentions and evidence provided subsequently by the native title party, and in particular the absence of reasons put forward by the native title party

as to why their proposed conditions should be adopted by the Tribunal, the Government party now submits that the Tribunal should determine that the act may be done without conditions.

Grantee party contentions and evidence

[25] The grantee parties provided the following contentions and documentary evidence:

- Statement of Contentions of behalf of Oil Basins Limited as a grantee party, dated 18 October 2012 ('GP Contentions');
- Affidavit of Neil Francis James Doyle, sworn on 3 August 2012 ('Doyle Affidavit'), and annexures;
- Affidavit of Kim Warren McGrath, sworn on 17 October 2012 ('McGrath Affidavit'), and annexures (including the grantee parties' proposed conditions drawn from the KLC's HPA, as set out in Annexure 64 ('GP Proposed Conditions'));
- Grantee party documents, provided 18 October 2012 (GP 3-11);
- Reply to Native Title Party's Contentions Dated 4 December 2012, dated 17 December 2012 ('GP Reply');
- Minute of Determination under section 38 Native Title Act 1993 (Cth) and supporting contentions, dated 18 December 2012;
- Submissions concerning the filing of the native title party's proposed conditions, dated 7 January 2013.

[26] Mr Doyle is the executive director and chief executive officer of Oil Basins Ltd, while Mr McGrath is its executive chairman. Mr Doyle's affidavit was provided for the purposes of the good faith inquiry and the grantee parties have clearly indicated their intention to rely on that evidence in the substantive inquiry. I accept the evidence of Messrs Doyle and McGrath and note that Mr Doyle's affidavit largely outlines the progress of negotiations, including issues discussed in mediation, and the heritage issues which arose. Mr Doyle's evidence assisted the good faith determination, but is of less relevance to the substantive

inquiry and so has not been referred to in any detail, as the evidence of Mr McGrath is more than adequate to support the grantee party's contentions relating to the substantive inquiry.

History of the Application

[27] The application for the proposed permit was made jointly by Oil Basins Ltd ('Oil Basins') and Backreef Oil Pty Ltd ('Backreef') and was accepted by the Government party on a competitive tender basis in 2008. Oil Basins is a publicly listed company with interests in onshore and offshore petroleum exploration in Western Australia, as well as offshore interests in the Gippsland Basin in south-eastern Australia. Oil Basins is also the operator of the Backreef Area within petroleum production licence L6 to the east of the proposed permit in the Canning Basin, and is exploring for petroleum, gas, coal seam gas, shale gas and oil. Backreef is a private oil exploration company, the sole director and shareholder of which is Mr David Archibald. Mr McGrath states (at paragraph 9) that he is aware from media and Australian Stock Exchange announcements and communications with Mr Archibald that Buru Energy Limited has agreed to acquire Backreef's interest in the proposed permit if granted.

Summary of the Project

[28] The proposed permit is located over the Canning Basin. According to Mr McGrath, early exploration of the basin commenced in the 1920s, continued through the 1950s to the 1960s and has since intensified. Mr McGrath states (at paragraph 12) that approximately 300 exploration wells have been drilled and over 150,000 square kilometres of seismic data recorded, leading to discoveries and the establishment of a number of producing wells and the permit area has previously been the subject of seismic surveys and drilling activity, including two wells, Booran-1 (drilled in 1981) and East Yeeda-1 (drilled in 1985). Mr McGrath states that the Canning Basin is also regarded as being highly prospective for unconventional gas.

[29] Mr McGrath states (at paragraph 15) that Oil Basins conducted geographical and geophysical desktop studies of the proposed permit in 2010 and, in 2012, undertook petro-physical studies of all existing wells and surrounding areas. According to Mr McGrath, Oil Basins has concluded that there is 'evident hydrocarbon exploration potential for conventional oil and gas and much deeper unconventional shale gas and unconventional shale oil.' ASX announcements made by Oil Basins on 1 June 2010 (GP 4) and 8 July 2010 (GP 5)

indicate that an independent expert report confirmed that work carried out by Oil Basins 'identified substantial potential for the presence of, and the potential to, develop non-conventional hydrocarbons' within the proposed permit and the Backreef Area, including coal seam gas ('CSG') and unconventional shale gas ('USG'). On the basis of these studies and its understanding of the petroleum geology of the area, Oil Basins intends to focus its exploration activity on the area between the Derby town site and Done Hill in the south-east corner of the proposed permit ('the search area'). Mr McGrath states that the estimated cost of the exploration program at the time of the application in 2008 was $12.8 million, though he anticipates that the cost 'will now be significantly greater'.

Outline of the Proposed Exploration Work Program

[30] During the first two years of the proposed permit, the grantee parties intend to undertake a seismic survey over 500 square kilometres and drill at least two exploration wells. During the following four years, the grantee parties intend to undertake a further 200 square kilometres of seismic survey and another four wells. According to Mr McGrath, seismic surveys involve the application of a seismic energy source by a vibroseis truck at discrete surface locations, which is reflected back from interfaces where rock properties change, and which are recorded at an array of geophones placed on the ground surface. The results are processed to produce two dimensional (2D) or three dimensional (3D) images of underground geological structures and other attributes that can be used to infer the physical rock properties and hydrocarbon potential. The Exploration Program (McGrath Affidavit, Annexure 58) notes that the activities will be directed towards USG and unconventional shale oil ('USO') and, at least in the first instance, will be less intrusive than the 3D surveys and 2D survey grids associated with conventional oil and gas exploration. Mr McGrath states that seismic surveys require reasonably clear lines to lay receiver and source cables and geophones, as well as to allow for vehicle access. However, he says that the process is flexible and it is possible for survey lines to 'zig-zag' to avoid areas such as cultural sites, water courses and trees. Mr McGrath also states that existing access routes will be used wherever possible, and where new lines are required, the vegetation will be 'rolled' rather than cleared, and the lines will be rehabilitated following the survey. The grantee parties expect that the initial 500 square kilometres of seismic survey will be completed within one month between approximately August and October, and will involve up to 12 personnel using

a vibroseis truck and other vehicles. I note that according to Government party material, there are already 33 road reserves in the permit area.

[31] According to Mr McGrath, the preparation of drilling pads will involve the clearing of areas of approximately 200 square metres with access roads around the pads and an exploration camp approximately one kilometre away, though the grantee parties intend to use existing roads and pastoral tracks where possible. Mr McGrath states that the completion of an exploration well is likely to take 45 to 60 days and will require approximately 30 personnel. The Exploration Program states that, based on the operator's experience in nearby areas, around 50 trucks will be needed to transport rig equipment and consumables (such as steel casing, cement, mud and chemicals) to the site. Mr McGrath states that the wells may be retained for production or rehabilitated, depending on the results.

[32] Mr McGrath also states (at paragraph 16) that there is potential for shallower CSG across the proposed permit. However, Mr McGrath states that there is no direct evidence of successful testing for gas in the area, so any initial CSG drilling would be by way of preliminary reconnaissance drilling to assess gas productivity and viability, which would be accomplished by drilling adjacent to roads in the proposed permit.

Native title party contentions and evidence

[33] The native title party provided the following contentions and documentary evidence:

- Objector's Contentions dated 4 December 2012, received 5 December 2012 ('NTP Contentions') (which also included the native title party's initial proposed conditions contained in the HPA ('HPA Conditions'));
- Affidavit of Dadaga,[1] affirmed on 5 December 2012 ('Dadaga Affidavit');
- A signed statement purporting to be the affidavit of Dr Kingsley Palmer, dated 5 December 2012 ('Palmer Statement')[2];

[1] The deponent has asked that he be referred to in this determination as Dadaga rather than his English name due to a recent death in his family.
[2] See comment and footnote in [37] of this determination

- *Nyikina and Mangala Native Title Application (WC99/025 – WG6099/98): Anthropologist's Report* by Dr Kingsley Palmer, dated August 2012 ('Palmer Report'); and

- Native Title, Heritage Protection and Mineral Exploration Conditions ('NTP Proposed Conditions') dated 3 January 2013.

[34] NTP Contentions were directed to three principle issues: the effect of the proposed permit on the enjoyment by the native title party of their registered rights and interests (s 39(1)(a)(i) NTA); the effect of the proposed permit on the way of life, culture and traditions of the native title party (s 39(1)(a)(ii) NTA); and its effect on areas or sites of particular significance to the native title party in accordance with its traditions (s 39(1)(a)(v) NTA). The NTP Contentions also address, albeit briefly, the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land or waters affected by the proposed permit and in relation to which there are registered rights and interests (s 39(1)(b) NTA). No contentions were made in relation the other criteria in s 39 of the Act. I discuss these issues in further detail while addressing the s 39 criteria below.

[35] In its contentions, the native title party sought a direction under s 155 of the Act restricting the disclosure of the Dadaga Affidavit and the Palmer Report on the basis that they contain information that is of a confidential and sensitive nature. In support of its application, the native title party relied on Dr Palmer's statement to the effect that the information made available to him by members of the native title party to prepare the report was provided on the basis that it is confidential and would only be used for the purpose of the proceedings in the Federal Court. The native title party also relied on statements in the Dadaga Affidavit that he did not want the information in his affidavit or the information provided to Dr Palmer to be used for any purpose other than the native title claim and protecting his country, and did not want his affidavit to be given to any Aboriginal person or anyone who is not a lawyer working on the present matter. As I was satisfied that the documents contain culturally sensitive information, I made directions pursuant to s 155 of the Act on 7 December 2012 restricting the disclosure of the evidence to the officers and legal representatives of the grantee and Government parties, as well as their respective employees and consultants. However, in light of the fact that the Palmer Report had already been filed and served on the Government party in the Federal Court proceedings, those directions were

made subject to the proviso that they did not limit the use of the documents in other proceedings in which the documents had been served on the parties.

[36] As the Dadaga Affidavit and the Palmer Report are subject to non-disclosure directions, I do not intend to reproduce large parts of those documents in these reasons. However, irrespective of those directions, I am required to set out the findings of fact upon which any inferences have been drawn and identify the source of those findings (see *Crowe v Western Australia* (2008) 218 FLR 429 at [35]; s 162(2) NTA) and, as I specified in the directions, they do not prevent me from appropriately explaining the reasons for my decision. Notwithstanding my obligation to disclose the findings on which my decision is based, I acknowledge the native title party's desire and other parties' agreement to limit the disclosure of culturally restricted information, and I discuss the contents of the documents only to the extent necessary to support my conclusions.

[37] In relation to the Palmer Statement, this was provided by the native title party on 5 December 2012 and is named *Affidavit of Dr Kingsley Parker affirmed December 2012*, but it is in fact a signed statement that does not appear to have been sworn in the form of an affidavit. The Tribunal has on many occasions expressed the view that it is preferable that evidence be presented by way of affidavit. However, the Tribunal has also shown flexibility in accepting witness statements, particular when there is no objection from other parties and the evidence is not contested[3].

[38] I also note and accept that Dadaga has authority to speak for the native title party in relation to the land covered by the permit area, and that Dr Palmer has authority to provide evidence by virtue of his qualifications as an anthropologist and his work with the native title party.

[3] On the day this determination was issued, Dr Palmer's sworn affidavit was provided to the Tribunal and parties by the native title party. The affidavit was in identical terms to the contents of Dr Palmer's statement. As I had already accepted that same evidence, and provided it with the appropriate weight, nothing turns on the affidavit, and as such, this evidence of Dr Palmer's is referred to throughout as being a Statement. Such an approach will always be driven by the circumstances of the particular matter.

Statutory interpretation in relation to future act determinations

[39] I rely on the principles enunciated in *Western Australia v Thomas* (1996) 133 FLR 124 *('Waljen'*), particularly at 162-163 and 165-166.

[40] Section 38 of the Act sets out the types of determinations that can be made and which 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.

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

> ***39 Criteria for making arbitral body determinations***
>
> (1) In making its determination, the arbitral body must take into account the following:
> (a) the effect of the act on:
> (i) the enjoyment by the native title parties of their registered native title rights and interests; and
> (ii) the way of life, culture and traditions of any of those parties; and
> (iii) the development of the social, cultural and economic structures of any of those parties; and
> (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
> (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
> (b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there

> are registered native title rights and interests, of the native title parties, that will be affected by the act;
> (c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
> (e) any public interest in the doing of the act;
> (f) any other matter that the arbitral body considers relevant.
>
> *Existing non-native title interests etc.*
>
> (2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:
> (a) existing non-native title rights and interests in relation to the land or waters concerned; and
> (b) existing use of the land or waters concerned by persons other than the native title parties.

[42] The Tribunal's task involves weighing the various criteria in s 39(1) by giving proper consideration to them on the basis of evidence. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue exploration and mining, and the interests of the Aboriginal people concerned. The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. The Tribunal is required to take into account diverse and sometimes conflicting interests in coming to its determination. The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence (see *Waljen* at 165–166; *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 at [37]).

[43] The Tribunal is not bound by the rules of evidence (s 109(3) NTA) and adopts a commonsense approach to evidence.

Findings on the Section 39 criteria

[44] The Tribunal looks to evidence of the native title party rights and interests which the native title party states will be affected, plus evidence of those effects – for example, current use and potential impact.

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

[45] The registered native title rights and interests arising from the Nyikina and Mangala native title claim application (WAD6099/1998, WC1999/025) are set out in the extract from the Register of Native Title Claims as follows:

(a) the rights to the possession, occupation, use and enjoyment to the exclusion of all others (subject to any native title rights and interests which may be shared with any others who establish that they are native title holders) of the area, and in particular comprise:

(i) rights and interests to possess, occupy and enjoy the area;

(ii) the right to make decisions about the use and enjoyment of the area;

(iii) the right of access to the area;

(iv) the right to control the access of others to the area;

(v) the right to use and enjoy resources of the area;

(vi) the right to trade in resources of the area;

(vii) the right to receive a portion of the benefit of any resource taken by others from the area;

(viii) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and

(ix) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

[46] The registered rights and interests listed above are claimed subject to the following:

(a) to the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in the right of the Commonwealth or the State of Western Australia, they are not claimed by the Applicants.

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under international law in relation to the whole or any part of the offshore place;

(c) the Applicants do not make a claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act, as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia and a law of that State has made provision for that act as described in section 23E NTA 1993;

(d) such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L;

(e) the said native title rights and interests are not claimed to the exclusion of any other rights or interests validly created by or pursuant to the common law, a law of the State or a law of the Commonwealth.

[47] Tengraph documentation indicates that approximately 7.88 per cent of the area subject to the proposed permit is classified as vacant crown land and, therefore, capable of supporting exclusive native title rights and interests, although it is not clear the extent to which this falls within the claim/permit area overlap. The remainder of the proposed permit comprises areas of freehold, Crown reserve, pastoral leasehold and general leasehold, over which exclusive native title rights and interests cannot subsist.

[48] None of the parties raised any issue about the application of the non-extinguishment principle to the grant of the proposed permit, such that any native title rights or interests that are inconsistent with the grant will be suspended for the duration of the grant: s 24MD(3)(a) NTA.

[49] The grantee parties contend (at GP Reply, paragraph 6) that the native title party's evidence does not address the effect of the proposed permit on the native title party's enjoyment of its registered native title rights and interests and that, in any event, the effect of the grant on those rights and interests will be negligible given the:

- 'transitory and low impact nature' of petroleum exploration;
- regulatory regime governing petroleum exploration; and
- existence of public and private interests and development including pastoral and mining interests in the proposed permit.

[50] The Government party contends (at GVP Reply, paragraph 8) that, in light of the tenure history of the search area and of the proposed permit area more generally, and the nature and extent of the operations proposed by the grantee parties, there will be little, if any, further diminution of the native title party's rights and interests, and that such diminution will, in any event be temporary. I agree generally with the Government party's position that, traditionally, petroleum exploration has a relatively low impact compared with some mineral exploration, and that the regulatory regime is extensive. The Tribunal has acknowledged on previous occasions that the practical impact of petroleum exploration and production on native title rights and interests is likely to be less than for mineral exploration and production: see *Western Australia v Hayes* (2001) 163 FLR 384 at [11]; *Moore v Mungeranie* (2005) 193 FLR 62 ('*Moore v Mungeranie*') at [79].

[51] However, I do not agree that the evidence suggests the underlying tenure in the search area and the permit area generally is such that there will be little effect on the exercise and enjoyment of native title rights and interests. Although the search area is predominately composed of the pastoral leases and the freehold tenure associated with the Curtain Air Base, the Mowanjum pastoral lease is classified as 'Indigenous-held' and there is a sizeable strip of unallocated Crown land along the western border of the search area. Furthermore, there are other areas of unallocated Crown land within the permit area, particularly around the mouth of the Fitzroy River. In this respect, I do not accept that the existing non-native title public

and private interests are as extensive as broadly suggested in the grantee and Government party's submissions. As such, in my reasoning outlined below, I will focus predominantly on the impact of the exploration, and the regulatory regime surrounding that exploration, in the context of native title party rights and interests in the overlap area.

[52] In view of these contentions, I have also taken time to explore each of the registered native title rights and interests listed in [45] above. In addition, the comments are made in the context of the overlap between the claim and the permit area being 67.23 per cent, and the proposed permit area covering approximately 13 per cent of the claim area.

Rights to possess, occupy and enjoy the area; to access the area

[53] The native title party contends (at NTP Contentions, paragraph 16) that the Dadaga Affidavit provides evidence that 'many Nyikina Mangala people live in the Nyikina Mangala claim area' and that Aboriginal communities exist at Jarlmadangah and Pandanus Park, which they say are located in or near the proposed permit. However, while Pandanus Park is within the permit area, Jarlmadangah is located approximately 40 kilometres from the southern boundary of the proposed permit. I note Dadaga does not specify the number of, or approximate number of, people from the native title party residing in Pandanus Park. Dadaga also refers (at Dadaga Affidavit, paragraph 34) to a community at Mowanjum, which is located within the proposed permit but outside the claim area. I note from mapping provided by parties, that there are several communities within the permit area, but outside the claim area, and also within the claim area, but outside the permit area.

[54] In several places in his affidavit, Dadaga refers incidentally to places used for camping and fishing, but gives no indication of how frequently these places are visited. Several of these places appear to be outside the proposed permit. Dadaga says that he takes young people out on the land to pass on the laws and customs of the native title party and started a program aimed at taking at-risk youths on country to teach them about culture (Dadaga Affidavit, paragraph 46). However, he does not specify whether the proposed permit area is used for these purposes, and if so, how often.

[55] The native title party also contends that the Palmer Report 'provides a plethora of evidence of current practices of the exercise of traditional rights on Nyikina Mangala country' (NTP Contentions, paragraph 16). In his report, Dr Palmer lists several of the rights

to country mentioned by individual members of the native title party in the course of his research, including rights to: access country; burn the country; camp on the country; perform rituals for increase; stage corroborees and teach others about the country (Palmer Report, paragraph 470, Table 9.1). However, I note that the specific instances recorded by Dr Palmer took place outside the permit area. Dr Palmer does not provide any indication of the extent to which these rights are exercised or enjoyed within the area of the proposed permit, or the search area. Dr Palmer states that members of the native title party continue to carry on ritual practices, including youth initiation and the use and custodianship of sacred objects by Law men, but does not specify whether any of these practices occur within the permit area. It also appeared that some of these activities were not currently undertaken, but had been undertaken in the past.

[56] Dr Palmer states (at Palmer Report, paragraph 831) that the claimants continue to use the claim area and its natural resources, citing as an example a fishing expedition with members of the native title party in an area located within the proposed permit (though outside the search area). According to Dr Palmer, meat and fish are important to the economy of the native title party, although he was unable to quantify the extent to which these resources are utilised.

[57] The grantee parties contend (at GP Contentions, paragraph 27) that, in view of the nature and extent of public, pastoral, military, mining and other non-native title interests and activities in the proposed permit, the native title party has no right to possess or occupy the 'great majority' of the land within the proposed permit and, to the extent the native title party has the right to use and enjoy the area, the grantee parties contend that any such right is co-existent with those of non-native title interest holders. Similarly, the grantee parties submit (at GP Contentions, paragraph 33) that the native title party's right of access to the proposed permit is already constrained by non-native title interests in the area. Although aspects of this argument are compelling, for the reasons stated above at [50]-[51], I do not find that it is wholly supported by the evidence.

[58] The grantee parties also contend that the grant of the proposed permit will have a negligible effect on the native title party's access rights (GP Contentions, paragraph 34) and will not interfere materially with the native title party's continued use and enjoyment of the area (GP Contentions, paragraph 28). This is explored further in this determination.

[59] Mr McGrath states (McGrath Affidavit, paragraph 30) that he has 'undertaken field trips' in the permit area and that he has not 'observed any activities in the area during ... visits other than heritage surveys' (paragraph 36). However, there is no information given on how many field trips or for how long he was in the field. In any event, Mr McGrath states (McGrath Affidavit, paragraph 37) that the grantee parties are willing to consult with the native title party to mitigate any interference with traditional activities.

I accept that members of the native title party continue to use and enjoy areas within the claim, and also therefore within the proposed permit. I do also note and accept the native title party's submission (at paragraph 19), that petroleum exploration involves 'very different rights' from pastoral interests. However, in the absence of specific evidence about the extent to which the native title party exercises its rights to use and enjoy the area within the proposed permit, as opposed to the claim area in general, I am unable to conclude that the grant of the proposed permit will have a significant effect on the enjoyment of those rights.

[60] Moreover, the activities proposed by the grantee parties are unlikely to have a significant or lasting effect on the native title party's use and enjoyment of the area. While those activities may interfere to some degree with the native title party's ability to access parts of the proposed permit, that interference will be temporary and limited to certain areas at certain times – for example, the times when seismic surveys are being done, and the time when exploration wells are being created. While the grantee parties activities will involve people and trucks being on the permit area for periods of time, and clearing of vegetation over 200 square kilometres at a time, I find that, given the evidence available, conditions imposed can mitigate against any interference of these activities with the rights and activities of the native title party. Accordingly, I find that the effect of the grant on the enjoyment of these rights does not support the conclusion that the act must not be done.

Rights to make decisions about the use and enjoyment of the area; to control the access of others to the area

[61] In its contentions, the native title party refers (at paragraph 18) to the grantee party's contention that '[a]s a consequence of the grant of the Permit the Native Title Party will not be able to make decisions as to how the Grantee Party exercises the rights conferred upon it' (GP Contentions, paragraph 32). In this respect, the native title party submits that the grant will necessarily constrain the native title party's right to make decisions about the use and

enjoyment of the area. Nevertheless, the native title party makes no specific contentions about the way in which that right, or the right to control the access of others to the area, is actually exercised or enjoyed by members of the native title party. Dadaga states that he is recognised under traditional Nyikina Mangala laws as speaking for the sites and traditional stories of Nyikina Mangala country, and has an obligation to protect those sites and stories and the country in general (Dadaga Affidavit, paragraphs 2, 45, 51). Similarly, Dr Palmer states that 'those with rights to country are required to protect and look after those whose country it is not' (Palmer Report, paragraph 473) and 'have a duty to protect areas of spiritual importance from physical harm' (Palmer Report, paragraph 479). However, there is little evidence of how these duties are performed in practice on the actual permit area.

[62] The grantee parties contend that the right of the native title party to make decisions about the use and enjoyment of the proposed permit area is constrained by the rights of non-native title interest holders. The grantee parties also submit (at GP Contentions, paragraph 37) that the native title party's right to control access to the proposed permit area has been extinguished or is significantly constrained by non-native title interests. With the exception of the portion of unallocated Crown land on the western boundary of the search area and in particular the Mowanjum pastoral lease, where members of the native title party feasibly have greater scope to control access and make decisions about the use and enjoyment of the land, I accept the grantee parties' contentions. I also accept that, in the context of the limited nature of the grantee parties' rights under the proposed permit and its proposed activities, any effect on the native title party's decision-making rights will not be great (GP Contentions, paragraphs 31-32).

[63] Given the lack of specific evidence from the native title party about the exercise or enjoyment of these rights in the proposed permit area, my finding is that, while there is some general evidence about the exercise and enjoyment of these rights in the claim area which could reasonably be extrapolated to the permit area, the grant of the proposed permit is unlikely to have a significant effect on the enjoyment by the native title party of any right to make decisions about the use and enjoyment of, or control the access of others to, the proposed permit area. Though I accept that the exercise and enjoyment of these rights are likely to be impaired to a certain degree by the exercise of the grantee parties' rights under the proposed permit, any such effect is likely to be mitigated by the imposition of Extra Conditions (2) and (3) (as outlined at [23]), which will ensure that the native title party is

notified and consulted in relation to the grantee parties' activities. In any event, the grantee parties have evidenced their desire and willingness to consult with the native title party in order to mitigate any interference with the native title party's rights and interests. As such, I cannot conclude in relation to the effect of the act on these rights that the act must not be done.

Rights to use and enjoy the resources of the area; to trade in resources of the area; to receive a portion of the benefit of any resource taken by others from the area

[64] The native title party made no specific contentions in relation to any of these rights. As noted above at [56], Dr Palmer states that claimants continue to use the *claim area* and its natural resources. However, the evidence regarding the use and enjoyment of those resources in the area of the proposed permit is limited. The only reference made in relation to the proposed permit area is to a fishing expedition which happens to be outside the search area. Dadaga refers to a good fishing place, but it is not located within the proposed permit. Dadaga does mention the site of a particular tree used for making a particular tool, which appears to be located near one of the seismic lines in the north-western section of the search area (Dadaga Affidavit, paragraph 33), though he does not state how often the site is visited for that purpose or whether it is the only site where the material for making the tool can be obtained. No evidence was presented by the native title party representative that members of the native title party trade in the resources of the area of the proposed permit, or are entitled as a matter of contemporary practice to receive a portion of the benefit of any resource taken by others from the area, apart from broad statements in relation to these activities.

[65] I accept that the right to use and enjoy the resources of the area is exercised by members of the native title party over the claim area. I also accept that, given it covers almost 13 per cent of the claim area, it is likely these rights are exercised from time to time over the proposed permit area, particularly as several communities of Nyikina and Mangala people are located in or near the proposed permit area. In this regard, I am satisfied that the proposed exploration activities are likely to have some effect on the native title party's enjoyment of those rights. However, in the absence of more specific evidence about the particular uses of the area, I am unable to conclude that the effect will be more than incidental. Although it is possible to infer from Dadaga's evidence that the particular tree site is to some extent unique, it seems unlikely that this is the only place where members of the

native title party harvest the material to make the particular tool. In any event, the native title party has provided insufficient evidence about this activity to support a finding that the grant will have a substantial effect on the enjoyment of the native title party's rights and interests, particularly given the nature of the grantee parties' activities. In this regard, I note the evidence of Mr McGrath that seismic lines are flexible and can be deviated to avoid sensitive areas, including trees. As such, I could not conclude here that the act must not be done.

Rights to maintain and protect places of importance under traditional laws, customs and practices in the area; to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area

[66] While this has been touched upon somewhat in the preceding paragraphs, no specific evidence has been provided in relation to how the native title party exercises the right to maintain, protect and prevent the misuse of cultural knowledge associated with the permit area. It is unlikely that the grant of the proposed permit would have any effect on that right. In relation to the right to maintain and protect places of importance under traditional laws, customs and practices in the area, the issue is considered below under s 39(1)(a)(v). Again, the evidence provided does not support a conclusion that the act must not be done.

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

[67] The native title party contends that the grant of the proposed permit will affect the way of life, culture and traditions of the native title party in the following ways:

- the transmission of knowledge about country, songs and stories relating to country will be affected if sites relating to those stories and songs are damaged (NTP Contentions, paragraph 21);
- if sites are damaged, the elders who are responsible for those sites and the stories and songs that relate to them could be punished in a way that affects their health or longevity (NTP Contentions, paragraph 21);
- the laws and customs of the Nyikina and Mangala community would be contravened if the elders responsible for looking after country do not carry out their obligations (NTP Contentions, paragraph 24); and

- if the Nyikina and Mangala people are unable to access their country or participate in making decisions about their country, it will have an adverse effect on their way of life, culture and traditions (NTP Contentions, paragraph 23).

[68] As the first three issues are associated with the effect of the grant on sites of significance to the native title party, they are considered below in the context of s 31(1)(a)(v), though it may be noted at this stage that, if such sites were damaged, it may have a detrimental effect on the native title party's way of life, culture and traditions. In relation to the fourth issue, I note the comments made above at [53]-[60] in relation to access rights and at [61]-[63] regarding the right to make decisions about the use and enjoyment of the area.

[69] As far as the native title party's evidence is concerned, it fails to adequately address the issue of how the grant of the proposed permit and the specific area it covers will affect the way of life, culture and traditions of the native title party. Though Dadaga expresses some general concerns about the consequences that may arise from the failure of Nyikina and Mangala people to carry out their cultural obligations in relation to country, he does not specify how any particular aspect of the native title party's way of life, culture or traditions might be affected by the proposed permit. Similarly, though the Palmer Report describes a number of traditional and religious practices carried on by members of the native title party within the *claim area*, it does not outline the relationship between those practices and the proposed permit area, nor does it indicate how the grant of the proposed permit might affect how they are carried on by members of the native title party, in the particular proposed permit area.

[70] The grantee party contends (at GP Contentions, paragraph 56) that the native title party's way of life, culture and traditions are currently exercised within the constraints of existing non-native title interests and activities in the proposed permit area (which as I have stated earlier, appears to be not necessarily an extensive constraint), and they submit that their proposed activities will not prevent access to any areas other than to specific seismic or drilling locations for short periods of time. The grantee party further contends that the native title party did not oppose the grant during negotiations with the grantee party, provided the grantee party entered into its standard heritage protection agreement, an issue I will consider in further detail below in relation to s 39(1)(b). In relation to the present issue, I accept the grantee party's contentions, although I do note the evidence which indicates seismic surveys will take approximately 30 days, and exploration wells will take approximately 2 months,

which is not necessarily, in combination, a short period of time. Based on the evidence before me, I find that grant of the proposed licence would have a marginal effect on the native title party's way of life, culture and traditions, and does not support the conclusion that the act must not be done where conditions can be imposed which mitigate against such interference.

Section 39(1)(a)(iii) – effect on the development of social, cultural and economic structures of the native title party

[71] The native title party made no contention in relation to the effect of the proposed permit on the development of the social, cultural and economic structures of the native title party, nor did it provide any evidence relevant to the issue. As the native title party has party elected not to address the issue, the Government party contends it should be determined according to the contentions made on behalf of the grantee parties and the Government party (GVP Reply, paragraph 5), and I agree.

[72] The grantee parties submit (at GP Contentions, paragraph 57) that their proposed activities will have no detrimental effect on the social, cultural and economic structures of the native title party. Rather, the grantee parties contend that the grant of the proposed permit will have a positive effect through increased economic activity, employment and contracting opportunities in the Derby area, and the likelihood that pastoral roads and tracks will be upgraded, particularly in the search area. Mr McGrath states that the grantee parties intend to employ local personnel and contractors where available and plan to investigate the skills and capabilities of Nyikina and Mangala people for field operations (McGrath Affidavit, paragraph 39-40). Mr McGrath also states that the grantee parties will endeavour to employ members of the native title party as environmental and cultural rangers during field operations (McGrath Affidavit, paragraph 41). If the project proceeds to production, Mr McGrath states that the grantee parties will investigate the establishment of local Indigenous training programs (McGrath Affidavit, paragraph 40).

[73] On the basis of the evidence before me, I find that the grant of the permit will, on balance, be likely to have a beneficial effect on the development of the social, cultural and economic structures of the native title party.

Section 39(1)(a)(iv) – freedom to access the land and freedom to carry on rites and ceremonies and other activities of cultural significance

[74] The native title party's contentions do not specifically address the effect of the grant on the native title party's freedom to access the area and carry on rites and ceremonies and other activities of cultural significance. As noted above at [55], the native title party states that the Palmer Report 'provides a plethora of evidence of current practices of the exercise of traditional rights on Nyikina Mangala country'. However, there is little evidence that the native title party carry on those practices in the specific area of the proposed permit or within the search area, and the evidence which is available is very broad.

[75] The grantee parties contend (at GP Contentions, paragraph 58) that only a small portion of the proposed permit area will be affected in practice by exploration activity and for periods of no more than several weeks. I note that the proposed permit area is over 5000 square kilometres, and the exploration activity can occur over areas of 200 square kilometres. Relative to an area of 5,000 square kilometres, an area of 200 square kilometres does not seem particularly significant. However, taken on their face, 200 square kilometres is a large area. I also note that seismic activites will take place for around a month, while drilling activities will last for around two months, which is longer than 'several weeks'. The grantee parties submit that, to the extent to which the native title party does access the proposed permit area for the performance of rites, ceremonies or other activities of cultural significance, the effect of the grant or the conduct of exploration activities will be minimal (at GP Contentions, paragraphs 59). Having regarding to my findings concerning s 39(1)(a)(i) above, I accept the grantee parties' contentions on the basis that conditions can be imposed which mitigate against such interference.

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

[76] The issue to be determined in relation to s 39(1)(a)(v) is whether the grant of the proposed permit will affect sites or areas of particular (that is, of special or more than ordinary) significance to the native title party in accordance with their traditions: *Cheinmora v Striker Resources NL* (1996) 142 ALR 21 at 34-35. The focus of the inquiry is on the effect of the future act on relevant sites or areas within the land or waters concerned. However, in some circumstances, the effect of the future act on sites or areas of particular significance located elsewhere may be relevant if they are linked in some way to sites or areas on the land

or waters concerned: *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2); Brendan Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 101 at [103].

[77] As noted above at [18]-[19], a search of the Aboriginal Sites Database establishes that there are 14 registered sites and 14 'other heritage places' within the proposed permit area. This does not mean there are not other sites or areas of significance to the native title party in the proposed permit or the surrounding areas. The Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. Nor does it mean that the sites registered under the AHA are necessarily sites of particular significance within the meaning of the Act. Rather, the question of whether there are sites or areas of particular significance on the proposed permit is a matter to be established on the evidence, particularly from those members of the native title party with the authority to speak for the area in question.

[78] In his affidavit, Dadaga gives evidence about a number of stories, songs and sites in the northern portion of the Nyikina Mangala claim area, a large part of which is located within the proposed permit. Many of the stories, songs and sites mentioned in Dadaga's affidavit are also referred to in the Palmer Report and are indicated on a map which is annexed to the report. The Palmer Report provides additional information about the sites mentioned in Dadaga's affidavit based on interviews conducted with members of the native title party, including Dadaga. However, as the report was prepared for a purpose other than this specific future act (that is, it was prepared in support of the native title claim), it does not refer specifically to the proposed permit area. Nor do the native title party contentions, or Dr Palmer's statement, provide a clear indication of which areas of importance are within the proposed permit, apart from mentioning, on an ad hoc basis, some which are within that area and some which are not. The native title party's evidence is uncontested, although the grantee parties contend that there has been no attempt to explain the relative significance of the sites in terms of s 39(1)(a)(v) (GP Reply, paragraph 13).

[79] On request of the Government party, the native title party also provided a version of the map containing handwritten notes by Dadaga showing the approximate locations of other sites mentioned in his affidavit ('the site map'), as well as a list of all the sites referred to in the affidavit and their corresponding map reference ('the site list'). I am mindful of the sensitivities surrounding this information, and the s 155 confidentiality orders. As such, I

refer to this information only in broad terms, or in a way which informs the reader but does not offend the s 155 direction.

[80] Dadaga refers to five categories of sites within the northern portion of the claim area: sites associated with W (name withheld); other sites in the northern portion of the country; areas south of Derby; the East Yeeda-1 area; and Erskine Ranges – Gumba. I deal with each of these in turn. As the map does not indicate the boundaries of the proposed permit or the seismic lines portrayed on the maps provided by the grantee parties, only a visual comparison was possible.

Sites Associated with W

[81] In his affidavit evidence, Dadaga describes a number of sites and stories associated with the journey of W, who is said to have been a Nyikina man responsible for creating the Fitzroy River during *Bugarigara* (the dreamtime or dreaming). According to Dr Palmer, the story of W 'forms a central tenet of Nyikina customary belief and practice' (Palmer Report, paragraph 516). Dr Palmer describes the W story as the Nyikina foundation law and notes that W is considered to be responsible for initiating Nyikina laws and customs. Several of the sites described by Dadaga are places which W is thought to have created, although the majority of these sites are located outside the area of the proposed permit. Nevertheless, based on the evidence before me, I accept that the places mentioned by Dadaga in relation to W are sites of particular significance in accordance with the traditions of the native title party, at least to the extent that they fall within the proposed permit area.

Other Sites in Northern Portion of Country

[82] Dadaga also refers to a number of other sites in the northern portion of the claim area. The Palmer Report provides some further information; however, I do not consider there is sufficient evidence to conclude that the sites are of particular significance to the native title party. For example, in relation to most of the other sites mentioned by Dadaga, the evidence does not adequately disclose the basis upon which the sites are regarded as particularly significant in accordance with the traditions of the native title party. As such, I am unable make a positive finding about the particular significance of these sites.

Areas South of Derby

[83] Dadaga states there are sacred areas south-east of Derby, and that interference with them could cause the person responsible to get sick and die. Dadaga also states that if people disturb or drill near a certain area, it may result in death. In light of Dadaga's evidence about the status of these areas and Dadaga's concerns about disturbance, I am prepared to find that they are sites of particular significance to the native title party.

East Yeeda-1 Area

[84] Dadaga's evidence in relation to sites in the East Yeeda-1 Area concerns water ways and other bodies of water in specific areas. Dadaga also refers to another area south of Derby and a number of areas including Nobby's Well to Munkajarra Pool, each of which are registered under the AHA. Dadaga talks about the importance of the water ways to the native title party, but does not discuss why the specific places referred to are considered particularly significant. In his report, Dr Palmer gives evidence about the spiritual significance of permanent water sources in the traditions of the native title party (Palmer Report, paragraphs 532-533). However, there is nothing in the native title party's evidence to distinguish the sites mentioned by Dadaga from other permanent water sources in the proposed permit area or the wider claim area. As such, I am unable to conclude that the water ways referred to in Dadaga's affidavit are sites of particular significance within the meaning of s 39(1)(a)(v).

Erskine Range – Gumba

[85] Dadaga states that there is an important soak in this area. It is difficult to determine from the site map and the other maps provided by parties whether the soak is located within the proposed permit. In any event, I do not consider that the native title party has provided sufficient evidence to support a finding that the soak is a site of particular significance to the native title party.

Effect of the Proposed Permit

[86] The native title party did not make any specific contentions regarding the effect of the proposed permit on sites of particular significance on the land or waters concerned. However, Dadaga does state that damage to sacred sites, including by drilling, may have spiritual repercussions and could result in sickness or death. In his statement, Dr Palmer also

states that interference with significant areas and places within Nyikina Mangala country could cause 'enormous emotional, spiritual, and social loss' (Palmer Statement, paragraph 7). Nevertheless, the native title party has not made any specific submissions about the particular effect that the proposed permit or exploration program may have on relevant sites.

[87] An assessment of the likely effect of the proposed permit on the sites referred to in the preceding paragraphs is complicated by the fact that, apart from the maps provided by the grantee parties, the search area has not been defined on the site map, making it difficult to identify the location of sites referred to in the native title party's evidence relative to the area where the grantee parties intend to conduct their exploration activities. However, a visual comparison of the site map with the maps provided by the grantee parties suggests that only one of the types of sites referred to above are located within the search area. Even then, these sites only appear to be situated on the western edge of the search area and, given the limits of a visual comparison, it is uncertain whether they do in fact fall within the search area, particularly as the sites in question were added to the map by hand.

[88] The Government party reply also refers to this difficulty, stating (at paragraph 15) that perhaps 12 of the 34 sites referred to in Dr Palmer's report or Dadaga's affidavit are within the permit area, and none appear to be within the search area. Again, this assessment was done by way of a visual comparison of the relevant maps. The native title party offered no further information in relation to this comparison, nor did it contest the statements made by the Government party in this regard. In any event, given the nature of the proposed exploration program, I am satisfied that the grantee parties will be able to avoid any interference with these sites, particularly where conditions are granted to mitigate such interference, such as conditions relating to consultation. As Mr McGrath states in his affidavit, the grantee parties are aware of their obligations under the AHA and intend to consult with the native title party about its proposed activities, and undertake surveys to ensure that sites are avoided or that any effect on sites is minimised (McGrath Affidavit, paragraph 52). The grantee parties' evidence indicates that, if necessary, seismic lines can be diverted to avoid significant sites, including trees, and there is a certain amount of flexibility in the placement of drilling sites.

[89] In his statement, Dr Palmer notes that the list of sites referred to in his report is not exhaustive and may only represent a portion of the actual sites within the Nyikina and Mangala claim area. I accept that there may be other sites of significance within the claim

area, which fall within the area of the proposed permit but have yet to be identified, and that some of those sites may fall within the scope of s 39(1)(a)(v). However, in the absence of specific evidence about the nature and location of those sites, I am unable to conclude that the grant of the proposed permit will have a significant effect on other such sites of particular significance that may exist on the land or waters concerned, and am confident that any conditions imposed will mitigate any such effects.

Section 39(1)(b) – effect on interests, proposals, opinions and wishes

[90] The native title party's contentions state that it does not want the act to be done (NTP Contentions, paragraph 30). Dadaga also states that he does not want the exploration to go ahead and is concerned that people will disturb his country and cause danger to him and his people (Dadaga Affidavit, paragraph 55).

[91] Both the Government party and the grantee parties contend that the position stated in the native title party's contentions is inconsistent with its previous responses to proposals for petroleum exploration in the claim area (GP Reply, paragraph 16-21; GVP Reply, paragraph 16-19). In particular, they note the native title party's involvement in the negotiations outlined in the good faith decision and its consent to other future act determination applications relating to petroleum exploration: see *Otto Oil Pty Ltd/Western Australia/Nyikina & Mangala and Rubibi People* [2004] NNTTA 34; *Arc Energy NL & Kimberley Oil NL/Western Australia/Ngurrara Peoples and Nyikina & Mangala Peoples* [2004] NNTTA 22; *Nyikina & Mangala Peoples/Western Australia/Rey Resources Ltd* [2007] NNTTA 78. It is apparent from the reasons published by the Tribunal in each of these matters that the native title party's consent was based on the fact that it had entered into native title and heritage protection agreements with each of the permit holders. This suggests that the native title party is not opposed to petroleum exploration as long as certain conditions are met, although that was not put forward by the native title party in the present matter.

[92] The Government party and the grantee parties note that the petroleum exploration permits which were the subject of the consent determinations referred to in the preceding paragraph contain a significantly greater number and concentration of the sites identified in the native title party's evidence than the proposed permit area.

[93] In the circumstances, in light of the native title party's conduct in previous negotiations involving petroleum exploration, including the negotiations which were the subject of the good faith decision in this matter, and given that the native title party has not provided any particulars of the basis for its opposition to the grant of the proposed permit, I have not accorded much weight to native title party's stated opposition to the grant of the proposed permit. However, I have given some weight to the fact that the native title party's consent to petroleum exploration in the past has been predicated on securing agreement with the relevant permit holder on appropriate heritage protection measures, and that the native title party had been negotiating with the grantee parties on the basis of a heritage protection agreement. I also note the native title party's submission that, if the Tribunal determines that the act may be done, it should be subject to the conditions contained in the HPA, which I discuss later in this determination.

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

[94] The native title party provided no specific contentions in relation to this limb of s 39 of the Act.

[95] The grantee parties contend that:

- the ongoing exploration and production of petroleum will have significant economic benefits for Western Australia in particular and Australia in general;
- the Canning Basin is recognised as a highly prospective though under-explored petroleum region;
- petroleum exploration will generate employment and other activity in the area as well as taxation revenue; and
- in addition to general employment opportunities, exploration operations will provide opportunities for members of the native title party to be employed in 'culturally related' positions, such as rangers.

[96] The grantee parties also rely on the general significance of the petroleum industry acknowledged by the Tribunal in *WMC Resources v Evans* (1999) 163 FLR 333 ('*WMC/Evans*').

[97] The Government party contends that:

- the grant of the proposed permit will be of great economic significance to the nation, the State and the local region;
- the economic benefits of the grant will include the generation of royalties for the State in the event that production occurs;
- there is likely to be economic benefits to the local economy in and around the proposed permit area in general as a result of the grant;
- likely benefits include the potential use of local businesses and service providers, regional employment opportunities, and an increase in domestic gas supply to the State; and
- such benefits may extend to members of the native title party.

[98] The native title party made no contentions in relation to the economic or other significance of the grant of the proposed permit.

[99] Although it is acknowledged that ongoing petroleum exploration and production will have significant economic benefits for the nation and the State of Western Australia in particular, it is the economic or other significance of the future act in question that must be considered under s 31(1)(c) and not its contribution to the maintenance of a viable petroleum industry overall, though this may be considered under s 31(1)(f): *Waljen* at 175-176.

[100] Mr McGrath says that exploration in the Canning Basin over the past 90 years has resulted in discoveries, including four petroleum systems and the establishment of a number of producing wells (McGrath Affidavit, paragraph 65). Nevertheless, Mr McGrath states that the Canning Basin is regarded as highly prospective but substantially under-explored. The *Western Australia's Petroleum and Geothermal Explorer's Guide* (2012) published by the Department of Mines and Petroleum ('DMP Guide') and identified as GP 3 in the grantee parties' list of documents, states that the Fitzroy Trough, part of which falls within the proposed permit area, is considered one of the most prospective areas of the Canning Basin. The DMP Guide also indicates that the region may be prospective for unconventional gas, though this potential is under-explored and the search for unconventional gas in the Canning Basin is still in its infancy.

[101] Mr McGrath states the geographical and geophysical desktop studies conducted by Oil Basins, in addition to petro-physical studies of existing wells in the surrounding areas, indicates there is evidence of exploration potential for conventional oil and gas, as well as USG and USO in the proposed permit area (McGrath Affidavit, paragraph 15). The grantee parties' permit application indicates that they intend to expend approximately $12.8 million over the initial term of the proposed permit (see GVP 1), though Mr McGrath states that he anticipates the cost will now be significantly greater (McGrath Affidavit, paragraph 19). Mr McGrath states that the grantee parties intend to employ local personnel and contractors where available but concedes that petroleum exploration typically requires skilled personnel and contractors. An ASX announcement made by Oil Basins on 8 July 2010 (GP 5) states that, should large enough volumes of gas be proven up, Oil Basins and Backreef Oil 'would consider plans for the establishment of domestic gas supply for the local region or to the significant mining operations in the Pilbara, and/or the establishment of either CSG or USG sourced liquefied natural gas (LNG) plant feedstock supply to the proposed Kimberley LNG Hub at James Price Point and/or potentially the development of a large scale gas to liquids (GTL) synthesis plant situated near Derby.'

[102] In general, I accept the Government and grantee parties' submissions regarding the economic significance of the proposed permit to Australia and the State. However, at the present stage, the economic benefits flowing from the grant of the proposed permit will be limited to the expenditure incurred in the course of the proposed exploration program. While that expenditure may generate taxation revenue for the Commonwealth and the State, and is likely to create benefits for the local economy, the real economic significance of the proposed permit lies depends on its potential to lead to production, which would result in further economic benefits, including the generation of royalties for the State and additional taxation revenue, as well as potentially resulting in an increase of domestic gas supply. Given the current status of the Canning Basin, a discovery may well encourage further investment in the region. While these factors depend on the success of the exploration program, as exploration is the first step towards production, I have nevertheless given weight to them.

[103] Insofar as s 39(1)(c) requires consideration of the economic or other significance of the proposed permit to the area in which the land or waters concerned are located and to Aboriginal peoples and Torres Strait Islanders who live in that area, I accept that the grant of the proposed permit is likely to be of some economic benefit to Derby and the Fitzroy

Region. According to Mr McGrath, the initial exploration program is likely to employ up to 12 personnel in respect of the seismic operations and approximately 30 personnel for the construction of wells. Presumably, other people will need to be employed at the rehabilitation stage. However, these activities will only be temporary, and the extent to which employment opportunities are available to people living in the region will depend on the skills and capabilities of the local population. Nevertheless, I accept that the exploration program is likely to create some opportunities for employment in the region and it is likely that the grantee parties will need to utilise the services of local businesses for various purposes. Further benefits are likely to flow to the local economy in the event that the project proceeds to production.

[104] I also accept that the grant of the proposed permit is likely to result in economic benefits for local Indigenous people. In particular, Mr McGrath states that the grantee parties will endeavour to employ members of the native title party as environmental and cultural rangers during field operations. Mr McGrath also states that the grantee parties recognise the benefit of engaging local Aboriginal people and will investigate the skills and capabilities of Nyikina and Mangala people for field operations. If the project leads to production, Mr McGrath says that the grantee parties will investigate the establishment of local Indigenous training programs in preference to outsourcing. Although Mr McGrath concedes that the specialised nature of petroleum exploration may mean there are few contracting opportunities, he says it is the intention of the grantee parties to provide information about tenders to nominated Nyikina and Mangala people or entities. While some of these benefits will depend on the skill sets within the local Indigenous population and the outcome of the exploration program, I find on balance that local Aboriginal people are likely to benefit from the grant of the proposed permit.

Section 39(1)(e) – public interest

[105] The Tribunal accepts there is a public interest in the ongoing exploration for petroleum resources and that the grant of the proposed permit is likely to contribute to the public interest due to the economic benefits that will accrue at a local, State and national level if production occurs: *Evans v Western Australia* (1997) 77 FCR 193 (‘*Evans*’) at 215; *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 at [59]. I accept that

there is a public interest in the grant of the proposed permit in terms of its contribution to the continued exploration for petroleum resources in the Canning Basin.

[106] The grantee parties also contend that the grant of the proposed permit will serve the public interest as it will result in improved pastoral roads and tracks, particularly in the search area. I accept the grantee parties' contention.

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

[107] Under this criterion, the Tribunal may have regard to the environmental impact of the future act: *WMC/Evans* at [81]. The Tribunal may also have regard to the Government party's environmental protection regime as described in *Waljen* at 212-214 and *Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd* (1998) 163 FLR 274 ('*Koara 2*') at [53]-[62], the findings of which are adopted here.

[108] In relation to the environmental impact of the proposed permit, the grantee parties contend (at GP Contentions, paragraph 70) that the activities carried out under the proposed permit will have a minimal and temporary impact and that rehabilitation will be rapid. Furthermore, the grantee parties contend that the proposed exploration activities will be subject to rigorous environmental and operational regulations. The Government party submits (at GVP Contentions, paragraph 79) that any effect on the local environment resulting from development carried out pursuant to the proposed permit will be regulated and minimised by: the limitations imposed by the relevant legislative and regulatory regimes; the conditions and endorsements to be imposed on the grant of the proposed permit; and the State and Federal regulatory regimes relating to environmental protection and the protection of Aboriginal heritage.

[109] Mr McGrath states (at McGrath Affidavit, paragraph 23) that the exploration program will be conducted where possible using existing access routes and the need for clearing vegetation will be minimised. As discussed above, where new lines are required for seismic operations, the grantee parties intend to employ a technique which involves the 'rolling' of vegetation to allow access, after which the lines will be rehabilitated. Depending on the results of the exploration program, Mr McGrath says that wells may be retained for production purposes or rehabilitated. In addition, Mr McGrath provided photographic evidence of rehabilitated land which he attests is near to the permit area, which is compelling

as to the effectiveness of rehabilitation (McGrath Affidavit, paragraph 24 and Annexure 58). This evidence was not contested by the native title party.

[110] In addition to the regulatory regime described in *Waljen* and *Koara 2*, the grant of the proposed permit will also be subject to legislative and regulatory measures directed specifically towards regulating and minimising the environmental impact of petroleum operations. Relevantly, proponents are required to submit an environmental management plan prior to commencing operations relating to petroleum, as set out in the document entitled *Environmental Assessment Processes for Petroleum Activities in Western Australia* identified as GVP 14 in the Government party's list of documents. Furthermore, pursuant to ministerial direction under s 95 of the PGERA, the grant of every exploration permit is subject to the *Schedule of Onshore Petroleum Exploration and Production Requirements 1991 (Amended 21 May 2011*) ('Schedule of Requirements'), identified as GVP 12 in the Government party's list of documents. The key features of the Schedule of Requirements include:

- the requirement that drilling programs must be assessed and approved by the Department of Mines and Petroleum prior to the commencement of operations (see cl 501-504);
- the obligation to take all reasonable steps to prevent communication between, leakage from, or the pollution of, aquifers that serve, or could serve, a useful purpose (see cl 525);
- daily reporting requirements in respect of drilling operations (see cl 536);
- obligations concerning petroleum production (see Pt VI); and
- obligations concerning geophysical and geological surveys (see Pt VII), including approval and authorisation requirements (see cl 701-705) and environmental protection requirements (see cl 706 and Appendix 1).

[111] Clause 706 of the Schedule of Requirement also incorporates the Australian Petroleum Production and Exploration Association ('APPEA') Code of Environmental Practice, while cl 114 provides that the operator must ensure that operations are carried out in a manner that avoids or, where that is not practicable, minimises any adverse impact on the environment. Furthermore, the Schedule of Requirements provides that an operator is required to have in place an approved code of environmental practice outlining procedures for avoiding or minimising environmental impacts before operations may be commenced.

The Government party (GVP Contentions, paragraphs 40-46) outlines in detail the various pieces of legislation which make up the regulatory context for such proposed permits, should the act be done.

[112] I am satisfied that the grantee parties have undertaken to observe all relevant directions and conditions imposed on the grant of the proposed permit, and that the environmental controls placed on the grant by the Government party will ensure that the effect of the proposed permit on the environment will be minimised.

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

[113] As noted earlier in this determination, I have regard to the existing non-native title rights and interests which may have already had an adverse impact on the enjoyment of native title, and the other matters considered in relation to s 39(1)(a).

Conditions

[114] The focus of this matter has not been conditions regarding compensation, but rather on heritage conditions. The first consideration is whether to impose such conditions, or any other conditions, on the grant of the permit and if so, the second consideration is which conditions to be imposed (over and above standard conditions which the Government party states it will impose on the grant, as outlined at [21] of this determination). Section 38(1)(c) of the Act gives the Tribunal a broad discretion to make a determination that an act may be done subject to conditions to be complied with by any of the parties. Conditions should not be imposed unless evidence suggests the need for them (see *Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia* [2011] NNTTA 80 at [92]-[96]).

Standard conditions

[115] The Government party have indicated they will impose a set of standard conditions on this permit (see [21] of this determination). The Hon C J Sumner, the Deputy President, outlined the Tribunal's approach to such conditions in *Australian Manganese Pty*

Ltd/Western Australia/David Stock and Ors on behalf of the Nyiyaparli People [2010] NNTTA 101. Accordingly, rather than impose those conditions, I accept the Government party's submissions as an undertaking that such conditions will be applied to the proposed permit upon grant. The grantee parties have indicated they intend to comply with the standard conditions.

Other conditions

[116] Apart from these standard conditions, there are four sets of conditions to consider in this matter:

1. The Extra Conditions as outlined at [23]
2. The GP Proposed Conditions – 18 October 2012
3. The HPA Conditions – 4 December 2012
4. the native title party's alternative set of proposed conditions ('NTP Proposed Conditions') – 3 January 2012

[117] In its initial contentions, the Government party proposed that the Tribunal should give consideration to imposing the Extra Conditions if justified by substantial and credible evidence from the native title party. Following receipt of the native title party's contentions and evidence, the Government party submitted that the Tribunal should determine that the act may be done without conditions.

[118] The native title party contends that it does not want the act to be done. However, if the Tribunal determines that the act may be done, the native title party initially submitted that the HPA Conditions should be imposed. I note that while the native title party proposes these conditions be adopted, they provide little, if any, support for why they should be adopted. In its response to the native title party's contentions, the grantee parties took issue with the proposal that the terms of the HPA be adopted as conditions on the basis that various provisions of the HPA are either inadequate or inappropriate in the context of a Tribunal determination. Specifically, the grantee parties noted that:

- the HPA includes the KLC rather than the native title party as the counter party, whereas any conditions would require mutual obligations between the native title party and the grantee parties;
- the HPA includes conditions concerning the grant of future 'tenements', which are irrelevant to the proposed permit;
- the HPA includes provisions for the payment of royalties which would be contrary to s 38(2) of the Act and in any event, unless agreed, should be determined in appropriate compensation proceedings;
- the heritage protocols outlined in the HPA contain numerous uncertainties, particular concerning the KLC's obligations and the timeframes within which a heritage impact assessment and survey are to be conducted;
- clauses 14.1 and 22.1 prevent the explorer from undertaking any activities until the KLC has performed its obligations under the HPA;
- clause 222 requires the explorer to surrender its statutory right to make applications under ss 16 and 18 of the AHA unless it first obtains the consent of the traditional owners; and
- the HPA purports to restrict the explorer's activities in relation to uranium exploration and carbon trading.

[119] In its response to the minute of determination, the native title party provided the NTP Proposed Conditions, which are apparently derived from the HPA. Again, no submissions were received from the native title party in support of the Tribunal adopting the NTP Proposed Conditions. In any event, the grantee parties highlight several inadequacies that remain in the NTP Proposed Conditions, including:

- numerous uncertainties regarding the native title party's obligations and the timeframes within which a heritage impact assessment and survey are to be conducted;
- the restriction on the explorer's rights to undertake activities until the native title party has performed its obligations; and
- the surrender of the explorer's statutory right to make a s 18 application without the native title party's consent.

[120] The grantee party also draws attention to several inconsistencies in the NTP Proposed Conditions, as well as provisions that it considered to be irrelevant or inappropriate in the context of the grant of a petroleum exploration permit. For example, the grantee parties note that:

- the definition of 'Exploration' includes a reference to the *Mining Act 1978* (WA);
- the definition of 'Permit' mirrors the definition of 'Tenement' in the HPA and includes a reference to s 8 of the *Mining Act 1978* (WA);
- the NTP Proposed Conditions contain definitions of 'Mining Act' and 'Mineral'; and
- several defined terms, such as 'GST', 'Minimum Statutory Annual Expenditure' and 'On-Ground Exploration Expenditure' do not appear in the conditions.

[121] The Government party, in submissions dated 7 January 2013, raise similar concerns in relation to the NTP Proposed Conditions. The Government party again goes so far as to say the act should be done without conditions.

[122] The grantee parties submit that, if appropriate, the Tribunal should adopt the conditions originally proposed by the grantee parties, which are also drawn from the HPA. However, while the grantee parties concede that steps should be taken in any area where exploration activities are carried out to mitigate any potential impact on sites or areas of significance that may exist in the area, they do not accept that the evidence demonstrates any likelihood that sites of significance to the native title party will be affected by the grant of the proposed permit (GP Reply, paragraph 7).

[123] The grantee party have indicated they would not oppose the Extra Conditions and the GP Proposed Conditions being imposed if the Tribunal considers it appropriate to do so and with 'Native Title Party approval and agreed participation' (GP Contentions, paragraph 73).

[124] In light of my findings in relation to the criteria in s 39(1)(a), I consider that the evidence provided in the form of Dadaga's Affidavit justifies the imposition of Extra Conditions. I note there is evidence which indicates Buru Energy Limited has agreed to acquire Backreef's interest in the proposed permit if granted. Unless a condition dealing with assignment is imposed, there is a risk that the assignee may not be contractually bound to the

native title party to comply with the Government party's extra conditions. Accordingly I include the assignment condition in the list of extra conditions to be imposed.

[125] Consideration of further heritage protection conditions has been difficult, due to the nature of the evidence provided. As noted earlier, the Government party standard conditions are largely relevant to the grantee parties fulfilling their bid and exploration obligations, rather than being of any significance to the protection of the rights and interests of the native title party.

[126] I have taken into account all of the evidence provided in this matter, for example, the activities of the grantee parties (the size of the areas to be cleared, the proposed existence of an exploration camp, workers, and the likelihood of 50 or so trucks being involved in relation to the exploration wells), together with the evidence which indicates there is an Aboriginal community within the claim/permit area overlap, as well as other communities that are within the permit area but which are not within the claim area. I have also taken into account: that the available evidence indicates a number of recorded and non-recorded sites within the permit area; the likelihood that significant sites exist within the claim/permit overlap which could be subject to interference in the absence of relevant conditions; that although there is some flexibility in terms of how the activities of the grantee parties can be conducted to avoid areas of significance (for example, survey lines can zig-zag), there would no doubt need to be consultation between the grantee parties and native title party in that regard; and that the grantee parties are willing to abide by the GP Proposed Conditions. I have also given some weight to the fact that the native title party's consent to petroleum exploration in the past has been predicated on securing agreement with the relevant permit holder on appropriate heritage protection measures, and that the native title party in this current matter had been negotiating with the grantee parties on the basis of the HPA. I have the same concerns that the grantee and Government parties raised in relation to the conditions proposed by the native title party. On that basis then, in addition to the Extra Conditions, I intend to impose the GP Proposed Conditions, as outlined at [147] below and annexed to this determination.

Minute of Determination

[127] As outlined at [11] of this determination, following receipt of the native title party's contentions and evidence, the grantee parties sought leave to file a minute of the proposed determination they seek to have the Tribunal make. I made directions on 13 December 2012

allowing each party to provide to the Tribunal and each other parties any minute of determination sought to be made by the Tribunal prior to the listing hearing. On 18 December, the grantee parties provided a minute of determination ('Minute') in the following terms:

1. The act, namely the grant of petroleum exploration permit 5/07-8 EP to the grantee parties, may be done pursuant to section 38 of the *Native Title Act 1993* (Cth).

2. Subdivision P of Division 3 of Part 2 of the *Native Title Act 1993* (Cth) will not apply to the issue of any petroleum exploration permits, drilling reservations, retention leases, production licences, infrastructure licences or pipeline licences (by whatever name called) to the grantee parties subsequent to and in respect of the land and waters covered by the grant of the petroleum exploration permit 5/07-8 EP; subject to the grantee parties entering into a written agreement with the native title party in relation to the grant of any of those titles from time to time or subject to the grantee parties and native title party complying with the terms of the Aboriginal Heritage Conditions contained in the Schedule to this determination (that is, the GP Proposed Conditions).

[128] Part 2 of the Minute relies on s 26D(2) of the Act, which relevantly provides that an act consisting of the creation of a right to mine (the later act) may be exempted from Subdivision P if:

1. an earlier act consisting of the creation of a right to explore or prospect takes place following a determination under s 38 that the earlier act may be done with or without conditions; and

2. the determination:

    a. includes a statement to the effect that, if the later act were done, Subdivision P would not apply to the later act; and

    b. provided that, if the later act were done, certain conditions would be complied with parties other than the native title parties, whether before or after the act is done; and

3. any conditions that were to be complied with before the later act is done are complied with before the later act is done.

[129] In the proposed determination, the 'earlier act' would be the grant of the proposed permit, while the grant of subsequent titles, including the grant of a production licence, would comprise the 'later acts' subject to compliance with the conditions referred to in s 26D(2).

[130] The Tribunal has previously applied s 26D(2) in *Moore v Mungeranie*. That matter involved a consent determination relating to the grant of an exploration licence under the *Petroleum Act 2000* (SA) (now *Petroleum and Geothermal Energy Act 2000* (SA), '*Petroleum Act'*). There, the negotiation parties agreed to a 'conjunctive determination' that would permit the grant of any retention licences, production licences, associated facility licences or pipeline licences subsequent to the grant of the exploration licence, subject to the grantee's compliance with the terms of an Aboriginal heritage protection protocol agreed to by the parties.

[131] In the present matter, the grantee parties contend that the proposed determination should be made on the following grounds:

(a) under the PGERA, the holder of an exploration permit is entitled upon satisfying certain requirements to be granted further titles including a production licence;
(b) the parties negotiated the possibility of a conjunctive agreement which provided for the grant of a production licence;
(c) in *Moore v Mungeranie*, the Tribunal recognised that a conjunctive agreement or determination is appropriate in petroleum and gas exploration as compared with hard rock mining; and
(d) the native title party's opportunity to negotiate the terms of an agreement under which future titles will be negotiated is preserved, as Subdivision P will apply if the parties cannot reach agreement.

[132] The Government party does not support the making of a determination in the terms of Part 2 of the Minute for the following reasons:

1. the *Petroleum Act* provides that the holder of an exploration permit has the right to apply for a production licence where a discovery warrants production, whereas no such right is relied on in the present matter;

2. the determination made by the Tribunal in *Moore v Mungeranie* was made by consent pursuant to an agreement reached between Eagle Bay Resources NL, the Yandruwandha/Yawarrawarrka native title claimants and the State of South Australia regarding its terms;

3. the reasons for the Tribunal's determination in *Moore v Mungeranie* suggest that the consent of the parties to the conjunction determination was based on a full consideration of all the issues affecting the grant of the exploration permit and the possible grant of a production licence, including the 'mature' nature of the Cooper Basin fields in South Australia, which the Tribunal took into account in deciding that it was appropriate to make the determination sought;

4. there is no evidence in the present matter concerning the issues arising for consideration if a production or other licence referred to in Part 2 of the Minute were to be granted. The Government party contends that this is a relevant consideration as the mature nature of the Cooper Basin can be distinguished from the 'frontier' nature of exploration in the Fitzroy Trough region and the lack of production in that region, meaning that there are limited examples of relevant petroleum operations and how they may affect the land in that region and the rights and interests in that land;

5. the situation in Western Australia involving petroleum exploration and production is 'quite different' to that in South Australia, where the majority of native title agreements are conjunctive agreements;

6. the reference to an 'infrastructure licence' in Part 2 of the Minute is misconceived, as no such licence is issued under the PGERA; and

7. the conditions upon which Part 2 of the Minute is proposed are expressed without any limitation as to time and leave open the possibility of a deadlock as to particular issues between the parties which may frustrate the intent of the proposed determination.

[133] In *Moore v Mungeranie*, Member Sosso observed (at [72]) that 'the real and practical benefits of conjunctive agreements and determinations lies with petroleum and gas exploration and production':

> This is, in part, due to quite different circumstances that pertain to petroleum and gas production as compared with hard rock mining. In the case of petroleum and gas the major expenditure lies in the exploration stage. Furthermore, the act of exploration is as disruptive to the environment and the asserted native title rights and interests, as is the actual production of petroleum and gas. Furthermore, unlike hard rock exploration, it is clear from the outset with petroleum and gas exploration both what the substance is that is the subject of the exploration and also the exact manner and nature of extracting the substance should it be found.

[134] Member Sosso went on to compare the circumstances of petroleum exploration and production with the situation described in *Re Koara People* (1996) 132 FLR 73, where a Full Panel of the Tribunal considered the difficulties involved in making a determination in relation to the grant of a mining lease under the *Mining Act 1978* (WA) when the project is still at the exploration stage. There, the Tribunal outlined (at 86) the consequences that flow from the nature of such mining leases, which give the holder both a right to explore and the right to carry on mining operations:

1. from the time when the normal negotiating procedures commenced, the parties were left to negotiate without any real opportunity to consider the impact of mining operations;

2. when a s 35 application is made, the Tribunal will have difficulties applying the s 39 criteria to a mining operation that may never occur and about which little or nothing is currently known;

3. the grantee parties were unable to give any worthwhile evidence about the nature and extent of mining operations which might be conducted and consequently the native title party could not respond about the possible effects of actual mining operations on their rights and interests in the subject land and waters;

4. the Government party had difficulty assessing future liability for compensation in the event that a lease was granted; and

5. it was difficult for the Tribunal to give full consideration to the native title party's right to be asked about actions affecting the land, to achieve respect for the native title party's connection to the land and provide appropriate protection.

[135] In Member Sosso's view, the transition from hard rock exploration to hard rock mining differs substantially from the transition from petroleum exploration to petroleum production. In relation to hard rock mining, Member Sosso noted that it will 'often be impossible to ascertain' the nature of the mining operations at the exploration stage, let alone the actual impact on native title rights and interests. In contrast, the cost and disruption associated with oil and gas mining occurs mostly at the exploration stage, whereas the production is simply a case of utilising equipment to bring the discovered product to the surface and transporting it by means of pipelines or road or rail transport to a place where it can be refined. Accordingly, Member Sosso considered that, in light of the evidence before him, it was appropriate to make a conjunctive determination.

[136] *Moore v Mungeranie* involved a determination in relation to the proposed grant of an exploration licence under the *Petroleum Act*. Section 35(1) of the *Petroleum Act* provides that the holder of an exploration licence is entitled to the grant of a production licence if certain conditions are met. Relevantly, s 50(1) of the PGERA provides that the holder of a petroleum exploration permit may make an application to the Minister for the grant of a petroleum production licence. However, there is nothing in the PGERA that explicitly states that the holder of a petroleum exploration permit is entitled as of right to the grant of a petroleum production licence. Rather, s 53(3) of the PGERA expressly provides that the Minister may decide not to grant the licence if:

1. the applicant has failed to comply with a ministerial requirement under s 51(2) to provide further information in connection with the application; or

2. the Minister is not satisfied that the area specified in the application contains petroleum.

[137] In this respect, a parallel may be drawn between the right conferred on the holder of a petroleum exploration permit under s 50(1) of the PGERA and the right conferred on the holder of an exploration licence under s 67 of the *Mining Act 1978* (WA) ('*Mining Act*'), which provides that the holder of an exploration licence has the right to apply for one or more mining leases in respect of any part or parts of the land the subject of the exploration licence.

In *Western Australia/Derrick Smith & Others on behalf of the Gnaala Karla Boodja People/South Coast Metals Pty Ltd* [2000] NNTTA 239 ('*South Coast Metals*'), the Hon E M Franklyn QC, then Deputy President, considered the right conferred under s 67 in the context of s 237(c) of the NTA, which provides that a future act will attract the expedited procedure if it is not likely to involve, or create rights whose exercise is likely to involve, major disturbance to any land or waters concerned. In that matter, Member Franklyn examined the relevant case law and concluded that the grant of an exploration licence does not confer or create a right to the subsequent grant of a mining lease. In particular, Deputy President Franklyn relied on the decision of the Full Court of the Supreme Court of Western Australia in *Re Warden French; Ex-parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315 ('*Re Warden French*'), in which the Court found that the Minister's obligation under s 75(7) of the *Mining Act* to grant an application for a mining lease is subject to his power to refuse the application under s 111A. Consequently, Deputy President Franklyn reasoned that the grant of an exploration licence does not create a right to the grant of a mining lease.

[138] I accept Deputy President Franklyn's analysis of the rights conferred on the holder of an exploration licence under the *Mining Act*, while noting that it cannot be said that the Minister's powers under the PGERA in relation to applications for petroleum production licences are as wide as those of the Minister under the *Mining Act*. As the decisions of the Full Court of the Supreme Court of Western Australia in *Re Warden French* and, subsequently, in *Re Warden Calder; Ex-parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343 make clear, s 111A of the *Mining Act* gives the Minister a broad discretion to refuse an application for the grant of a mining tenement. On the other hand, the Minister is only entitled to refuse the grant of a petroleum production permit under the PGERA if the applicant fails to comply with a request for further information under s 51(2) or the Minister is not satisfied that the area the subject of the licence contains petroleum. This is comparable with the situation under the *Petroleum Act*, where the applicant is only entitled to the grant of a production licence if a 'regulated resource' has been discovered in the area and production is commercially feasible or is more likely than not to become commercially feasible within 24 months of the application. Further, an application for the grant of a licence under the *Petroleum Act* will lapse if the applicant fails to comply with a ministerial requirement to provide any further information, documents or material to assist in assessing and determining the application: ss 65(3) and (4). Although it could be said that the grantee parties have

overstated the rights conferred by the grant of a petroleum exploration permit under the PGERA, they are not dissimilar to the rights conferred by the holder of an exploration licence under the *Petroleum Act*.

[139] In any case, there is nothing in s 26D(2) which specifies that the earlier act must confer or create a right to the later act. Section 26D(2) only requires that the earlier act consists of the creation of a right to explore or prospect and that the later act consists of a right to mine. The Explanatory Memorandum to the *Native Title Amendment Bill 1997* ('EM'), which introduced the provision, merely refers to an agreement or determination that includes conditions about 'a possible later grant of a mining right.' Nor is there anything in Member Sosso's reasoning in *Moore v Mungeranie* to suggest that he regarded any right conferred by the grant of an exploration licence under the *Petroleum Act* to the grant of a production licence to be a relevant factor in his decision. Rather, the critical distinction identified by Member Sosso was the difference between the transition from petroleum exploration to production and the transition from mineral exploration to hard rock mining. If s 26D(2) requires that the earlier act confers or creates an unconditional right to the grant of the later act, it is difficult to see how it could operate in any jurisdiction.

[140] The grantee parties contend that consent is not a prerequisite to a determination being made under s 26D(2). In this regard, s 26D(2) contemplates that a conjunctive arrangement may arise under an agreement of the kind mentioned in s 31(1)(b) or pursuant to a determination under s 38 and does not specifically refer to any requirement that the determination be made by consent. While the EM states that s 26D(2) 'ensures that "conjunctive" agreements can be negotiated where the parties agree,' it is clear from other extrinsic sources that the legislature intended the arbitral body to have the ability to determine that later acts would be exempt from the right to negotiate. For example, the Supplementary Explanatory Memorandum to the Government Amendments moved in July 1998, which among other things excluded ministerial determinations and declarations from the operation of s 26D(2), states that the amendments were intended to ensure that the provision only applies to acts that were contemplated by parties in an earlier agreement or by the arbitral body in a determination. In this respect, the EM states that the purpose of s 26D(2) is to 'allow a single right to negotiate where the first encompassed all relevant matters relating to the later act.'

[141] This draws attention to two issues to which the Tribunal must give careful consideration when asked to make a conjunctive determination under s 26D(2).

[142] First, the Tribunal must be satisfied that the proposed determination clearly meets the requirements of s 26D(2). In particular, the Tribunal must be satisfied that the conditions to be complied with by parties other than the native title party (whether before or after the later act is done) are both appropriate and enforceable. Specifically, the proposed conditions must not only be consistent with the Act and relevant to its purpose, but must also possess reasonable certainty of meaning and application (see *Evans* at 213-214). The need for conditions to be unambiguous is particularly important given that the later act will only be exempt from the right to negotiate under s 26D(2) if parties other than the native title parties have complied with conditions required to be complied with before the later act is done.

[143] Second, the Tribunal must consider whether the proposed determination is justified on the evidence before it. In *Moore v Mungeranie,* for example, the fact that parties consented to the determination was a relevant consideration, as it demonstrated that parties had turned their minds to the likely impact of the later acts, particularly in relation to the claimant's registered native title rights and interests. However, Member Sosso also had regard to the fact that the evidence provided by the grantee party enabled the Tribunal to assess the nature and extent of the operations that might be conducted if the project were to proceed to production. Therefore, Member Sosso found that the evidence enabled him to 'sensibly apply the section 39 criteria to the gas/oil production stage' (at [79]). In this respect, the native title party's consent will not necessarily be relevant where the evidence otherwise suggests that a conjunctive determination should be made. Nevertheless, as a determination under s 26D(2) has the effect of depriving the native title party of its procedural rights under Subdivision P, the Tribunal will be extremely circumspect in exercising its discretion, and will only do so in circumstances where the proposed determination very clearly meets the requirements of s 26D(2) and where such a determination is manifestly justified on the evidence before it, whether or not the native title party has given its consent.

[144] In the present matter, I am not satisfied that the proposed determination meets the requirements of s 26D(2). First, the two conditions (being the requirement to enter into a written agreement in relation to the grant of any of the titles mentioned in the minute 'from time to time' and the requirement that the grantee parties and native title party comply with the terms of the GP Proposed Conditions) are expressed in the alternative. As such, it is

uncertain whether the right to negotiate would apply in circumstances where the grantee parties had complied with the GP Proposed Conditions but no written agreement had been reached. Second, the requirement that parties comply with the GP Proposed Conditions is imposed on the native title party as well as the grantee parties. Section 26D(2) only empowers the Tribunal to impose conditions on parties other than the native title parties. As the GP Proposed Conditions impose obligations on the native title party, there is no way to rectify the conditions without making substantial alterations. Arguably, the condition requiring the grantee parties to enter into a written agreement with the native title party also binds the native title party. Third, as no timeframe is expressed as to when the grantee parties must enter into an agreement with the native title party, it is impossible to determine the point at which it could be said that the grantee parties have failed to comply with the condition. In this respect, I do not accept the grantee parties' submission that the condition ensures that Subdivision P will continue to apply if parties cannot reach agreement. Rather, the proposed condition is drafted in terms which suggest that negotiations could carry on indefinitely. Nor do I accept that it is within the Tribunal's power to impose such a condition. As noted above, the purpose of s 26D(2) is to allow a single right to negotiate to apply to later acts where certain requirements are met by parties other than the native title parties. However, the effect of the proposed condition in this matter is to substitute the right to negotiate under Subdivision P for another. To impose such a condition would not only frustrate the intent of s 26D(2) but, as the condition effectively excludes the right to apply for a determination under s 38, it may also undermine the objects of the future act regime. As the Federal Court observed in *Evans*, it is inherent in s 38 that the Tribunal must not leave outstanding issues unresolved. In my view, this observation applies with equal force to a determination under s 26D(2). Accordingly, I consider that a condition requiring parties to agree on certain matters before the later act may be done is beyond the Tribunal's power under s 26D(2)(c).

[145] Even if it were within the Tribunal's power to impose the conditions, I am not satisfied on the evidence before me that a conjunctive determination is appropriate in the circumstances. Although the grantee parties submit that parties discussed the possibility of a conjunctive agreement which would provide for the grant of a production licence, it is clear from the material provided to the Tribunal during the good faith inquiry that these discussions did not progress very far. Significantly, the evidence indicated that the native title party did not consider itself to be adequately resourced to participate in negotiations about a conjunctive agreement. In the circumstances, I am not satisfied that the parties, and the

native title party in particular, were able to give full consideration to the possible effect of the later acts contemplated in Part 2 of the Minute on the native title party's registered native title rights and interests. While I accept Member Sosso's findings in *Moore v Mungeranie* about the general nature of petroleum exploration and production, the grantee parties have not provided any evidence about what petroleum operations might involve in the event the project proceeds to production. In the circumstances, it is uncertain what effect such operations are likely to have, particularly in light of the Government party's submissions regarding the differences between the Cooper Basin and the Fitzroy Trough. Taking these factors into account, I am not satisfied that it is appropriate to make a determination in the terms sought by the grantee parties in Part 2 of the Minute.

Conclusion

[146] The weight of evidence supports a determination that the act may be done. As outlined above, the Government party indicated they intend to impose the conditions and endorsements listed at [21], and there is sufficient evidence to support the imposition of the Extra Conditions and the GP Proposed Conditions (as annexed to this determination).

Determination

[147] The determination of the Tribunal is that the act, being the grant of petroleum exploration permit EP 5/07-8 to Backreef Oil Pty Ltd and Oil Basins Ltd, may be done subject to:

a. the Extra Conditions outlined at [23] to the effect that:

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 petroleum title is not to be restricted except in relation to those parts of the land which are used for exploration or production 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 the grantee party submits to the Executive Director**,** Petroleum Division**,** Department of Mines and Petroleum a proposal to undertake an exploration or production 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 operations and related infrastructure**,** including proposed access routes.

4. Upon assignment of the petroleum title the assignee shall be bound by these conditions.

and;

b. The GP Proposed Conditions as annexed to this determination.

Helen Shurven
Member
1 February 2013

Annexure One: The Grantee Party Proposed Conditions

Aboriginal Heritage Conditions

1. Interpretation

1.1. In these Conditions;

'Aboriginal Site' means a site or area to which either of the Heritage Acts applies or may apply.

'Activities' means any ground disturbing Exploration activities conducted or proposed to be conducted by or on behalf of the Grantee Party on the Land.

'Exploration' means conducting any geological, geophysical, geochemical or seismic survey (but excluding airborne surveys), exploration or appraisal drilling or taking samples for the purpose of analysis and evaluation or Petroleum prospectivity including:

a) Entering and re-entering the Land with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for Petroleum;
b) Digging pits, trenches and holes and sinking bores, shafts, tunnels in or under the Land or ascertaining the quality, quantity or extent of Petroleum and other material by drilling or other methods;
c) The extraction and removal for sampling and testing of an amount of material or other substances reasonably necessary to determine its hydrocarbon bearing quality;
d) Taking or diverting water from any natural spring, pool or stream situated on or flowing through the Land including sinking a well or bore and taking water there from for domestic use or any purpose in connection with exploring for Petroleum; and
e) Without limiting the foregoing, any activity or thing authorities to be done pursuant to an exploration permit, granted under the Petroleum Act or a licence granted under the *Petroleum Pipelines Act 1969* (WA).

'Field Inspection' means the field inspection described in Condition 4.1.

'Field Inspection Report' means the report referred to in Condition 4.7.

'Field Inspection Survey' has the meaning given to the term in Condition 4.1.

'Field Inspection Team' has the meaning given to the term in Condition 4.3.

'Heritage Acts' means the *Aboriginal Heritage Act 1972* (WA) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

'Heritage Impact Assessment' and **'HIA'** means the consultation process referred to in Condition 2.

'Land' means the area of land that is coincident to the Native Title Claim and the Permit.

'Native Title Act' means the *Native Title Act 1993* (Cth).

'Native Title Claim' means the Nyikina Mangala native title determination application assigned National Native Title Tribunal reference number WC 99/25 and Federal Court Number WAD 6099/.

'Native Title Party' means Annie Milgin, Cyril Archer, Rosita Shaw, Joe Green, Rona Charles, Robert Watson, Anthony Watson, David Banjo, Harry Watson, John Watson or such other persons as may from time to time be authorised by the Federal Court to be the named applicants for the Native Title Claim.

'Parties' means one or more of the signatories to this Agreement.

'Permit' means the exploration permit issued pursuant to application 5/07-8 under the Petroleum Act, and includes any extension, variation, renewal or re-issue of the same.

'Petroleum Act' means the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

'Petroleum' has the meaning given to that term in the Petroleum Act.

'Survey Team' has the meaning given to the term in Condition 5.3.

'Team' means a Field Inspection Team or a Survey Team, as the context requires.

'Work Program Clearance Survey' means the survey described in Condition 5.1.

'Work Program Clearance Survey Report' means the report referred to in Condition 5.7.

2. Heritage Assessment Prior to Activities

2.1. Prior to commencing any Activities the Grantee Party must request the Native Title Party to conduct a Heritage Impact Assessment, and if required by the Native Title Party, a Field Inspection or a Work Program Clearance Survey for the relevant area.

2.2. The Grantee Party is not required to request the Native Title Party to conduct a Heritage Impact Assessment or a Field Inspection or Work Program Clearance Survey if the Native Title Party has, during the term of the Permit, previously cleared the same Activity in the same area. The Grantee Party will provide

advance notice to the Native Title Party of any Activities that it intends to conduct under this Condition 2.2.

2.3. The Grantee Party must issue the Native Title Party notice in writing setting out the Activities the Grantee Party intends to carry out (**'HIA Notice'**). The HIA Notice shall provide information necessary to complete a HIA, including:

a) Details of the proposed Activities;

b) Two (2) identical 1:100,000 or other appropriate scale topographic maps of the land in question, and/or aerial/satellite images, showing with reasonable accuracy the areas where the proposed Activities are to occur;

c) Details of:
   i. The nature, scope and objectives of the Activities;
   ii. The estimated time and period for the performance of the Activities;
   iii. The techniques, infrastructure and major items of equipment to be used;
   iv. The approximate number of personnel who will be involved in the conduct of the Activities and whether they are likely to be employees or independent contractors of the Grantee Party;
   v. The likely effect of the Activities on the environment, including copies of any:
      A. Reports required by relevant state or federal legislation concerning the environmental impact of the proposed Activity;
      B. Environmental protection measures which may be required or recommended; and
      C. Proposals or recommendations, of relevant state or federal environmental protection agencies, designed to minimise the environmental impact and/or disturbance to the Native Title Party;
   vi. Any water, timber, vegetation, soil (including ochre) or other natural resources proposed to be obtained from the Permit;
   vii. The area or, where appropriate, line distance the subject of the Activity (in square or, where appropriate, line kilometres); and
   viii. Details of any other aspect of the Activity which will or is likely to have an impact, adverse or otherwise, upon or cause disturbance to the environment or to the exercise of the rights and responsibilities of the Native Title Party;

d) An indicative schedule for the proposed Activities; and

e) Any other information reasonably requested by the Native Title Party.

2.4. If at any time the Grantee Party wishes to substantially vary the proposed Activities, the Grantee Party shall submit a variation to the original HIA Notice or a new HIA Notice, to the Native Title Party. In either case, the varied Activities must be promptly assessed by the Native Title Party.

3. Heritage Impact

3.1. Upon receipt of the HIA Notice the Native Title Party shall, within 28 days, determine whether:

a) The proposed Activities can proceed without any further assessment;
b) A Field Inspection Survey is required; or
c) A Work Program Clearance Survey is required.

3.2. The Native Title Party shall give the Grantee Party a reasonable opportunity to explain the details of the proposed Activities and to clarify any issues, including Exploration techniques, personnel on the ground, level of disturbance and areas of specific interest.

3.3. The Native Title Party shall notify the Grantee Party, in writing, of the outcome of the HIA within 28 days after the determination under Condition 3.1. if the written outcome of the HIA has not been received by the Grantee Party within 90 days after the HIA notice has been received by the Native Title Party, then the Activities proposed by the Grantee Party in the HIA Notice will be deemed to have been cleared under the Heritage Acts

3.4. The Grantee Party shall contribute to the costs of the HIA by way of a fixed fee of $2000. The Grantee Party shall pay the amount within 21 days of receipt of a tax invoice from the Native Title Party.

4. Field Inspection

4.1. If the Native Title Party notifies the Grantee Party under Condition 3.3 that a Field Inspection is required, the Native Title Party shall arrange for a Field Inspection Survey to be carried out and a Field Inspection Report to be provided to the Grantee Party, within 90 days after the HIA Notice has been received by the Native Title Party. If the Native Title Party notifies the Grantee Party that a Field Inspection is required and no Field Inspection is undertaken or a Field Inspection Report is not provided within the 90 days after the HIA Notice has been received by the Native Title Party then the activities proposed by the Grantee Party in the HIA Notice will be deemed to have been cleared under the Heritage Acts.

4.2. The Native Title Party will provide a Field Inspection Report to the Grantee Party, within 21 days of the Field Inspection Survey.

4.3. The Native Title Party shall organise a field inspection team consisting of up to eight (8) members of the Native Title Party for each day of the survey ('Field Inspection Team').

4.4. A representative of the Grantee Party, with authority to vary the proposed program of Activities, may also attend the Field Inspection provided that the representative shall not be privy to confidential discussions between members of the Field Inspection Team.

4.5. The Field Inspection Team shall examine the physical location of the proposed Activities to either clear, or not clear the Activities, giving due consideration to

any program modification that the Grantee Party's representative may be able to provide to accommodate Aboriginal Sites.

4.6. Communications in the field between the Grantee Party, its employees or contractors and members of the Field Inspection Team shall not constitute clearance or non-clearance of any aspect of the Grantee Party's proposed Activities. The Native Title Party may, by prior approval in writing, authorise a member of the Field Inspection Team, upon completion of all or any part of the survey, to advise the Grantee Party that all or part of the proposed Activities are cleared. Such advice shall be via a map, endorsed by the Field Inspection Team and the Grantee Party and marked up accordingly with a copy being provided to the Grantee Party.

4.7. Within 90 days of receiving the HIA Notice and Native Title Party shall provide a Field Inspection Report to the Grantee Party.

4.8. The Field Inspection Report shall set out which of the proposed Activities have been cleared and which have not, as the case may be, and any conditions on the conduct of the Activities. The Field Inspection Report shall include a clear indication on a map and by description of those parts of the Permit surveyed by the Field Inspection Team:

a) Upon which all or part of the proposed Activities may be carried out as proposed;
b) Upon which the Native Title Party have attached conditions, for the protection of Aboriginal Sites, for carrying out all or part of the proposed Activities; and
c) Those areas where the Activities may affect Aboriginal Sites.

4.9. The Grantee Party shall pay all reasonable costs, fees, disbursement and expenses incurred by the Native Title Party in carrying out the field Inspection, in accordance with a budget agreed by the Parties

5. Work Program Clearance Survey

5.1. If the Native Title Party notifies the Grantee Party under Condition 3.3 that a Work Program Clearance Survey is required, the Native Title Party shall arrange for the survey to be carried out, and a Work Program Clearance Survey Report to be provided to the Grantee Party within 90 days after the HIA Notice has been received by the Native Title Party. If the Native Title Party notifies the Grantee Party that a Work Program Clearance Survey is required and no Work Program Clearance Survey is undertaken or a Work Program Clearance Survey is not provided within the said 90 days after the HIA Notice has been received by the Native Title Party then the Activities proposed by the Grantee Party in the HIA Notice will be deemed to have been cleared under the Heritage Acts.

5.2. Within 90 days of receiving the HIA Notice the Native Title Party will provide a Work Program Clearance Survey Report to the Grantee Party.

5.3. The Native Title Party shall organise a Work Program Clearance Survey team **('Survey Team')** consisting of the following personnel:

a) Up to eight (8) Native Title Party for each day of the survey; and

b) A male anthropologist and/or female anthropologist (if deemed appropriate by the Native Title Party) appointed by the Grantee Party for a panel nominated by the Native Title Party.

5.4. A representative of the Grantee Party, with authority to vary the proposed Activities, may also attend but shall not be privy to confidential discussion between members of the Survey Team.

5.5. The Native Title Party shall, at the same time as it provides the Grantee Party with the budget for the survey, notify the Grantee Party of the identity of any personnel proposed to form part of the Survey Team.

5.6. The Survey Team shall examine the physical location of the proposed Activities to either clear or not clear the proposed Activities accordingly, giving due consideration to any program modification that the Grantee Party's representative may be able to provide to accommodate specific Aboriginal Sites.

5.7. Communications in the field between the Grantee Party, its employees or contractors and members of the Survey Team shall not constitute clearance or non-clearance of any aspect of the Grantee Party's proposed Activities. The Native Title Party may authorise a member of the Survey Team, upon completion of all or any part of the survey, to advise the Grantee Party that all or part of the proposed Activities are cleared. Such advice shall via a plan, endorsed by the Survey Team and marked up accordingly with a copy being provided to the Grantee Party.

5.8. Within 90 days or receiving the HIA Notice the Native Title Party shall provide the Grantee Party with a Work Program Clearance Survey Report including a map.

5.9. The Work Program Clearance Survey Report shall set out which of the proposed Activities have been cleared and which have not, as the case may be, and any conditions, for the protection of Aboriginal Sites, on the conduct of Activities. The Work Program Clearance Survey Report shall include a clear indication on a map and by description of those parts of the Permit surveyed by the Field Inspection Team:

a) Upon which all or part of the proposed Activities may be carried out as proposed;
b) Upon which the Native Title Party have attached conditions, for the protection of Aboriginal Sites, for carrying out all or part of the proposed Activities; and
c) Those areas where the proposed activities may affect Aboriginal sites.

5.10. The Grantee Party shall pay all reasonable costs, fees, disbursement and expenses incurred by the Native Title Party in carrying out the Work Program Clearance Survey, in accordance with a budget agreed by the Parties.

6. Budgets and Payment process

6.1. If a Field inspection or Work Program Clearance Survey is required, the Native Title Party shall within 28 days after the determination referred to in Condition 3.1, submit to the Grantee Party a budget which shall include an estimate of all of the costs and expenses associated with the required Field Inspection or Work Program Clearance Survey, as the case may be. The budget will be based on current practices and rates including daily rates and substance for members of the Team, the costs of an anthropologist, and substance and transport costs and an administration fee of 5%.

6.2. The Grantee Party and Native Title Party must attempt to agree upon the budget prior to any Field Inspection or Work Program Clearance Survey. Each party shall use its reasonable endeavours to minimise the costs of a Field Inspection or Work Program Clearance Survey.

6.3. The Native Title Party shall submit to the Grantee Party, within 21 days of the completion of a Field Inspection or a Work Program Clearance Survey, in invoice for all costs and expenses incurred in accordance with the budget (together with reasonable documentary evidence of the expenses), less any amount paid by the Grantee Party pursuant to Condition 6.5.

6.4. The invoice referred to in 6.5 shall include the following information:

a) The number of days worked by each member of the Team;
b) The number of days worked by any anthropologists;
c) The number of vehicles, costs, rates and kilometres travelled; and
d) Any other reasonable costs incurred in accordance with the budget.

6.5. The Grantee Party shall, prior to the commencement of a Field Inspection or a Work Program Clearance Survey, pay to the Native Title Party fifty per cent (50%) of the costs and expenses set out in the budget. The Grantee Party shall pay the balance of the budget to the Native Title Party upon delivery of an invoice and the Field Inspection Report or the Work Program Clearance Survey Report, as the case may be.

7. Cultural Heritage Information

7.1. The Native Title Party shall not be required to disclose;

a) Any information which they are not able to disclose to the Grantee Party in accordance with traditional law custom; or
b) The location of or a description of any Aboriginal Site except to the extent required to provide a Field Inspection Report or a Work Programme Clearance Survey Report.

7.2. Except as required by any law or regulation court or administrative officer or a stock exchange rule the Grantee Party shall not record or disclose any cultural or heritage information that relates to the Native Title Party without their prior written consent.

7.3. The Grantee Party shall not use any information received from the Native Title Party, or information of which it becomes aware as a result of the conduct of a conduct of a Field Inspection or a Work Program Clearance Survey, in the Native

Title Claim except in relation to matters that may affect the rights and interests of the Grantee Party.

7.4. The Grantee Party will give reasonable notice to the Native Title Party of any application under section 16 or 18 of the *Aboriginal Heritage Act 1972* (WA) with respect to any part of the Land.

8. Assignment

8.1. The Grantee Party must not assign any interest in the Permit until the assignee executes and delivers to the Native Title Party a deed expressed to be for the benefit of the Native Title Party by which the assignee undertakes to be bound by these conditions as if it were the Grantee Party.