NATIONAL NATIVE TITLE TRIBUNAL

***Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85 (18 August 2014)**

Application No: WF2013/0005, WF2013/0006, WF2013/0007, WF2013/0008

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Minister for Lands, State of Western Australia (Government party/applicant)

- and -

Western Australian Land Authority (grantee party)

- and -

Buurabalayji Thalanyji Aboriginal Corporation RNTBC (native title party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE

Tribunal:	Raelene Webb QC, President
Place:	Perth
Date of decision:	18 August 2014
Hearing dates:	12 and 19 November 2013

Catchwords: Native title – future acts – application for determination with respect to the compulsory acquisition of native title rights and interests – application to refer question of law – application for referral refused – jurisdictional issues – notice simultaneously given under *Land Administration Act 1997* (WA) and *Native Title Act 1993* (Cth) – validity of notice given under State legislation irrelevant to exercise of power – notices effective for the purposes of s 29 – s 39 criteria considered – no direct or immediate effect on registered native title rights and interests – no effect on sites of particular significance – economic significance where areas required to support existing development – public interest in acquiring the interests outweighs effect on native title – determination that the acts may be done

Legislation: *Native Title Act 1993* (Cth), ss 24MD(2), 24MD(3), 24MD(6A), 25(4), 26(1)(c)(iii), 29, 30, 30A, 31(1)(b), 35, 36(1), 36A, 38, 39, 41(3), 41(5), 52, 52A, 109(3), 145, 169, 253

Land Administration Act 1997 (WA), ss 165, 166, 167, 170

Western Australian Land Authority Act 1992 (WA), ss 3, 5A, 16(e)

Aboriginal Heritage Act 1972 (WA), ss 5, 18

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Mining Act 1978 (WA)

Petroleum and Geothermal Energy Resources Act 1967 (WA)

Transfer of Land Act 1893 (WA)

Cases:

Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland [2013] NNTTA 52 (‘*Adani Mining v Diver*’)

Attorney-General of the Northern Territory v Ward (2003) 134 FCR 16; [2003] FCAFC 283 (‘*Attorney-General v Ward*’)

Australian Manganese Pty Ltd v Western Australia (2008) 218 FLR 387; [2008] NNTTA 38 (‘*Australian Manganese v Western Australia*’)

Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) & Ors on behalf of Nyikina and Mangala/Western Australia [2013] NNTTA 9 (‘*Backreef Oil v JW*’)

Banjima People v Western Australia (No 2) [2013] FCA 868 (‘*Banjima People v Western Australia (No 2)*’)

Bissett v Mineral Deposits (Operations) Pty Ltd (2001) 166 FLR 46; [2001] NNTTA 104 (‘*Bissett v Mineral Deposits (Operations)*’)

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

Cheinmora v Striker Resources NL; Dann v Western Australia (1996) 142 ALR 21; [1996] FCA 1147 (‘*Cheinmora v Striker Resources*’)

Dann and Others (Amangu People) v Western Australia (2006) 208 FLR 357; [2006] NNTTA 126 (‘*Dann v Western Australia*’)

Dixon v Northern Territory (2001) 166 FLR 29; [2001] NNTTA 29 (‘*Dixon v Northern Territory*’)

Dolores Cheinmora & Ors/Western Australia/Mark James Thompson, Striker Resource NL and Australian United Gold NL [1995] NNTTA 26 (‘*Cheinmora v Thompson*’)

FMG Pilbara Pty Ltd v Cox (2009) 175 FCR 141; 255 ALR 229; 2 ARLR 141; [2009] FCAFC 49 (‘*FMG Pilbara v Cox*’)

Hayes v Western Australia [2008] FCA 1487 (‘*Hayes v Western Australia*’)

Hicks v Western Australia [2002] FCA 1490 (‘*Hicks v Western Australia’*)

Jabiru Metals Ltd v Victoria (2010) 257 FLR 443; [2010] NNTTA 138 (‘*Jabiru Metals v Victoria*’)

Jax Coal Pty Ltd v Smallwood (2011) 260 FLR 99; [2011] NNTTA 46 (‘*Jax Coal v Smallwood*’)

Albert Little and Others on behalf of the Badimia People/Western Australia/FMG Resources Pty Ltd [2011] NNTTA 173 (‘*Little v FMG Resources*’)

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurruma and Pinikura People; Puutu Kunti Kurruma and Pinikura People #2/Western Australia [2011] NNTTA 80 (‘*Magnesium Resources v Puuntu Kunti Kurruma and Pinikura*’)

McKenzie v Minister for Lands (2011) 45 WAR 1; 187 LGERA 1; 256 FLR 1; 6 ARLR 1; [2011] WASC 335 (‘*McKenzie v Minister for Lands*’)

Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respect (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People [1998] NNTTA 2 (‘*Minister for Lands v Strickland*’)

Minister for Mines (WA) v Evans (1998) 163 FLR 274; [1998] NNTTA 5 (‘*Minister for Mines v Evans*’)

Monadee v Western Australia (2003) 174 FLR 381; [2003] NNTTA 38 (‘*Monadee v Western Australia*’)

Moore v Mungeranie (2005) 193 FLR 62; [2005] NNTTA 53 (‘*Moore v Mungeranie*’)

O’Sullivan v Farrer (1989) 168 CLR 210; 89 ALR 71; 64 ALJR 86; [1989] HCA 61 (‘*O’Sullivan v Farrer*’)

Peregrine Resources Pty Ltd v Ashwin [2014] NNTTA 59 (‘*Peregrine Resources v Ashwin*’)

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; [1998] HCA 28 (‘*Project Blue Sky v Australian Broadcasting Authority*’)

Raymond Dann & Others on behalf of the Amangu People/Western Australia/Warrego Energy Limited [2010] NNTTA 30 (‘*Dann v Warrego Energy*’)

Re Koara People (1996) 132 FLR 73; [1996] NNTTA 31 (‘*Re Koara People*’)

Silver v Northern Territory (2002) 169 FLR 1; [2002] NNTTA 18 (‘*Silver v Northern Territory*’)

State of Western Australia/M M Strickland and A J Nudding on behalf of the Maduwongga People; B & D Champion, C & D Sambo, G Wilson and C Donaldson on behalf of the Gubrun People; and D Dimer, O Dimer and H Dimer on behalf of Mingarwee (Maduwonjga) People/Plutonic (Baxter) Pty Ltd and Mineral Commodities NL [1998] NNTTA 12 (‘*Western Australia v Strickland*’)

Summons v Victoria (2003) 176 FLR 1; [2003] NNTTA 66 (‘*Summons v Victoria*’)

Walley v Western Australia (1999) 87 FCR 565; 168 ALR 359; [1999] FCA 3 (‘*Walley v Western Australia*’)

Ward v Western Australia (1996) 69 FCR 208; 136 ALR 557; [1996] FCA 1452 (‘*Ward v Western Australia*’)

Weld Range Metals Ltd v Western Australia (2011) 258 FLR 9; [2011] NNTTA 172 (‘*Weld Range Metals v Western Australia*’)

Western Australia v Gordon (2010) 258 FLR 168; [2010] NNTTA 152 (‘*Western Australia v Gordon*’)

Western Australia v Thomas (1996) 133 FLR 124; [1996] NNTTA 30 (‘*Western Australia v Thomas*’)

Western Desert Lands Aboriginal Corporation v Western Australia (2009) 232 FLR 169; 2 ARLR 214; [2009] NNTTA 49 (‘*Western Desert Lands v Western Australia*’)

WF (Deceased) & Ors on behalf of the Wiluna Native Title Claimants/Western Australia/Emergent Resources Ltd [2012] NNTTA 17 (‘*WF v Emergent Resources*’)

WMC Resources v Evans (1999) 163 FLR 333; [1999] NNTTA 522 (‘*WMC Resources v Evans*’)

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

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd [2014] NNTTA 8 (‘*Yindjibarndi Aboriginal Corporation v FMG Pilbara*’)

Representatives of the Government party and the grantee party:	Mr Stephen Wright, Francis Burt Chambers Ms Sophia Woodrow, State Solicitor’s Office Mr Cheyne Beetham, State Solicitor’s Office
Representatives of the native title party:	Ms Chau Huynh, Corser & Corser Lawyers Mr Jerome Frewen, Desert Management Pty Ltd

REASONS FOR DECISION

Background

[1] In August 2012, the Minister for Lands on behalf of the State of Western Australia ('the Government party') gave four notices of its intention in accordance with s 170 of the *Land Administration Act 1997* (WA) ('LAA') to take interests in land and confer interests under written law (referring also to s 24MD(6A) of the *Native Title Act 1993* (Cth) ('the Act', 'NTA') – as to which see [11] and [33]-[49] below); and in accordance with s 29 of the Act, to compulsorily acquire native title rights and interests in certain land ('the August 2012 notices'). The notices were signed by the Minister on 10 August 2012. By way of notification under s 29 of the Act, copies of the notices were given to Buurabalayji Thalanyji Aboriginal Corporation ('the native title party') and the National Native Title Tribunal ('the Tribunal') under cover of letter dated 20 August 2012. This letter is referred to later in these reasons as 'the Raven letter'.

[2] The notices relate to four separate areas of land near the town of Onslow in the Shire of Ashburton, as follows:

(a) approximately 200 hectares, being portions of Lot 152 on Deposited Plan 220265 shown as "Area 1" on Deposited Plan 72887, being portion of Crown Lease 56/1967 "Minderoo Station" being part of the land in certificate of Crown land title volume 3098 folio 710 ('Area 1').

(b) approximately 60 hectares, being portion of Lot 153 on Deposited Plan 220110 shown as portion of "Area 2" on Deposited Plan 72887, being portion of Crown Lease 330/1967 "Urala Station" being part of the land in certificate of Crown land title volume 3135 folio 585, and Portion of Lot 152 on Deposited Plan 220265 shown as portion of "Area 2' on Deposited Plan 72887, being portion of Crown Lease 56/1967 "Minderoo Station" being part of the land in certificate of Crown land title volume 3098 folio 710 ('Area 2').

(c) approximately 8 hectares, being the whole of Lot 350 on Deposited Plan 72964, being the whole of the land in certificate of Crown land title volume 3020 folio 843; the whole of Lot 72 on Deposited Plan 214441, being the

whole of the land in qualified certificate of Crown land title volume 3054 folio 771; and the whole of Lot 79 on Deposited Plan 214441, being the whole of the land in qualified certificate of Crown land title volume 3054 folio 772 ('Area 6').

(d) approximately 31.5 hectares, being portion of Lot 152 on Deposited Plan 220265 shown as "Area 7" on Deposited Plan 74351, being portion of Crown Lease 56/1967 "Minderoo Station" being part of the land in certificate of Crown land title volume 3098 folio 710 ('Area 7').

[3] Areas 1, 2 and 7 are within the Ashburton North Strategic Industrial Area ('ANSIA'). The ANSIA, located approximately 12 kilometres south-west of Onslow and two kilometres north-east of the Ashburton River, is the proposed multi-user port and strategic industrial area at Ashburton North with a land area of approximately 8000 hectares.

[4] Area 6 is adjacent to the town of Onslow, but outside its current townsite boundary. Its proposed future use is residential development and associated infrastructure.

[5] The purpose of the proposed compulsory acquisitions is to enable the transfer or grant of freehold title to Areas 1, 2, 6 and 7 to the Western Australian Land Authority (LandCorp) so that it may then develop and subdivide the areas and transfer freehold lots or grant leases, and other associated interests, to third parties.

[6] Section 5A of the *Western Australian Land Authority Act 1992* (WA) ('WALA Act') provides that LandCorp is not an agent of the Crown and does not have the status, immunities or privileges of the Crown. Because the purpose of the acquisitions is not to confer rights and interests on the Government party or to provide an 'infrastructure facility', as defined in s 253 of the Act, the taking of the areas pursuant to s 165 of the LAA are compulsory acquisitions of native title rights and interests covered by s 26(1)(c)(iii) of the NTA. They are therefore future acts to which the right to negotiate provisions set out in Part 2 Division 3 Subdivision P of the Act apply. Unless the provisions of Subdivision P are complied with, the future acts will be invalid to the extent that they affect native title: s 25(4) NTA.

[7] The Government party asserts that LandCorp is a 'grantee party' in respect of each of the future acts. Section 253 of the Act defines a 'grantee party' as having the meaning given in s 29(2)(c), which clearly identifies the 'grantee party' as the person who has 'requested or applied for' the doing of the relevant act. It is not at all clear from the evidence that LandCorp has requested or made application for the proposed future acts to be done. Nonetheless this matter has proceeded from the outset on the assumption that LandCorp is a 'grantee party', and no party has questioned that assumption. For the purposes of the present matter, where negotiation in good faith is not an issue (see [10] below), the correctness or otherwise of that assumption is of no consequence. LandCorp is the beneficiary of the proposed acquisitions in any event. For those reasons I am prepared to proceed, as the parties have, by referring to LandCorp as the grantee party, although noting that the Government party and the grantee party were jointly represented and filed joint contentions and evidence. I will adopt the same approach as the parties and refer to the Government party and the grantee party collectively as the 'GPs', where relevant.

[8] For the purposes of s 29(4), the notices specified the notification day as 22 August 2012 and contained a statement to the effect that, under s 30 of the Act, persons have until three months after the notification day to take certain steps to become native title parties in relation to the notice. At the notification day, the Buurabalayji Thalanyji Aboriginal Corporation was the registered native title body corporate in relation to the land that will be affected by the proposed acts. It is therefore a native title party in accordance with s 29(2)(a) of the Act and by s 30A has the status of a 'negotiation party' under Part 2 Division 3 Subdivision P of the Act. There is no other native title party to these proceedings. The Government party and the grantee party are also 'negotiation parties'.

[9] On 21 June 2013, the Government party applied under s 35 of the Act for a future act determination under s 38. The application was made on the basis that the negotiation parties had not been able to reach agreement on the proposed acts within six months of the notification day. On 3 July 2013, I appointed Member Dan O'Dea to constitute the Tribunal for the purpose of conducting an inquiry into the proposed acts. Following the untimely passing of Member O'Dea, I appointed myself to the matter on 3 September 2013.

Preliminary Issues

[10] A preliminary conference was convened on 12 August 2013 for the purpose of determining whether any party intended to raise the issue of whether any other party, apart from the native title party, had negotiated in good faith and to set directions for the conduct of the inquiry. As the native title party indicated that it would not be taking issue with the good faith of the other parties, directions were issued for the progress of the substantive inquiry.

[11] At the preliminary conference, Member O'Dea drew attention to the fact that each of the August 2012 notices refer to s 24MD(6A) as well as s 29 of the Act. Parties were invited to make submissions as to whether the reference to s 24MD(6A) affected the validity of the notices. Section 24MD(6A) concerns the treatment of acts that pass the freehold test but do not attract the right to negotiation. As the native title party indicated its intention to challenge the validity of the notices on this ground, in parallel with the directions made for the progress of the inquiry, directions were made for the native title party to file submissions on the s 24MD(6A) issue and for the Government party and the grantee party to file submissions in response.

[12] On 2 September 2013, the native title party filed an Outline of Submissions - Invalidity of Notices of Intention to take Land ('NTP Submissions'). In response, the Government party and the grantee party jointly filed an Outline of Submissions regarding the Validity of the Notices on 13 September 2013 ('GP Submissions').

[13] In addition to addressing the validity of the notices, the native title party's submissions also included a request that the matters dealt with in the submissions be referred to the Federal Court pursuant to s 145 of the Act. Section 145 provides that the Tribunal may, on its own initiative or at the request of a party, refer a question of law arising in an inquiry to the Federal Court for a decision. The native title party also requested the opportunity to respond to any submissions made on behalf of the Government party or the grantee party in relation to the notices.

[14] On 19 September 2013, I gave leave to the native title party to reply to the GP Submissions and indicated to parties that I would reserve my decision as to whether the matter should be referred to the Federal Court until that reply had been filed. The native title party filed its Responsive Submissions - Invalidity of Notices of Intention

to take Land on 1 October 2013 ('NTP Responsive Submissions'), together with the affidavit of Frances Hayes affirmed on 24 September 2013 and the affidavit of Lesleigh Anne Emily Bower sworn 27 September 2013. Pursuant to liberty given on 10 October 2013, the Government party and the grantee party filed submissions in reply on 14 October 2013 ('GP Reply') and the native title party filed further responsive submissions on 15 October 2013 ('NTP Final Submissions').

[15] In addition to addressing the effect of the references to s 24MD(6A) on the validity of the notices, the native title party raised a further ground for asserting invalidity of the notice of intention to take that accompanied the notice for Area 1, namely a handwritten notation on the copy of that notice which was an annexure to the s 35 application. On 24 October 2013, I directed the Government party and the grantee party to file an affidavit deposing to the circumstances in which the annotation was made. The Government party and the grantee party subsequently filed the affidavit of Anita Passante sworn 28 October 2013 ('Passante Affidavit').

[16] On 29 October 2013, having considered the submissions and supporting documents filed by each party in relation to the validity of the notices, I declined the native title party's request that the matters dealt with in the submissions be referred to the Federal Court. The Tribunal issued certification of the outcome, indicating that the reasons for my decision would be made available in due course. My reasons now follow.

Referral to Federal Court

[17] The power to refer a question of law arising in an inquiry to the Federal Court is discretionary (see *Cheinmora v Thompson*). The Tribunal has no obligation to accede to a request that a question of law be referred to the Federal Court, and the presiding member must agree to the referral (see s 145(2) NTA). Importantly, there must be clarity as to the question of law to be referred.

[18] The matter dealt with in the NTP Submissions which the native title party requested be referred to the Federal Court under s 145 of the Act is the purported invalidity of the Notices of Intention to Take ('NOITTs') in respect of Areas 1, 2, 6 and 7. Those submissions rest on two grounds. The first is that the reference in the notices to both s 29 and s 24MD(6A) confuses the rights to which the relevant native title parties are entitled under the Act. The second ground is that the handwritten note on the

instrument lodged for registration at the Western Australian Land Information Authority (Landgate) in respect of Area 1 (Form LAA-1029) is inaccurate, as it purports to add a further portion of land to the area advertised in the notice.

[19] The NTP Submissions placed considerable emphasis on the decision of the Supreme Court of Western Australia in *McKenzie v Minister for Lands*, in which Martin CJ considered the interaction between the LAA and the NTA. In subsequent submissions, the native title party shifted its focus to the question of whether the notices complied with s 29 of the Act, though it continued to maintain that the validity of the NOITTs under the LAA was nevertheless a precondition to the Tribunal's jurisdiction (for example, NTP Final Submissions at paragraph 7).

[20] I note here that whilst 'jurisdiction' has been used to describe the Tribunal's authority to conduct the future act inquiry, 'it would be equally accurate and perhaps clearer to characterise the question as one about the power of the Tribunal which is not a court but a statutory body carrying out an administrative function': *Hicks v Western Australia* at [15] per French J, see also *FMG Pilbara v Cox* at 143. Where relevant, references to 'jurisdiction' in these reasons are to be read with that qualification.

[21] The Government party and the grantee party submit that the question of whether the NOITTs issued under the LAA are invalid is beyond the jurisdiction of the Tribunal to determine, as it is neither a question that arises under the application nor a question that goes to the Tribunal's jurisdiction to conduct an inquiry and make a determination in respect of the application (GVP Submissions, paragraph 2). Accordingly, the Tribunal has no power to refer the question to the Federal Court as it is not a question 'arising in an inquiry.' Alternatively, the Government party and the grantee party submit that the matter should not be referred to the Federal Court as the Tribunal is capable of deciding for itself any questions raised in the native title party's submissions, including the extent to which the questions as relevant to its jurisdiction, as it has done previously in *Western Australia v Gordon* and *Jabiru Metals v Victoria* (GP Submissions, paragraph 3).

[22] To the extent the matters raised in the native title party's submissions are framed around the validity of the NOITTs under the LAA, I accept the Government party and the grantee party's submission that the Tribunal's authority to conduct the future act

inquiry does not depend on the validity of the NOITTs. This precise issue has already been considered by the Tribunal in *Western Australia v Gordon*. In that matter, Deputy President Sumner (at [48]) referred to his earlier findings in *Jabiru Metals v Victoria* at [16], where he concluded it was unnecessary for the Tribunal to satisfy itself of the validity of an application under the relevant mining legislation before it could deal with a proposed future act under the right to negotiate provisions. In *Western Australia v Gordon*, Deputy President Sumner considered that the same principles applied to a jurisdictional challenge based on the validity of a notice given under the LAA (at [49]-[50]):

> The Tribunal is concerned with a proposed future act as identified in the s 29 notice not with State processes leading up to or indeed whether State legislation requires further procedures to be complied with following those of the NTA … The Tribunal is concerned with the content of the s 29 notice and whether it complies with the NTA. A valid s 29 notice is a necessary pre-condition to the Tribunal's jurisdiction in a right to negotiate inquiry … Once there is a proper notice of a future act under the NTA (irrespective of what procedures might be required by other legislation) the Tribunal has jurisdiction to deal with it … If in the conduct of an inquiry it appears that the proposal is not in fact the one for which the notice was given then a jurisdictional issue could arise at that point. It could also be that questions about the validity of the future act could arise if a future act was done which was different to the one considered by the Tribunal … However, at this point in the process the Tribunal has before it a valid s 29 notice and clear statements from the Government party in its contentions about the nature of the future act … which confirms the information in the s 29 notice. On this basis the Tribunal can proceed to an inquiry and make a determination.

[23] In my view, it is important to appreciate that the August 2012 notices simultaneously gave notice under s 170 of the LAA and notice under s 29 of the Act, combining those notices in the same document, but addressing two separate procedures under different legislation. Although both procedures (under the LAA and the NTA) have to be completed if a compulsory acquisition of native title is to be valid, I agree with Deputy President Sumner that the Tribunal's power to conduct the future act inquiry is conditioned only upon proper notice of a proposed future act being given under s 29 of the Act. If the Tribunal has before it a valid s 29 notice it will have the power to conduct a right to negotiate inquiry, even in circumstances where a challenge is made elsewhere to the validity of the notice given under s 170 of the LAA.

[24] I will turn to the issue of whether the notices comply with s 29 and whether they accurately describe the acts proposed to be done later in these reasons. For present purposes, I adopt the principles outlined by Deputy President Sumner in *Jabiru Metals v Victoria* and *Western Australian v Gordon*. The question whether the NOITTs issued under the LAA are invalid is beyond the Tribunal's jurisdiction to

determine. The power to conduct an inquiry and make a determination in respect of the s 35 application does not depend on the validity of the NOITTs under State law. It follows that the Tribunal does not have power to refer that question to the Federal Court as it is not a question 'arising in an inquiry' for the purposes of s 145(1) of the Act.

[25] The native title party's submissions on the validity of the NOITTs were predicated on whether notice was given in accordance with s 29 of the Act, thus conflating the two separate procedures under the LAA and the NTA. In this regard, the native title party's submissions fail to appreciate that each of the August 2012 notices simultaneously gave notice under s 170 of the LAA as well as notice under s 29 of the NTA (see [23] above). This is exemplified in the NTP Reply, particularly at paragraphs 23 and 27, which refers to the s 29 notice relied on as a NOITT issued under the LAA, and then identifies the issue as whether the NOITTs give the notice required by s 29 of the NTA.

[26] This underscores the difficulty with the way in which the submissions on this issue have been framed, focusing on the validity of the combined notices, instead of the live issue before the Tribunal identified in the NTP Reply at paragraph 21: 'Has the Government party complied with section 29 of the NT Act?'

[27] I accept that the question of whether there has been compliance with s 29 may be one of general importance, as the purpose of the notice provisions is to ensure that native title holders and claimants are not left out of negotiations and have the opportunity to make submissions on the proposed act (see *Western Australia v Strickland*). The notice provisions also ensure that persons have the opportunity of becoming registered native title claimants, though this has less relevance to the present matter, as there is a registered native title body corporate for all the areas affected by the proposed acquisitions (see ss 29(2)(b) and 29(3) NTA).

[28] However, the Tribunal has already dealt with the requirements of s 29 in previous decisions. If a question of law could be formulated, I am not satisfied it would raise a novel issue requiring the consideration of the Federal Court. In the circumstances, I do not consider that the referral of the issue to the Federal Court is preferable given the additional expense that would be incurred by the parties. I have also taken into

account the existence of a right of appeal to the Federal Court on a question of law from any decision or determination of the Tribunal in relation to these proceedings (see s 169 NTA; *Cheinmora v Thompson*).

[29] Another question may be said to arise regarding the annotation to the Form LAA-1029 for Area 1. As will become apparent from my discussion of the issue later in these reasons, the question of whether the annotation renders the notice invalid is at best a question of law and fact, as it depends on a finding as to the meaning of the annotation. For this and the reasons outlined above, I do not consider this to be an appropriate question for referral pursuant to s 145(1) of the Act.

Validity of the Notices

Compliance with the Land Administration Act

[30] As noted above at [22]-[24], I accept the submission of the Government party and the grantee party that the Tribunal's jurisdiction in this matter does not depend on the validity of the NOITTs under the LAA. The Tribunal's jurisdiction is conditioned on compliance with the requirements of s 29 of the Act, and the validity of the notices for the purposes of the LAA is not a precondition to its jurisdiction to conduct an inquiry under s 38 of the Act.

Reference to s 24MD(6A) NTA

[31] Each August 2012 notice purports to give notice in accordance with s 170 of the LAA and s 24MD(6A) of the NTA. Notice is also said to be given in accordance with s 29 of the NTA. All parties accepted that the reference to s 24MD(6A) has no operation in relation to the proposed acquisitions, and the Government party and the grantee party state that the reference was included in error.

[32] The native title party argues that it is likely the Government party's error in including the reference to s 24MD(6A) is a systemic one, as it occurred across all four notices. Whether or not that error has occurred in other notices, the question remains whether the reference to s 24MD(6A) affects the validity of the August 2012 notices for the purposes of s 29 of the NTA.

[33] It is helpful for present purposes to set out the notice heading and preamble in full:

NOTICE OF INTENTION
TO TAKE INTERESTS IN LAND TO CONFER INTERESTS UNDER WRITTEN LAW
LAND ADMINISTRATION ACT 1997 (WA) SECTION 170
AND TO COMPULSORILY ACQUIRE NATIVE TITLE RIGHTS AND INTERESTS
NATIVE TITLE ACT 1993 (CTH) SECTION 29

I, the Honourable Brendon John Grylls MLA, Minister for Lands HEREBY GIVE NOTICE in accordance with Section 170 of the *Land Administration Act 1997* (LAA) and Section 24MD(6A) of the *Native Title Act 1993* (*Cth*) (NTA) that it is proposed to take, pursuant to Section 165 of the LAA, those interests in the land described in the Schedule for the purposes specified.
AND for and on behalf of the State of Western Australia HEREBY GIVE NOTICE in accordance with Section 29 of the NTA that any native title rights and interests in the land described in the Schedule are to be compulsorily acquired for the purposes specified.

[34] The native title party submits that the 'primary' references to s 24MD(6A) in the NOITTs 'undermine and negative' the later references to s 29. It is said that the reference to s 24MD(6A) in each of the notices is 'a fundamental error' that invalidates them for the purposes of s 29 of the Act (NTP Responsive Submissions, paragraph 50). It is also argued that a notice which 'fundamentally confuses the applicable procedure by conflating mutually exclusive provisions of the LA Act and/or the NT Act' cannot be clear or certain, meaning they are unable to satisfy the requirements of s 29 of the NTA (NTP Responsive Submissions, paragraph 48).

[35] According to the Government party and the grantee party, the NOITTs only constitute part of the notice given to the native title party for the purposes of s 29. In this regard, the Government party and the grantee party rely on a letter dated 20 August 2012 from Murray Raven, Pilbara Manager of the State Lands Services Division, Department of Regional Development and Lands to the native title party, which enclosed copies of the NOITTs and other documents relating to the proposed acquisitions (the Raven Letter). That position is consistent with the assertion in paragraph 7.1 of the s 35 application that the notices were given in accordance with s 29 of the NTA on 20 August 2012.

[36] The Government party and the grantee party submit that the Raven Letter and the accompanying documents satisfy the requirements of s 29 of the Act in relation to the proposed acquisitions (GP Submissions, paragraph 10-11). Specifically, it is stated that the Raven Letter:

- makes express reference to notice being given under s 29 of the Act;

- identifies each of the proposed acquisitions, both in the letter itself and in combination with the accompanying documents;

- makes reference to there being a notification day, which is specified in the enclosed NOITTs; and

- contains statements, both in the letter itself and the enclosed NOITTs, to the effect that, under s 30 of the Act, persons have until three months after the notification day to take certain steps to become native title parties.

[37] I note that all of these requirements are also met in the August 2012 notices, if read as simultaneously giving notice under s 170 of the LAA as well as notice under s 29 of the NTA.

[38] The Government party and the grantee party submit that the Act does not prescribe a particular form in which the notice must be given and only requires substantial compliance, particularly where the native title party has not been adversely affected by any deficiencies in the notice (GP Submissions, paragraph 9). It is submitted that the inclusion of references to s 24MD(6A), while incorrect, has no effect on the validity of the notice under s 29 of the Act or otherwise on the Tribunal's jurisdiction to make a determination in respect of the s 35 application (GP Submissions, paragraph 14). The native title party, on the other hand, maintains it was the NOITTs and not the Raven Letter that constituted notice for the purposes of s 29 of the Act, and the Raven Letter cannot be relied on to cure any defects in the NOITTs. The native title party placed particular emphasis on what is described as the Government party's reliance on the NOITTs in making its application to the Tribunal, based upon the reference in paragraph 7.1 of the s 35 application to giving 'four notices in accordance with section 29 of the *Native Title Act 1993* (Cth) ... of the acts referred to in paragraph 9 below (Notices)', and then attaching the August 2012 notices as evidence of that notification.

[39] It is of no consequence that the Government party referred to and included the August 2012 notices in its application to the Tribunal rather than the Raven Letter and the accompanying documents. What matters is whether the notice actually given to the native title party on 20 August 2012 complied with the requirements of s 29 of the Act and, if it did not comply with those requirements, whether the non-compliance

invalidates the notice. To address those issues, it is necessary to examine the language of s 29 in the context of the scope and objects of the Act, taking account of the practicalities of compliance and the consequences of non-compliance (see *Dann v Western Australia* at [24]; *Western Australia v Strickland*; *Little v FMG Resources* at [11]-[22]).

[40] Section 29(1) of the Act provides that, before the act is done, the Government party must give notice of the act in accordance with the section. For present purposes, the relevant provision is s 29(2)(a), which requires the Government party to give notice of the act to any registered native title body corporate in relation to any of the land or waters that will be affected by the act. As the native title party is the registered native title body corporate in relation to all the land or waters that will be affected by the act, the Government party was not required to give notice to any registered native title claimant or representative Aboriginal/Torres Strait Islander body in accordance with s 29(2)(b) or public notification under s 29(3). It was required to, and did, give notice to the Tribunal as required by s 29(2)(d).

[41] A notice given under s 29(2) must specify a day as the notification day; contain a statement to the effect that, under s 30, persons have until three months after the notification day to take certain steps to become native title parties in relation to the notice; and be accompanied by any prescribed documents and include any prescribed information (s 29(4) NTA). There are no documents or information prescribed in relation to s 29(2)(a) and there are no statutory requirements other than that the Government party 'must give notice' of the act, though the notice must be adequate to inform the native title party of the nature and location of the act (see *Jabiru Metals v Victoria* at [7]).

[42] The question is whether the inclusion of references to s 24MD(6A) in the NOITTs meant that the Government party did not 'give notice' of the acts in accordance with s 29, taking into account the purpose of the notice provisions and the possible implications of non-compliance. The Government party and the grantee party place particular emphasis on the fact that there is nothing to suggest the native title party was denied its procedural rights or otherwise prejudiced as a result of the erroneous reference to s 24MD(6A). In this regard, reference was made to the Tribunal's finding in *Dann v Western Australia* at [100]-[106], where it was held that a notice was valid

notwithstanding the voluntary inclusion of incorrect information over and above the requirements of s 29, especially where there is no evidence that anyone relied on the information to their detriment. However, the pertinent inquiry is whether, as a matter of statutory construction, any non-compliance with the Act rendered the notice invalid (see *Project Blue Sky v Australian Broadcasting Authority* at 388-391). Although the possible consequences of non-compliance are relevant in determining the legislative intent behind the provisions, the actual consequences can only be illustrative of the potential implications of non-compliance and are not a complete answer to the question of validity.

[43] As noted above at [27], the purpose of the notice provisions is to ensure that native title holders and claimants are not left out of negotiations and have the opportunity to make submissions on the proposed act. The native title party says that the consequences arising from the confusion of the relevant procedural rights are significant, substantial and potentially serious, as there are patent differences between the rights afforded by s 24MD(6A) and those available under s 29 (NTP Submissions, paragraph 46). Specifically, the native title party argues that, if the notices are found to be effective for the purposes of s 29, it is possible that determinations could be made without a native title party having clear or certain notice of what is proposed and the laws governing its procedural rights, particularly where the native title party is unrepresented (NTP Responsive Submissions, paragraph 52).

[44] This issue must be determined on the facts in this matter, and not on some hypothetical situation. There is no evidence, or even any allegation in the native title party's submissions, that this native title party was deprived of any negotiation or procedural rights in this matter as a result of the reference to s 24MD(6A) in the August 2012 notices. Indeed, it appears that the error only came to light when it was raised by Member O'Dea at the preliminary conference following the lodging of the s 35 application. There is no question that negotiations did not occur between the parties as required by the Act: see [10]-[11] above and [234]-[235] below.

[45] I do not accept the proposition that the reference to s 24MD(6A) in the notice to the native title party had the potential to cause a situation where the proposed acquisitions could proceed without the involvement of the native title party. In the present circumstances, the proposed acquisitions would only be valid if an agreement of the

kind mentioned in s 31(1)(b) was made or there was a determination under ss 36A or 38 that the act may be done or may be done subject to conditions (see s 28(1) NTA). That is to say, the procedures under Part 2, Division 3, Subdivision P would need to have been followed irrespective of whether the notices included references to an alternative procedure, in order for the proposed acquisitions to be validly done.

[46] The native title party responded to the notice by lodging an objection to the proposed acquisitions, which is a right that would have been available to the native title party under s 24MD(6A). This suggests there may have been some confusion as to how to proceed, but it is clear from the 'objection' that the native title party was aware of, and intended to pursue the negotiation and procedural rights available to it under the NTA. The letter of objection concluded by stating that the objection would be withdrawn upon the proponents entering into negotiations in good faith with the determined native title holders in compliance with the provisions of the NTA.

[47] In other circumstances, there may be a question as to whether the reference to s 24MD(6A) may influence a person's decision to take the necessary steps to become a registered native title claimant. That question does not arise in the present matter, as the native title party is the registered native title body corporate in relation to all of the land that will be affected by the proposed acquisitions.

[48] In any event, the notices must be read as a whole. The Raven Letter expressly states that any person who is a native title party in relation to the proposed acquisitions 'has the procedural rights provided in Part 2 Division 3 Subdivision P of the NTA (i.e. the right to negotiate).' It also invites the native title party to make submissions in accordance with s 31(1)(a) of the Act. Furthermore, each of the August 2012 notices made 'Particular statements for the purposes of the NTA and *Native Title (Notices) Determination 2011 (No. 1)* (Cth).' Those 'Particular statements', which, in my view, were clearly intended to be read as giving notice in accordance with s 29 of the NTA, included a statement that '[a]ny person who is or becomes a native title party is entitled to the negotiation and procedural rights provided in Part 2 Division 3 Subdivision P of the NTA.' Even if one were to disregard the Raven Letter, I do not accept that any existing or potential native title party would have been mistaken about the nature of its procedural rights available under the NTA.

[49] In conclusion, I find that the inclusion of the reference to s 24MD(6A) in the August 2012 notices does not mean the notices were ineffective for the purposes of s 29 of the Act and does not deprive the Tribunal of jurisdiction to determine the application.

Handwritten annotation

[50] The native title party also submits that the notice issued in respect of Area 1 is invalid because it contains an inaccurate description of the land to be compulsorily acquired. The submission is made on the basis of a handwritten note made on the face of the Form LAA-1029 which, together with the August 2012 notice relating to Area 1, formed part of Attachment 1 to the s 35 application.

[51] The parcel of land to be taken in respect of Area 1 is described in the Schedule of the August 2012 notice relating to that Area, as follows:

> LAND DESCRIPTION: the portions of Lot 152 on Deposited Plan 220265 shown as 'Area 1' on Deposited Plan 72887, being portion of Crown Lease 56/1967 'Minderoo Station' being part of the land in certificate of Crown land title volume 3098 folio 710 Area: 200.4387 hectares

[52] This is consistent with the information recorded in the 'Description of Land' panel of the Form LAA-1029:

> The portions of Lot 152 on Deposited Plan 220265 shown as 'Area 1' on Deposited Plan 72887, being portion of Crown Lease 56/1967 "Minderoo Station"

[53] To the right of the 'Description of Land' panel in the Form LAA-1029 are further panels labelled 'Extent', 'Volume' and 'Folio'. Respectively, these panels contain the following typed entries: 'Part', '3098' and '710'. Beneath these entries are then handwritten annotations, with the symbol '&' between the 'Description of Land' and 'Extent' panels and the symbol '″' in the 'Extent' panel beneath the word 'Part', the letters 'CL' between the 'Extent' and 'Volume' panels, and the numbers '56' and '1967' in the 'Volume' and 'Folio' panels respectively. The native title party submits that the annotation is a reference to Crown Lease 56/1967 and its only possible meaning is to add a further portion of Crown Lease 56/1967 to the land to be acquired. In the native title party's submission, the annotation invalidates the notice as it renders the land to be taken ambiguous (NTP Submissions, paragraphs 56-71).

[54] The Government party and the grantee party submit that the copy of the Form LAA 1029 given to the native title party with the Raven Letter did not contain the annotation, which was inserted by Landgate as part of the process of registering the NOITT (GP Submissions, paragraphs 17-18). In any event, the Government party and the grantee party submit that the annotation does not affect the validity of the notice as there was no ambiguity in the documents comprising the notice as to the identification of the proposed future act and there is no evidence that the native title party was misled, denied its procedural rights or otherwise prejudiced as a result of the annotation. In particular, they note that Area 1 is correctly identified in the Raven Letter and the accompanying maps and in the native title party's objection in response to the notice (GP Submissions, paragraph 19).

[55] In reply, the native title party submits that the registration of the NOITT by Landgate constitutes a public representation by the Government party regarding the land to be acquired. According to the native title party, the discrepancy between the registered Form LAA-1029 and the notice given to the native title party creates ambiguity as to the proper form of the NOITT, as a native title party, properly advised, would be expected to check any notice given to it under s 29 of the Act against the details disclosed on a title search (NTP Responsible Submissions, paragraphs 74-79). This is disputed by the Government party and the grantee party, who submit that both the annotated and unannotated versions of the Form LAA-1029 refer to the same proposed acquisition (GP Reply, paragraph 17).

[56] The affidavit of Ms Passante explains the circumstances in which the annotation was made. Ms Passante states that she is the Senior Registration Officer in the Crown Subdivisions Section of Landgate. Ms Passente is also designated as an Assistant Registrar under the *Transfer of Land Act 1893* (WA). Ms Passante deposes that she made the handwritten annotation on 13 August 2012, when the document was lodged at Landgate by State Lands Services (now Department of Lands). Ms Passante explains that the handwritten notation reflects the narrative description in the 'Description of Land' panel (Passante Affidavit, paragraphs 1 and 6-7).

[57] Ms Passante says the annotation was made in part because the information is usually recorded as part of Landgate's administrative practice in the 'Extent', 'Volume' and 'Folio' panels, rather than the 'Description of Land' panel (Passante Affidavit,

paragraphs 7 and 9). Ms Passante states that the annotation also served as 'a reminder to Landgate staff, of the need to make notations about the Document on both the Crown Lease and also the Crown Land Title for that Crown Lease' (Passante Affidavit, paragraph 9). According to Ms Passante, the annotation 'did not change the substantive information conveyed by the Document' and it is 'common practice to make handwritten notations on documents lodged with Landgate for registration, in circumstances like these' (Passante Affidavit, paragraph 11).

[58] I am satisfied that the notice given to the native title party did not contain the handwritten annotation in respect of Area 1. I am also satisfied that the annotation was made in the course of Landgate's usual administrative practice and did not alter the substance of the information presented in the Form LAA-1029, although it is not clear why this was not done in respect of the other NOITTs. I do not accept the native title party's interpretation of the annotation (that is, that it purports to add a further portion of Crown Lease 56/1967 to the land to be acquired). The narrative description of the land clearly indicates that the land to be acquired is part of Crown Lease 56/1967. The land to be acquired is also illustrated on the deposited plan, which the Raven Letter enclosed with the relevant NOITT. If there was any confusion on the part of the native title party as to the effect of the annotation, it could have made enquiries with Landgate or the Department of Lands. In any event, I do not accept that the registration of the annotated Form LAA-1029 created any ambiguity about the land to be acquired.

[59] Whatever the effect of the annotation, the critical issue for the Tribunal's jurisdiction is whether the notice given to the native title party complied with s 29 of the Act. It is not suggested that the description of the land to be acquired contained in the notice was unclear. Rather, the native title party's submission hinges on the discrepancy between the unannotated NOITT that accompanied the Raven Letter and the annotated NOITT included in Attachment 1 to the s 35 application. If the annotation purported to expand the area proposed to be taken, then the Raven Letter would not have constituted effective notice for the purposes of the Act. This is because s 29 requires notification 'of the act', which itself requires a description of the land the subject of the act (see *Dixon v Northern Territory* at [11]). That is not the case in the present matter. It is not disputed that the unannotated notice accurately describes the

land to be acquired. In the circumstances, there is nothing to suggest that the notice was not given in accordance with s 29. Accordingly, the Tribunal has jurisdiction to deal with the matter.

The Inquiry

Directions for inquiry and written submissions

[60] Directions for the inquiry required each party to provide a statement of contentions and documentary evidence in relation to the criteria in s 39 of the Act. The directions also set dates for the hearing of the matter.

[61] The Government party and the grantee party filed a statement of contentions on 9 September 2013 ('GP Contentions'), together with supporting documentary evidence. These were subsequently tendered as exhibits during the hearing of the application and are listed as GP1 to GP88 in Appendix 1.

[62] In addition to the supporting documentary evidence that accompanied their statement of contentions, the Government party and the grantee party also provided the following affidavits:

(a) Affidavit of Vaughan Peter Murray Brazier, sworn 5 September 2013 ('Brazier Affidavit 1');
(b) Affidavit of Ben William Graham, sworn 6 September 2013 ('Graham Affidavit'); and
(c) Affidavit of Christopher John Clark, sworn 6 September 2013 ('Clark Affidavit').

[63] The Government party and the grantee party also filed a letter on 7 October 2013 to supplement their statement of contentions ('GP Letter'). This letter concerned the Tribunal's conclusion in *Western Australia v Gordon* at [36]-[41] regarding the extinguishing effect of certain compulsory acquisitions, which was recently referred to by the Federal Court in *Banjima People v Western Australia (No 2)* at [1366].

[64] The native title party filed a 'statement of effect of future acts' on 18 October 2013 ('NTP Statement'). The documents accompanying the NTP Statement are set out as NTP1 to NTP8 in Appendix 2, but it is convenient for present purposes to note that

the documents included a report entitled 'Discussion of the Heritage Values of the Onslow Area to the Thalanyji' by Fiona Hook and published in October 2012 ('Hook Report').

[65] To assist with the preparation for the hearing, the Tribunal wrote to parties by email on 29 October 2013 requesting an indication of the likely location of the hearing and whether any site visits would be required; the number of witnesses intended to be called; whether parties would be seeking leave to cross-examine the witnesses; the likely duration of the hearing; and other others matters of which the Tribunal or the other parties should be aware.

[66] On 1 November 2013, the Tribunal received an email from the State Solicitor's Office acting on behalf of the Government party and the grantee party proposing that the hearing should be held at the Tribunal's offices in Perth and estimating that the hearing would take one day, including evidence and oral submissions. The email indicated that the Government party and the grantee party:

- intended to rely on the three affidavits filed on 9 September, as well as a further affidavit of Mr Brazier sworn 1 November 2013 ('Brazier Affidavit 2') and provided later the same day, and did not intend to call the deponents to give oral evidence;
- sought leave to cross-examine Dr Hook in relation to the report; and
- noted that the native title party had not filed any further evidence, and would be proceeding on the understanding that the documents provided by the native title party on 18 October 2013 comprise the entirely of its contentions and evidence in the matter.

[67] A listing hearing was held on 4 November 2013. At the listing hearing, the native title party indicated its intention to file a further affidavit. I indicated that the Tribunal would accept the affidavit so long as the deponent is made available for the hearing. I also directed the native title party to ensure that Dr Hook is available for the hearing. The native title party was also directed to confirm whether it intended to cross-examine any of the Government party and the grantee party's witnesses. The hearing was set down 12 November 2013.

[68] On 7 November 2013, the native title party provided the affidavit of Meachum Kelly affirmed 7 November 2013 ('Kelly Affidavit' – this affidavit was erroneously dated 6 November 2013, but no party objected to the error). The following day, Corser & Corser Lawyers informed the Tribunal on behalf of the native title party that it intended to cross-examine Mr Clark, Mr Brazier and Mr Graham.

Details of hearing – 11 November 2013

[69] The first hearing commenced on Tuesday 12 November 2013 at 9:30am, and was held in the Tribunal's offices in Perth. The Government party and the grantee party were represented by Mr Stephen Wright (Francis Burt Chambers), appearing with Mr Beetham and Ms Sophia Woodrow (State Solicitor's Office). The native title party was represented by Ms Huynh of Corser & Corser Lawyers.

[70] The following witnesses gave evidence at the hearing: Mr Graham, Mr Brazier, Mr Clark and Dr Hook. Leave was given to cross-examine the witnesses.

[71] In the course of the hearing, the documents provided to the Tribunal prior to the hearing were accepted into evidence. The exhibit numbers assigned to the documents are indicated in the Appendixes. The following exhibits were also tendered by the Government party and the grantee party:

(a) Exhibit GP88A: Map of Onslow - Residential Section 18 Survey Area, Application Area and Proposed Development Footprint, dated 25 October 2012.

(b) Exhibit GP88B: Map of Onslow Development Plan Staging Plan, dated 21 June 2012.

(c) Exhibit GP89: Graham Affidavit.

(d) Exhibit GP90: Brazier Affidavit 1.

(e) Exhibit GP91: Brazier Affidavit 2.

(f) Exhibit GP92: Clark Affidavit.

(g) Exhibit GP93: Australian Archaeological Association, *Code of Ethics* (extract from www.australianarchaeology.com/about-2/code-of-ethics, accessed 11 November 2013).

(h) Exhibit GP94: Letter from State Solicitor's Office to Corser & Corser dated 13 December 2012.

[72] Although Mr Kelly had initially been unavailable to attend the hearing, arrangements were made for his attendance by telephone. However, on the day of the hearing, Ms Huynh informed the Tribunal that Mr Kelly had fallen ill and was unable to participate in the hearing. After hearing from the parties on the issue and in particular the Government party and the grantee party's objection to the receipt of the affidavit, I indicated that I would receive the evidence but, unless Mr Kelly was made available for cross-examination, little weight may be given to the affidavit.

[73] In the alternative, Ms Huynh proposed that an affidavit in substantially the same terms could be obtained from another member of the native title party, who would be available for cross-examination the following week. As the Government party and the grantee party did not object to this proposal, I accepted this as an appropriate course of action and directed the native title party to provide the additional affidavit. Accordingly, the hearing was adjourned to 19 November 2013.

Details of hearing – 19 November 2013

[74] On 15 November 2013, the native title party provided the affidavit of Ms Trudy Hayes sworn 15 November 2013 ('Hayes Affidavit'), along with Annexure TH1, being a map of the ANSIA and the proposed acquisitions. Ms Hayes gave evidence at the hearing on 19 November 2013 in person and leave was given to cross-examine.

[75] Ms Hayes is a Thalanyji person. Ms Hayes is considered to be a senior person of the group, and conducts cultural awareness programs for people who wish to come onto Thalanyji land to carry out activities. Ms Hayes said she lived in the Onslow area for 30 years and knows the Onslow area and the Thalanyji people who live there very well. Although she now resides in South Hedland, Ms Hayes said she visits Onslow every second week.

[76] During cross-examination, Ms Hayes was asked to look at a satellite photographic map of Onslow and the surrounding areas and mark the locations of specific places referred to in her evidence. This map was subsequently tendered by the Government party and the grantee party, becoming Exhibit GP95. The native title party also tendered the Kelly Affidavit (Exhibit NTP9) and the Hayes Affidavit (Exhibit NTP10), though the former was only accepted into evidence on the basis that it would have little or no weight, particularly in light of the evidence given by Ms Hayes.

[77] The hearing concluded with closing oral submissions from the Government party and the grantee party and the native title party.

Hayes Map

[78] As noted above at [76], Ms Hayes was shown and asked to mark up a map of Onslow and the surrounding areas (Exhibit GP95). Following the hearing, this map could not be located and the Tribunal made enquiries to determine whether the map or a copy was in the possession of the parties. The parties confirmed that they did not possess the document.

[79] On 4 February 2014, Ms Huynh contacted the Tribunal by email attaching a copy of the map marked up with annotations she made during the hearing on 19 November 2013. Ms Huynh said she had conferred with Ms Hayes, who had confirmed that the annotations were generally correct. Ms Huynh also reported comments made by Ms Hayes in relation to specific locations which she had marked on the map. The email attached what was described as a copy of the map marked up with Mr Wright's annotations during the hearing, though Ms Woodrow subsequently clarified that the annotations were made by Mr Wright the previous week relying on the transcript of the hearing and his own recollections. The Tribunal subsequently located another copy of the map, which Tribunal staff had marked up based on the annotations made by Ms Hayes.

[80] Though it is regrettable that the exhibit has not been located, it appears that the three copies of the map currently in the Tribunal's possession are consistent with each other and the evidence given Ms Hayes at the meeting. As such, I am satisfied it is appropriate to rely on the copies in substitution for the original exhibit.

The Proposed Acquisitions

Interests to be acquired

[81] The proposed future acts involve the compulsory acquisition of all registered and unregistered interests (including any native title rights and interests) in Areas 1, 2, 6 and 7 other than:

(a) the interests of the Crown; and

(b) all existing rights created by the grant of mining tenements under the *Mining Act 1978* (WA) (‘*Mining Act*’) and all existing petroleum or geothermal energy rights granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (*‘PGER Act*’).

Underlying tenure

[82] Area 1 is currently part of pastoral lease 3114/661 (Minderoo station). The whole of area is also subject to existing exploration licences granted under the *Mining Act*, being E08/2059 and E08/2009, as well as Petroleum Exploration Permit EP 110 R 5 granted under the *PGER Act*.

[83] Area 2 is comprises parts of Minderoo station and pastoral lease 3114/765 (Urala station). The area is wholly covered by EP 110 R5 and Geothermal Exploration Permit GEP 35 granted under the *PGER Act*.

[84] Area 6 currently comprises unallocated Crown land. The whole of Area 6 is covered by EP 110 R5.

[85] Area 7 is wholly within Minderoo station and is subject to E08/2059 and EP 110 R5.

Purpose of acquisitions and proposed development

Ashburton North Strategic Industrial Area

[86] The purpose of the proposed acquisitions is to support the development of the ANSIA, associated industry and the town of Onslow.

[87] The background to the establishment of the ANSIA and current status of the ANSIA are outlined in the affidavit of Mr Clark at paragraphs 6-25 and Mr Brazier's affidavit of 5 September 2013 at paragraphs 6-17. Mr Clark is the Executive Director Strategic Infrastructure (Ashburton North) at the Department of State Development ('DSD') and has been responsible for the overall planning and development of the ANSIA since his appointment in January 2011. Mr Brazier is engaged by the grantee party as its Business Manager, Strategic Industrial. Mr Brazier has been responsible for managing the grantee party's interests in the ANSIA since April 2011, and was involved in the initial development of the ANSIA project between October 2007 and April 2011.

[88] The ANSIA was identified as one of several Strategic Industrial Areas ('SIAs') as part of the Government party's Heavy Use Industrial Land Strategy, the aim of which is to prepare key areas for development as industrial estates. According to Mr Clark, the strategy 'aims to ensure that land in the SIAs is ready for the development of industrial projects' by obtaining the necessary statutory and planning approvals. The strategy is 'designed to attract investment in major industrial projects to Western Australia by reducing the time needed by proponents of such projects to establish those projects' (Clark Affidavit, paragraphs 7-8).

[89] Mr Clark states that an area had previously been identified for the establishment of an SIA approximately five kilometres from the town of Onslow, and had been intended to cater for anticipated industrial development associated with the discovery of gas reserves in the nearby Carnarvon Basin and Exmouth Gulf (Clark Affidavit, paragraph 10). However, constraints on land use associated with the area's proximity to the town meant that only a limited amount of land was available for development.

[90] Following expressions of interest from various companies in developing gas processing facilities at Ashburton North for the purpose of commercialising nearby gas fields, the Government party 'formed the view that the proposed Onslow SIA was inadequate to accommodate multiple industry proponents and related support industries' (Clark Affidavit, paragraph 13). In October 2009, the Government party announced that it would support the establishment of the ANSIA as a gas processing precinct to facilitate the exploitation of natural gas reserves in the Carnarvon Basin and Exmouth Gulf. In December of the following year, the Shire of Ashburton's

Town Planning Scheme was amended to include the ANSIA as a 'Special Control Area.' It is anticipated that the ANSIA will provide land for infrastructure and other facilities required for processing liquid natural gas ('LNG') and other hydrocarbon products, including natural gas for the domestic market.

[91] There are currently two major projects located within the ANSIA, namely the Macedon Domestic Gas Project and the Wheatstone LNG and Domestic Gas Project. The proponent of the Wheatstone project is Chevron Australia Pty Ltd ('Chevron') and the proponent of the Macedon project is BHP Billiton Petroleum Pty Ltd ('BHP'). Final investment decisions were made in respect of the Macedon and Wheatstone projects in September 2010 and September 2011 respectively, and the requisite approvals were obtained in 2011. Pursuant to agreements reached with BHP and Chevron, the native title party entered into deeds for the compulsory acquisition of any native title rights and interests in connection with the Macedon and Wheatstone projects in December 2010 and November 2011 respectively. It is understood that, at the time of the hearing of this matter, the Macedon project had already been constructed, and the Wheatstone project was under construction.

[92] According to Mr Brazier, a site has been also allocated for a potential third major project, known as the Scarborough project, which is a joint venture of Esso Australia Resources Pty Ltd and BHP and would be situated between the existing Macedon and Wheatstone sites (Brazier Affidavit 1, paragraphs 11-12). Mr Clark and Mr Brazier also refer to the possibility of establishing downstream processing industries in the future (Clark Affidavit, paragraph 32; Brazier Affidavit 1, paragraphs 13-14).

[93] Mr Clark and Mr Brazier note that Chevron plans to construct a multi-user port in the ANISA as part of its Wheatstone project. Although the port will mainly be used for the export of LNG and other hydrocarbon products, it will also be operated as a public port servicing industry operating in the ANSIA and Onslow and as a marine supply base for offshore oil and gas operations. Once completed, it is intended that ownership and control of the port will be passed to the Dampier Port Authority, save for certain infrastructure specific to Chevron (Clark Affidavit, paragraphs 30-31; Brazier Affidavit 1, paragraphs 10, 41).

The role of the Government party and the grantee party in the proposed development

[94] The grantee party is a statutory authority established under the WALA Act. The objects of the WALA Act are set out in s 3 and include 'the provision and development of industrial, commercial, residential and other land in a range of localities to meet the social and economic needs of the State.' One of the grantee party's functions is to provide or improve land, infrastructure, facilities or services for centres of population (see s 16(e) WALA Act).

[95] Mr Brazier states that, in fulfilling its statutory role, the grantee party 'seeks to develop land in advance of demand to facilitate positive economic and social outcomes for the State and avoid critical industrial land supply shortage and land supply price spikes' (Brazier Affidavit, paragraph 19). In particular, the grantee party 'seeks to ensure the supply of industrial land where demand for industrial land is unlikely to be met by the private sector' (Brazier Affidavit 1, paragraph 20). According to Mr Brazier, the grantee party has identified Areas 1, 2 and 7 as priorities for facilitating the further development of the ANSIA in the immediate to medium term following the approval of the Macedon and Wheatstone projects (Brazier Affidavit 1, paragraph 16).

[96] Section 19 of the WALA Act requires the grantee party to act on commercial principles and ensure it meets a specified rate of return on the projects it undertakes. Accordingly to Mr Brazier, if it is anticipated that a project will not achieve the specified rate of return, it cannot proceed unless the grantee party seeks a contribution from the State Government. Mr Brazier states that the grantee party anticipates that a Government contribution will be required to meet the specified rate of return in developing Area 1, 2 and 7 (Brazier Affidavit 1, paragraphs 21-22).

[97] Mr Clark describes DSD's role as 'to work with proponents, LandCorp, the Department of Planning, the Western Australian Planning Commission ('WAPC'), the Department of Lands and the Shire of Ashburton to facilitate development within the ANSIA and related development in Onslow to improve amenity and infrastructure as well as providing for the expansion of the Onslow townsite' (Clark Affidavit, paragraph 18).

Area 1

[98] Area 1 is proposed to be used for general industrial purposes. The area is required due to anticipated demand for general industrial land associated with the construction and operation of the Macedon and Wheatstone projects, which is expected to come from businesses in the support service industries, such as plant and equipment hire, transport and logistics, vehicle repair and pipeline maintenance (Brazier Affidavit 1, paragraph 24). Mr Brazier states that there are no areas within the town of Onslow suitable for general industrial development and Area 1 was selected due to its proximity to existing projects in the ANSIA; the existence of a suitable buffer zone from areas designated for gas projects and heavy industry; and its level of elevation compared with surrounding areas. The size of the area has been determined by the grantee party as the amount of land necessary to accommodate expected demand for support services in the ANSIA (Brazier Affidavit 1, paragraphs 26-29, 43).

[99] The area comprises two parts, both of which will be granted to the grantee party as freehold title. It is intended that the eastern part will be developed first to meet expected demand associated with the construction of the Wheatstone project, followed by the western part when demand requires. It is expected that the initial development will require extensive earth works to remove sand and create a level base for the construction of roads and separate lots. These lots will then be leased. As the land is not connected to power and water services, lessees will be required in the short term to provide their own utilities; however, it is anticipated that power and water facilities will be constructed by Chevron. Once these facilities become operational, they will be connected to Area 1 to create serviced lots, at which point the grantee party will sell the lots as freehold title (Brazier Affidavit 1, paragraph 31).

Area 2

[100] Area 2 is proposed to be used as a port supply base and for general industrial purposes. The area is located south of the proposed port and Wheatstone project areas, a short distance to the east of the Macedon project area and immediately adjacent to the existing infrastructure corridor. The land is required as a laydown area for the port and for general industrial use associated with the port, and was selected due to its elevation and proximity to the port. The size of the area has been determined by the

grantee party as the amount of land necessary to provide a port supply area (Brazier Affidavit 1, paragraphs 41, 45).

[101] The grantee party will be granted freehold title over Area 2, upon which it will develop the area before offering it for lease or sale to third parties. The grantee party intends to have Area 2 developed and on the market by the time the port commences operations, which is expected to occur around 2016 (Brazier Affidavit 1, paragraph 42).

Area 7

[102] Area 7 is proposed to be used for transient worker accommodation purposes. The area is located immediately south of the existing Wheatstone project construction camp. The area is required due to the current and expected growth in demand associated with the construction of the Wheatstone project and the limited amount of workforce accommodation presently available in the ANSIA and the town of Onslow. Mr Brazier notes that Area 7 is separated from the gas processing and heavy industry areas in the ANSIA, which he says is 'desirable from an occupational health and safety point of view.' The size of the area has been determined by the grantee party as the amount of land necessary to accommodate expected demand for support services in the ANSIA (Brazier Affidavit 1, paragraphs 34-38, 43).

[103] It is proposed that freehold title over Area 7 will be transferred to the grantee party. The grantee party will then lease the area to one or more proponents or accommodation providers. There is no intention to sell the land in freehold at this time (Brazier Affidavit 1, paragraph 39).

Area 6

[104] The purpose of Area 6 is outlined in the affidavit of Mr Graham. Mr Graham has been employed by the grantee party since 2008 and has held the position of Project Manager for the proposed development of the Onslow townsite from 2009.

[105] Area 6 comprises three parcels of land (lots 72, 79 and 350) just outside the current Onslow townsite boundary, which are proposed for residential development. The area will be used primarily for housing, though it may also be used in part for roads, parks

and other infrastructure associated with residential development. Area 6 is part of a larger area to be used for residential development and in respect of which native title has been determined not to exist or has already been acquired. The development is required due to the growth in the population of Onslow and associated demand for the expansion of the Onslow townsite generated by the Wheatstone and Macedon projects. Mr Graham also noted the significance of the potential expansion of local industry, including Onslow Salt's industrial salt operations, which are located 5 kilometres to the east of the ANSIA (Graham Affidavit, paragraphs 5, 6, 7-10).

[106] It is proposed that freehold title over Area 6 will be transferred to the grantee party, after which it will either develop the area for sale or sell the area as undeveloped land to facilitate residential development. Mr Graham also indicates that Lot 350 will initially be utilised as bulk offsite works to assist with the development of a super lot to accommodate operational workers associated with the Wheatstone project, but will eventually be developed for residential use (Graham Affidavit, paragraph 18-19).

The planning process and regulatory framework

Areas 1, 2 and 7

[107] The planning process for the Areas 1, 2 and 7 and the ANSIA generally is outlined in Mr Brazier's affidavit of 5 September 2013 (at paragraphs 49 to 65).

[108] In February 2010, the Shire of Ashburton initiated an amendment to its town planning scheme (Scheme Amendment No 9) designating the ANSIA as a 'Special Control Area' and establishing criteria for the rezoning and development of the area. This amendment was granted final approval by the Minister for Planning on 14 December 2010.

[109] The grantee party and DSD commissioned Arup Pty Ltd in 2010 to undertake a Concept Design Planning Study for the ANSIA. This study was the first to identify the need for land to be set aside for general industry, worker accommodation and supply base uses to support the development of the ANSIA.

[110] In the same year, Chevron lodged the ANSIA Structure Plan for approval with the Shire of Ashburton, which was granted final approval by the WAPC in October 2011. The structure plan established the framework for the ANSIA and designates sites for

domestic gas and LNG projects, a port area, a multi-user infrastructure corridor and transient workforce accommodation. The structure plan also provides for the development of the ANSIA in stages, due to timeframes associated with the development of various project components.

[111] The Structure Plan divides the ANSIA into three stages:

- Stage 1A, consisting of the port area, the Wheatstone LNG and Domestic Gas Plant, the multi-user access and infrastructure corridor, and the Wheatstone transient workforce accommodation.

- Stage 1B, consisting of the Macedon Domestic Gas Plant, 'Future Industry Area' and secondary transient worker accommodation.

- Stage 2, containing general industrial areas previously designated as Stage 1C. The north-western portion of Stage 2 is intended as a buffer between heavy industry areas and the light industry and accommodation area and may contain compatible industrial and other land uses.

[112] In 2010, the Shire of Ashburton initiated another amendment to its town planning scheme (Scheme Amendment No 10) to rezone the areas in Stage 1A from 'rural' to 'strategic industry', 'other purposes – infrastructure' and 'special use – transient workforce accommodation' to accommodate the Stage 1A development. The amendment was granted final approved by the Minister for Planning on 25 October 2011. In February 2011, Chevron lodged the ANSIA Stage 1A Development Plan for approval with the Shire of Ashburton, and this was granted final approval by the WAPC on 10 October 2010.

[113] In April 2012, the Shire initiated Scheme Amendment No 17 and 18 to rezone the Stage 1B and 1C areas from 'rural' to 'strategic industry', 'other purposes – infrastructure', 'special use – transient workforce accommodation' and 'industry'. At the time of Mr Brazier's affidavit, these amendments had been approved by the Shire and were with the WAPC and Minister for Planning for final approval. Area 1 falls within the Scheme Amendment No 18 area, while Areas 2 and 7 fall within the area of Scheme Amendment No 17.

[114] At the same time, the grantee party lodged the ANSIA Stage 1B and 1C Development Plan for approval with the Shire of Ashburton. These plans have been approved by the Shire and, at the time of Mr Brazier's affidavit, were with the WAPC for final approval. The plans were supported by a range of studies commissioned by the grantee party concerning the environmental and social impact of the proposed development.

[115] According to Mr Brazier, a determining factor in selecting these areas for development was 'the identification of areas which could be developed without affecting the prevailing hydrology of the ANSIA.' Mr Brazier states that extensive work was carried out to identify flood hazards and likely water levels affecting different areas within the ANSIA, which identified only a limited number of areas as being suitable for development.

[116] Another determining factor was the decision to design the ANSIA in accordance with industrial ecology objectives, which contemplate the integration of different industries within a particular development in order to minimise environmental impacts and maximise industrial outcome and optimise outcomes for surrounding communities. The decision to design the ANSIA in accordance with these principles lead the grantee party to commission an industrial ecology strategy, which subsequently informed plans for development.

[117] In February 2013, the grantee party lodged the ANSIA General Industrial Area – Eastern Portion, Outline Development Plan for approval with the Shire of Ashburton. This plan aims to provide a greater level of detail about the subdivision and development of the eastern portion of Stage 1C, which includes Area 7. The plan has been approved by the Shire subject to conditions and, at the time of Mr Brazier's affidavit, had been sent to the WAPC for final approval.

Area 6

[118] The affidavit of Mr Graham outlines the planning process in respect of Area 6.

[119] In July 2010, the Shire of Ashburton formally adopted its Onslow Townsite Strategy, which was subsequently endorsed by the WAPC in March 2011. This strategy identified an area that includes the whole of lots 72 and 79 and part of lot 350 as an

area for possible development. In 2012, the Shire of Ashburton, the grantee party and other agencies published an expansion plan to seek public comment on specific projects that were proposed or underway. This expansion plan included the majority of Area 6, which was proposed for development as part of the townsite expansion.

[120] In 2013, the grantee party published an Onslow Townsite Expansion Stage 1 Development Plan, which was subsequently adopted by the WAPC in March 2013 and includes a proposal for the development of a nine hectare superlot for the construction of worker accommodation for the Wheatstone LNG plant. The Stage 1 Subdivision Plan for the superlot was conditionally approved by the WAPC in 2013, and designates Lot 350 as a 'bulk offsite works'. According to Mr Graham, these offsite works will be completed as part of Stage 1 to assist with reducing the future costs of developing Lot 350 for residential use.

[121] The grantee party has also prepared a Full Development Plan which includes each of the lots comprising Area 6 and, together with the Stage 1 Development Plan, provides for the staged expansion of the Onslow townsite. The Full Development Plan was reviewed by the Environmental Protection Authority in August 2013, which decided that the plan did not require assessment. At the time of Mr Graham's affidavit, the Full Development Plan was still to be publically advertised by the Shire of Ashburton.

Aboriginal communities and Aboriginal cultural heritage

Aboriginal communities

[122] The Bindi Bindi Aboriginal Community is located within the town of Onslow. There does not appear to be any other residential Aboriginal communities in the vicinity of Onslow and the ANSIA.

Registered sites

[123] The Government party and the grantee party provided searches of the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA') in relation to registered sites within Areas 1 and 2. In relation to Area 1, the following registered sites are identified:

- Wheatstone 28 (Site ID 29998): artefacts/scatter, grinding patches/grooves – closed access – no gender restrictions

- Wheatstone 29 (Site ID 29999): artefacts/scatter, grinding patches/grooves – closed access – no gender restrictions

[124] A further registered site (MP08 - 46, Site ID 28687 – artefacts/scatter, grinding patches/grooves, camp) is identified in the search for Area 1. However, this site does not appear to actually fall within either the eastern or western parts of Area 1. I also note the evidence of Dr Hook that the area indicated for a particular site on the Aboriginal Sites Database may not correspond to the actual dimensions of the site and is likely to be larger than the site itself. It follows that Wheatstone 28 and Wheatstone 29 may not in fact be situated within Area 1. In its closing arguments, the Government party made the point that, because these sites are identified by reference to the Wheatstone project, it can be inferred that they are within the Wheatstone project area and not Area 1. I accept that submission.

[125] In relation to Area 2, one registered site is identified (MP 08 - 25, Site ID 28667 – artefacts/scatter, camp, shell – open access – no gender restrictions).

[126] Searches were also provided in respect of an area that includes Area 6 and another area that includes Area 7. In relation to the area inclusive of Area 6, the following registered sites are identified:

- Burubarladji (Site ID 66147): mythological – closed access – no gender restrictions

- Dew Talu (Site ID 6618): ceremonial, water source – closed access – no gender restrictions

- Jinta 2 (Site ID 6620): water source – closed access – no gender restrictions

- LCOR-1205 (Site ID 32544): artefacts/scatter, midden/scatter – open access – no gender restrictions

[127] In relation to the area inclusive of Area 7, the following registered sites are identified:

- Wheatstone 12 (Site ID 28594): artefacts/scatter – open access – no gender restrictions
- Wheatstone 16 (Site ID 28599): artefacts/scatter – open access – no gender restrictions
- Wheatstone 17 (Site ID 28603): artefacts/scatter – open access – no gender restrictions
- Wheatstone 19 (Site ID 28605): artefacts/scatter – open access – no gender restrictions
- Wheatstone 20 (Site ID 28606): artefacts/scatter – open access – no gender restrictions
- MP08 - 32 (Site ID 28674): artefacts/scatter, grinding patches/grooves, camp – open access – no gender restrictions
- MP08 - 33 (Site ID 28675): artefacts/scatter, grinding patches/grooves, camp – open access – no gender restrictions
- MP08 - 48 (Site ID 28689): artefacts/scatter, grinding patches/grooves, camp – open access – no gender restrictions
- Wheatstone 28 (Site ID 29998): artefacts/scatter, grinding patches/grooves, camp – open access – no gender restrictions
- Wheatstone 29 (Site ID 29999): artefacts/scatter, grinding patches/grooves, camp – open access – no gender restrictions

[128] As the searches were undertaken in respect of areas that included Area 6 and Area 7, it is difficult to determine whether any of these sites are situated on land that is proposed to be acquired.

[129] The native title party also provided searches of the Aboriginal Sites Database in respect of the proposed acquisitions. These searches indicate the existence of 45 registered sites and 34 ‘other heritage places’ within an area described as ‘Areas 1, 3 and 7’, which appears to be focused on the ANISA, and the existence of 5 registered

sites and 8 ‘other heritage places’ within an area described as ‘Areas 4, 5 and 6’, which is centred around the Onslow townsite. As these searches relate to areas larger than the proposed acquisitions, I have not found these documents particularly useful in determining the existence or location of registered sites or other heritage places within the areas proposed to be acquired.

Heritage Surveys

[130] In October 2012, the grantee party commissioned Land Access Solutions (‘LAS’) to conduct an archaeological survey and desktop ethnographic study with respect to Area 7 and the eastern part of Area 1 (Brazier Affidavit 1, paragraph 67; GP19). This survey did not involve any Thalanyji people or representatives of the native title party. During the course of the survey, a previously unrecorded archaeological site (LCOR-1209) was identified within the eastern part of Area 1. The report describes the site as ‘an artefact scatter of low archaeological significance’ (GP19, pages 3, 23-27).

[131] Following the report, the grantee party referred the proposed development of Area 7 and the eastern part of Area 1 to the Department of Indigenous Affairs for approval under s 18 of the *Aboriginal Heritage Act 1972* (WA) (‘AHA’). On 10 January 2013, the Minister for Education, Energy and Indigenous Affairs wrote to the grantee party in relation to the application, stating that Aboriginal Cultural Materials Committee (‘ACMC’) had considered the application and he had been advised that the proposed development would not impact on any Aboriginal sites within the meaning of s 5 of the AHA (Brazier Affidavit 1, paragraph 69-70; GP22).

[132] In relation to Area 6, an archaeological survey and desktop ethnographic survey was also commissioned in respect of lot 350 and surrounding areas (Graham Affidavit, paragraph 28-29; GP86). This survey was also conducted by LAS without the involvement of Thalanyji people or representatives of the native title party. Eight previously unrecorded archaeological sites were identified, being shell middens with associated artefacts scatters (LCOR-1201 to LCOR-1208). All but one site were classified as being of low archaeological significance, with the remaining site (LCOR-1205) classified as being of low to medium archaeological significance (GP86, pages 3, 25-78). The grantee party subsequently made an application under s 18 of the AHA, which was approved by the Minister for Indigenous Affairs in January 2013 (Graham

Affidavit, paragraph 27; GP28). A separate survey was undertaken by LAS in relation to lot 79 and the northern half of lot 72, but was not included in the s 18 application as no sites were identified (Graham Affidavit, paragraph 30; GP26).

[133] The grantee party plans to undertake a detailed archaeological survey and ethnographic study for Area 2, the western part of Area 1 and the southern half of lot 72 closer to the proposed development timeframes (Brazier Affidavit 1, paragraph 71; Graham Affidavit, paragraph 31).

The Hook Report

[134] The native title party commissioned Dr Hook of Archae-aus to prepare a report outlining the heritage values of the Onslow area and the consequences arising from the fact that Thalanyji people were not consulted in relation to the archaeological or ethnographic significance of the area. Specifically, the native title party asked the report to address:

- the need for a heritage protocol;
- agreement on a cultural heritage management plan;
- the existence of sites in the area;
- the rich ethnography and archaeology of the area, and the risk to Thalanyji of disturbance; and
- the consequences to Thalanyji of damage to sites.

[135] Although Dr Hook's exact qualifications have not been made clear to the Tribunal, she indicated during the course of the hearing that she had worked with Thalanyji people over the last 20 years and is one of the native title party's preferred heritage consultants. It was accepted that Dr Hook is an experienced archaeologist.

[136] In her report, Dr Hook makes several criticisms of the LAS reports:

- The reports fail to state that the Thalanyji people are the determined native title holders.

- Although the reports state that it will be necessary to conduct a proper ethnographic field survey with the appropriate Thalanyji traditional owners, this was not included among the recommendations of the reports.

- The sites identified in the reports were classified as being of low archaeological significance without the Thalanyji people having the opportunity to inspect the sites and explain their significance.

- No ethnographic assessment was made, despite the Thalanyji people providing quotes for ethnographic surveys to the grantee party.

[137] Dr Hook notes that it is 'standard practice in Australian archaeology to conduct archaeological heritage assessments with Traditional Owners present and participating in the heritage work' and 'both the Australian Archaeological Association and the Australian Association of Consulting Archaeologists Inc have codes of ethics that require members to engage and consult with traditional owners' (Hook Report, page 3). Dr Hook also makes note of the due diligence guidelines published by the DAA, which refer to consultation with the relevant Aboriginal people. Dr Hook concludes that the grantee party has not followed the due diligence guidelines published by the DAA and the authors of the LAS reports 'have potentially … breached the code of ethics of [the Australian Archaeological Association]' (Hook Report, page 4).

[138] During the hearing on 12 November 2013, Dr Hook identified the relevant provisions of the Australian Archaeological Association's code of ethics as 2.2, 2.4 and 3.4. The provisions are set out as follows:

> 2.2 Members will endeavour to ensure that archaeological sites and materials which they investigate are managed in a manner which conserves the archaeological and cultural heritage values of the sites and materials.
>
> …
>
> 2.4 Members recognise the importance of repatriation of archaeological materials for both Indigenous and non-Indigenous communities of concern and they support and advocate the necessity to properly manage archaeological materials in accordance with agreements with communities of concern.
>
> …
>
> 3.4 Members will negotiate equitable agreements between archaeologists and Indigenous communities whose cultural heritage is being investigated. AAA endorses and directs members to the current guidelines regarding such agreements published by the Australian Institute of Aboriginal and Torres Strait Islander Studies.

[139] Dr Hook stated that, although the issue of whether particular conduct constitutes a breach of the code is determined by the Association itself, in her opinion the authors of the LAS reports had potentially breached the code.

[140] In terms of the AHA, Dr Hook states that the making of the s 18 applications without the input of the Thalanyji people would not allow the ACMC to fully assess the importance and significance of the sites under s 5 of the AHA, and as such there is potential for places of importance and significance to the Thalanyji people to be affected by the proposed development (Hook Report, page 5).

[141] In cross-examination, Dr Hook accepted that the field methodology adopted by LAS was appropriate for identifying archaeological sites, though she disagreed with the classifications given to sites in LAS Area 1 that featured shell components. Dr Hook also said she was aware that copies of the s 18 applications had been provided to the native title party before they were provided to the ACMC but did not know whether the native title party had provided any comments to the ACMC. There is no evidence that the native title party made any submission to the ACMC.

[142] The history of consultations between the Government party and the grantee party and the native title party with respect to heritage issues is summarised in the s 18 application made by the grantee party in relation to the eastern part of Area 1. It is convenient to set out the relevant passages in full:

> 18 November 2011: State wrote on LandCorp and State's behalf, seeking Thalanyji input into planning and development of Onslow and ANSIA, including by holding meeting and participating in heritage surveys. Provided draft heritage agreement for their consideration…
>
> 14 March 2012: State wrote on LandCorp and State's behalf again seeking to hold preliminary meeting seeking Thalanyji input into planning and development of Onslow and ANSIA, including by participating in heritage surveys…
>
> 23 April 2012: State wrote, on LandCorp and State's behalf, outlining a number of matters including offers of funding to settle on appropriate heritage and negotiating documentation…
>
> 30 April 2012: presentation emailed to Thalanyji in lieu of being able to present to BTAC [the native title party] in person, advising *inter alia* of intended heritage protection arrangements and proposed areas for site avoidance and site identification survey, including the Land the subject of this Notice…
>
> 26 June 2012: LandCorp wrote to Thalanyji to invite participation in funded surveys or cultural monitoring of Land the subject of this Notice…
>
> 19 July 2012: LandCorp reaffirmed offer to Thalanyji to participate in funded surveys or monitoring…

> 3 August 2012: Email and phone conversation between DSD and Thalanyji advising that LandCorp (and State) representatives would be in Onslow on 7 and 8 August 2012 to discuss heritage matters and other issues related to proposed development…
>
> 10 August 2012: Thalanyji wrote to LandCorp…and the State…advising that Thalanyji representatives would not participate in heritage surveys with LandCorp until the State enters an agreed negotiation funding agreement.

[143] This timeline is consistent with the evidence given by Mr Brazier and Mr Graham at the hearing on 12 November 2013, as well as the correspondence attached to Mr Brazier's affidavit of 1 November 2013, which includes a letter sent by the grantee party to the native title party on 19 July 2012 and a reply sent on 10 August 2012 by Templeton Knight Lawyers, who then represented the native title party.

[144] The grantee party's letter to the native title party of 19 July 2012 refers to the draft agreement provided in November 2011, as well as an offer made in April 2012 to fund a review of the draft agreement and a separate offer to fund an information meeting for the native title party and its representatives in Perth. The letter notes that no substantive comment had been received in relation to the draft agreement, though the evidence given by Mr Graham and Mr Brazier at the hearing suggests there were several discussions between the parties about the proposed terms. The letter then invites the native title party to participate in the survey, offering to fund the participation of up to four Thalanyji people at a rate of $500 per person per day. The letter also asks the native title party to nominate a preferred heritage consultant. The letter concludes as follows:

> Should no response be received from Thalanyji with respect to participation in surveys or the nomination of a preferred heritage consultant by 15 August 2012, we will still need to proceed with surveys in early September in order to ensure compliance with the Aboriginal Heritage Act 1972.

[145] In reply, the native title party indicated that a heritage agreement would not be entered into until a negotiation funding agreement had been concluded and, in the absence of such an agreement, the Thalanyji people would not be participating in any survey undertaken by the grantee party. The letter also states that, should the grantee party proceed with the proposed survey, it would do so 'without the benefit of any input from the Thalanyji people.'

[146] When asked by Ms Huynh as to why the surveys went ahead without Thalanyji participation, Mr Graham said there had been disagreement over a number of matters in relation to the conduct of the heritage surveys, including the costs associated with the involvement of Thalanyji people and consultants. In relation to the residential development, Mr Graham accepted that the grantee party had proceeded with the survey in order to meet its deadline, which was driven by the need for accommodation and affordable housing in Onslow. Similar evidence was given by Mr Brazier under cross-examination from Ms Huynh. Mr Brazier said the situation in Onslow was 'fairly critical' because of the lack of available general industrial land, and the grantee party needed to go ahead with the survey to meet its development timeframes.

[147] On 13 December 2012, a further letter was sent from the State Solicitor's Office to Corser & Corser Lawyers, who had by then replaced Templeton Knight as the native title party's representative. The letter describes the actions arising from a meeting between the Government party and the native title party at DSD on 30 November 2012 regarding future act matters relating to the ANSIA and the Onslow townsite. The letter refers to a quote provided by Corser & Corser for archaeological and ethnographic surveys of the industrial and residential areas the subject of the grantee party's s 18 application, which was provided at the meeting and by email to the Department of Premier and Cabinet.

[148] In the letter, the Government party indicates that it does not agree to an archaeological survey for the particular survey areas, but offers to fund the native title party's nominated archaeologist to peer review and comment on the LAS reports. The Government party also agrees to fund the ethnographic survey, subject to:

- rates being adjusted to conform with those in the Government Standard Heritage Agreement;
- fees for the native title party's heritage advisor being removed;
- the survey being completed and the report delivered to the grantee party by the end of January 2013;
- the ethnographic report providing comment on the ethnographic significance or otherwise of the sites identified in both LAS reports;

- the ethnographic report providing comment on and mapping the existence of any other ethnographic sites within the survey areas; and

- the ethnographic report providing comment on the likely impact to identified ethnographic sites should there be any and, if so, how to best manage or mitigate those impacts, including by way of salvage or avoidance.

[149] The letter also states that, while the quote for the archaeological survey is not accepted for the areas already surveyed, the Government party and the grantee party would seek an additional quote from the native title party to undertake an archaeological and ethnographic survey of additional areas.

[150] It does not appear that the Government party's offer was taken up by the native title party. In cross-examination, Dr Hook stated she was unaware of this correspondence when she composed her report.

Native title rights and interests

[151] The registered native title rights and interests entered on the National Native Title Register following the determination of native title in *Hayes v Western Australia* are set out as follows:

> (a) enter and remain on the land, camp, erect temporary shelters, and travel over and visit any part of the land and waters of the Determination Area;
> (b) hunt, fish, gather and use the traditional resources of the land and waters of the Determination Area;
> (c) take and use water, and for the sake of clarity and the avoidance of doubt this right does not include the right to take or use water captured by the holders of the Pastoral Leases;
> (d) engage in ritual and ceremony on, and in relation to, the land and waters of the Determination Area; and
> (e) care for, maintain and protect from physical harm, particular sites, areas and ceremonial or other sacred objects connected with the land and waters of the Determination Area, which are of significance to the Native Title Holders.

[152] The registered native title rights and interests are subject to and exercisable in accordance with the laws of the State and the Commonwealth, including the common law, and the traditional laws and customs of the native title holders for personal, domestic and non-commercial purposes (including social, cultural, religious, spiritual

and ceremonial purposes). The registered native title rights and interests do not confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others, or a right to control access to, or use of, the land and waters of the determination area or their resources.

[153] The registered native title rights and interests include the right to take and use ochre to the extent that ochre is not a mineral pursuant to the *Mining Act*, but not other minerals and petroleum as defined in State mining and energy legislation.

Legal Principles

[154] Pursuant to s 38 of the Act, the Tribunal must make one of three types of determination, namely a determination that the act must not be done, or that the act may be done, or that the act may be done subject to conditions. Section 38(2) specifically prohibits the Tribunal from imposing a profit-sharing condition. Whilst the Act does not specify what sort of conditions the Tribunal may impose, the s 39 criteria 'provides an indication in broad terms of what Parliament considers might be the appropriate subject matter of conditions which the Tribunal might impose upon the doing of the act': see *Walley v Western Australia* per Carr J at 576.

[155] It is useful here to set out the terms of s 39 in full:

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

> (c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
>
> (e) any public interest in the doing of the act;
>
> (f) any other matter that the arbitral body considers relevant.
>
> *Existing non-native title interests etc.*
>
> (2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:
>
> (a) existing non-native title rights and interests in relation to the land or waters concerned; and
>
> (b) existing use of the land or waters concerned by persons other than the native title parties.
>
> *Laws protecting sites of significance etc. not affected*
>
> (3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.
>
> *Agreements to be given effect*
>
> (4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:
>
> (a) must take that agreement into account; and
>
> (b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[156] In interpreting the s 39 criteria, the Act does not require greater weight to be given to some criteria than attributed to others. It is a discretionary exercise in assessing the broad factors of s 39 of the Act and it will depend on the evidence (see *Western Desert Lands v Western Australia* at [37]). In *Western Australia v Thomas* at 165-166 the full panel of the Tribunal said:

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

[157] Section 36(1) of the Act requires the Tribunal to take all reasonable steps to make a determination as soon as practicable. Section 109(3) of the Act confirms that the Tribunal is not bound by technicalities, legal forms or rules of evidence.

[158] Although there is no burden of proof, evidential or otherwise, which falls on any of the parties in a future act inquiry, the Tribunal can only act on evidence: *Western Australia v Thomas* at 157-158.

[159] A commonsense approach to the evidence is required, meaning that parties will produce their own evidence to support their contentions, particularly where the facts are peculiarly within their own knowledge: *Western Australia v Thomas* at 157; *Dann v Warrego Energy* at [13].

Consideration of the Section 39 Criteria

Subsections 39(1)(a)(i) and 39(2) – enjoyment of registered native title rights and interests

[160] Section 39(1)(a) requires the Tribunal to determine the effect of the proposed future act on the exercise or enjoyment by the native title party of its registered native title rights and interests. The question of whether a particular proposed act will have an effect on the exercise or enjoyment of the native title party's registered rights and interests is a matter of fact to be determined on the evidence in each case and will depend upon the nature of the act and the native title rights and interests capable of being affected: *Western Australia v Thomas* at 167. In making this assessment, the Tribunal must also take into account existing non-native title rights and interests in the relevant area, as well as the existing use of the land by other persons: s 39(2) NTA.

[161] The Government party and the grantee party contend that the proposed acquisitions will involve the extinguishment of the registered native title rights and interests (GP Contentions, paragraphs 16 and 27). However, in the GP Letter, the Government party and the grantee party note that the proposed acquisitions specifically exclude any existing rights created by the grant of mining tenements under the *Mining Act* and any existing petroleum or geothermal energy rights granted under the *PGER Act*, and draw attention to the Tribunal's decision in *Western Australia v Gordon*. In that matter, the Tribunal concluded (at [36]-[41]) that an act involving the compulsory acquisition of native title that did not also involve the taking of interests granted under the *Mining*

Act did not satisfy the condition in s 24MD(2)(b), which requires the whole or equivalent part of all non-native title rights and interests in relation to the land or waters to be acquired. Accordingly, the Tribunal held that s 24MD(3) applied to the act, meaning that the non-extinguishment principle would therefore apply. This decision has received recent support from the Federal Court in *Banjima People v Western Australia (No 2)* at [1366].

[162] The Government party and the grantee party formally maintain their existing contention that the proposed acquisitions will extinguish any native title rights and interests in the land or waters concerned, and reserve the right to argue in other proceedings that *Western Australia v Gordon* and *Banjima v Western Australia (No 2)* were wrongly decided.

[163] In any event, whether the native title rights are extinguished by the proposed acquisitions, as the Government party and the grantee party formally contend, or are wholly ineffective until such time as the acquisitions are removed, the s 39(1)(a)(i) inquiry remains focused on the effect of the proposed acquisitions on the enjoyment by the native title party of the registered native title rights and interests.

[164] The native title party contends that proposed acquisitions will significantly affect the enjoyment of its registered rights and interests. The Government party and the grantee party accept that the proposed acquisitions will have some effect on areas where native title rights and interests can be exercised, but say the impact will be marginal in the context of the exercise and enjoyment of the relevant rights and interests.

Right to enter and remain on the land, camp, erect temporary shelters, and travel and visit any part of the land and waters

[165] The Government party and the grantee party contend that the proposed acquisitions will have no immediate effect on the native title party's right to enter and remain on the land, but there will be no opportunity to do so once the areas are developed, other than to travel over and visit the areas using public roads and access ways, and in the case of Area 7, with the permission of the lessee (GP Contentions, paragraphs 64, 106, 146, 184).

[166] In her oral evidence, Ms Hayes stated that the Thalanyji people visit areas of the proposed acquisitions 'nearly every weekend.' In her affidavit, Ms Hayes states that Areas 1, 2, 6 and 7 are considered by Thalanyji people to be 'prime hunting ground' (Hayes Affidavit, paragraph 11). Ms Hayes states that she 'continues to go hunting, camping, foraging and fishing with my family in these areas' and, though she 'now goes less regularly,' her children do so regularly whenever they are in Onslow (Hayes Affidavit, paragraph 14). Ms Hayes considered the proposed development would affect access to sites, as well as access to sources of food and bush medicine.

[167] In cross-examination, Ms Hayes suggested that access to the areas within the ANSIA had already been restricted by existing development:

> MR WRIGHT: Yes. And now that bitumen road has been put through there and you've got the accommodation village and all the gas plants and so on, do you still go and collect bush food from around those areas?
>
> MS HAYES: No, we're not allowed to go out there. You're talking about where the main bitumen road is?
>
> MR WRIGHT: Yes
>
> MS HAYES: No, we're not allowed to go past that point, unless you've got to have a pass to go in there.
>
> MR WRIGHT: So are you allowed to drive along that bitumen road? That's a public road, is it?
>
> MS HAYES: Well, as far as I understand, you're not supposed to go in there, unless you have a pass.
>
> MR WRIGHT: Not go in there at all?
>
> MS HAYES: No. So by moving this further out, we're still going to be pushed further back…

[168] When asked whether Thalanyji people can no longer go out and collect bush food and medicine in the areas of the proposed acquisitions, Ms Hayes' answer was '[n]ot where the project area is, no.'

[169] On re-examination, Ms Hayes confirmed that, as opposed to the areas acquired for the Wheatstone and Macedon projects, Area 2 and Area 6 had not been fenced off and Thalanyji people still travel over Area 2, though she was not specifically asked about Area 1 and Area 7. In relation to Area 6, Ms Hayes indicated that access to Area 6 was limited due to the proximity of the Onslow Salt operations and the cemetery, as well as recent earthworks that have disturbed the sandhills in the area. Ms Hayes said that kids still go over to the sandhills, but are told not to because of the loose sand.

[170] In the submission of the Government party and the grantee party, Ms Hayes' oral evidence should be taken as suggesting that, as a result of the future acts associated with the Wheatstone and Macedon projects, there is already very limited or no access to the areas of the proposed acquisitions, at least in the ANSIA. On the other hand, the native title party submits that the evidence of Ms Hayes regarding restrictions on access is limited to the areas already taken.

[171] In my view, the inconsistencies in Ms Hayes' testimony on the issue of access is explained to some degree by a confusion in the terminology used to describe the proposed acquisitions, the areas already taken and the ANSIA area itself. Though on one view the evidence of Ms Hayes suggests that access to the areas the subject of these proceedings is already restricted, I am not aware of any right to exclude Thalanyji people from the areas proposed to be acquired. Consequently, I take Ms Hayes' reference to the 'project areas' to be a reference to areas already taken for the purposes of the Wheatstone and Macedon projects.

[172] In her oral evidence, Ms Hayes stated that Thalanyji people used to camp around the claypans in the area now set aside as the ANSIA. However, in cross-examination Ms Hayes confirmed that the area is no longer used for camping. Ms Hayes also gave evidence that Thalanyji people do not camp in or around Area 6.

Right to hunt, fish, gather and use the traditional resources of the land and water

[173] The Government party and the grantee party contend that the proposed acquisitions will have no immediate effect on hunting, fishing, gathering and using the traditional resources of the areas but there will be no opportunity to do so once the areas are developed, except insofar as there may be traditional resources within Area 6 that can be gathered and used within areas of public roads, pathways and public open space (GP Contentions, paragraphs 66, 108, 148, 186).

[174] As noted above at [166], Ms Hayes refers to the areas as a 'prime hunting ground.' In her affidavit, Ms Hayes states that she and her family hunt for kangaroos, emus, wild turkey, goannas, porcupine, shell meat and crabs (Hayes Affidavit, paragraph 15). Ms Hayes also states that she and her family gather bush food and medicine from the areas of the proposed acquisitions, including red gums and bush honey; bush potatoes; plants for curing warts; and gumtree leaves for curing flus and sores (Hayes Affidavit,

paragraph 17). Ms Hayes says that the areas are also used for gathering ochre for ceremonies (Hayes Affidavit, paragraph 18). In her oral evidence, Ms Hayes stated that the areas are used for hunting because they are a short distance from town and are not too far to go to hunt. Ms Hayes also stated that most of the things they get, such as food and medicinal remedies, come from around the area.

[175] In cross-examination, Ms Hayes admitted there is a lot of traffic, including road trains, on the road linking Onslow to the Wheatstone and Macedon project areas. Ms Hayes said that the dust generated by this traffic had destroyed a lot of the plants in the area, though she later gave evidence that plants such as bush potato and bush cucumber can still be found in the area. Ms Hayes also conceded that Thalanyji people could no longer hunt around the area of the Wheatstone and Macedon projects, as most of the area is now restricted. Similarly, Ms Hayes described the area between Onslow and the airport as being too close to town for hunting. In relation to ochre, Ms Hayes said it was mostly collected closer to the Ashburton River.

[176] The evidence of Ms Hayes suggests that, while Thalanyji people continue to hunt throughout the determination area and particularly along the Ashburton River, it no longer occurs in and around the areas proposed to be acquired. It is likely this is due in part to the proximity of existing industrial and residential development. Though the evidence of Ms Hayes indicates that the development of these areas has had some effect on the distribution of bush resources as a result of dust generated by increased traffic in the area, she also suggests that these resources can still be found within the area of the proposed acquisitions. On this basis, it is possible to infer that Ms Hayes and other Thalanyji people still visit the areas to gather these resources, though there is little evidence as to the extent of these activities.

Right to take and use water

[177] The Government party and the grantee party contend that the proposed acquisitions will have no immediate effect on the right to take and use water but there will be no opportunity to do so once the areas are developed, except within areas of public road, pathways and public open space within Area 6 (GP Contentions, paragraphs 68, 110, 150, 188).

[178] There is no specific evidence regarding the use of water by the native title party in the areas proposed to be acquired.

Right to engage in ritual and ceremony on, and in relation to, the land and waters

[179] The Government party and the grantee party contend that the proposed acquisitions will have no immediate effect on ritual and ceremony conducted on or in relation to the areas acquired, but there will be limited opportunity to do so once the areas are developed, except within areas of public road, pathway and public open space within Area 6. The Government party and the grantee party note that rituals and ceremonies could still be undertaken elsewhere (GP Contentions, paragraphs 70, 112, 150 and 190).

[180] In her affidavit, Ms Hayes deposes to the existence of a male ceremonial ground located between Area 4 and Area 6 within the townsite of Onslow. Area 4 is one of the areas previously acquired and consists of two parts, one of which is adjacent to the eastern part of Area 6 and the other abutting the coast on the opposite side of the town. Ms Hayes states that Thalanyji people 'used to conduct initiation ceremonies on this site every 12 months,' but these ceremonies 'ceased about 8 to 10 years ago because of the development and expansion of the Onslow Townsite' (Hayes Affidavit, paragraph 20). In cross-examination, Ms Hayes acknowledged that the ceremonial ground is not in one of the areas proposed for development. There is no other evidence concerning rituals or ceremonies undertaken on or in connection with the areas proposed to be acquired.

Right to care for, maintain and protect from physical harm, particular significant sites, areas and ceremonial or other ceremonial objects connected with the land and waters

[181] As discussed below in relation to s 39(1)(a)(v), I find that the evidence does not establish the existence of areas or sites of particular significance that might be affected by the proposed acquisition. The LAS reports identify several artefact scatters and shell middens within Areas 1 and 6, and the evidence suggests there may be other archaeological sites in the areas that are yet to be surveyed. While there is some evidence to support the finding that certain archaeological sites may have significance for the native title party insofar as they demonstrate the historical occupation of the

area by Thalanyji people, there is no evidence that sites of this kind exist in the areas proposed to be acquired.

[182] In her oral evidence, Ms Hayes said it was 'very likely' that sites were missed because Thalanyji people had not participated in the surveys undertaken by LAS and they should have been consulted about the areas. During the hearing, Dr Hook stated that the Thalanyji were not provided with an opportunity to participate 'in a culturally appropriate way where they can give their views on the heritage significance and importance of the places that have been surveyed and the sites that have been identified' and believed the significance of these areas may have been missed.

[183] To my mind, a distinction must be drawn between the obligation to care for, maintain and protect sites of significance and negotiation about the terms on which surveys are to be conducted. It is clear from the evidence that the Government party and the grantee party did endeavour to obtain the participation or involvement of the native title party in the LAS surveys and did seek to consult with the native title party on heritage matters. Although the parties were unable to agree on the terms of a heritage agreement, the Thalanyji people were nevertheless invited to participate in the LAS surveys and were asked to provide quotes in relation to further archaeological and ethnographic surveys in respect of the areas proposed to be acquired. Again, these surveys did not proceed because the parties could not reach agreement as to costs.

[184] Regardless of whether parties are able to agree on the terms of the survey, including as to costs, the non-exclusive right to protect sites from physical harm does not confer a right to exclude others from the land (see *Attorney General v Ward* at [24]-[25]). This is consistent with the well established principle that the native title party is not entitled to exercise a veto in relation to acts to which the right to negotiate applies (see *Re Koara People* at 79-80; *Australian Manganese v Western Australia* at [57]-[58], [71]-[72]). Arguably, this is a case in which the native title party chose not to exercise the relevant right, though it only did so because it was unable to negotiate an agreement that was acceptable to it.

[185] As the evidence does not establish the existence of areas or sites of significance to the native title party likely to be affected by the proposed acquisitions, I do not consider the exercise of the right to care for, maintain and protect significant areas or sites will

be affected. However, to the extent the evidence suggests the possibility of archaeological sites that may be of some significance to the native title party, I am satisfied that the grantee party will comply with the AHA and continue to seek the involvement of the native title party in the identification and management of those sites, though I accept this may involve further negotiation.

Effect of proposed acquisitions on areas outside the land to be taken

[186] The native title party contends that the effect of the proposed acquisitions on its registered native title rights and interests will not be limited to the title boundaries of the areas proposed to be acquired, but will extend to any industrial buffers relevant to those areas (NTP Statement, paragraph 4(i)). This contention is based on a planning requirement in Amendment No 9 to the Shire of Ashburton Town Planning Scheme No 7, which set aside the ANSIA as a Special Control Area. The relevant planning requirement states that, when considering a request to initiate rezoning in the ANSIA, one of the matters the local government must be satisfied of is whether the structure plan prepared by the proponent deals with industrial buffers both within and outside the site (GP12, pages 6-7).

[187] In his oral evidence, Mr Brazier stated that the rezoning of the proposed acquisitions had already been initiated and the relevant planning documents had been provided to the Western Australian Planning Commission for approval. Mr Brazier indicated that, to his knowledge, a buffer had not been proposed in respect of the relevant areas and was not required, as the land is being set aside for general industrial purposes rather than heavy industry.

[188] In their closing submissions, the Government party and the grantee party referred to a development plan report prepared on behalf of the grantee party for the purpose of the rezoning process, which mentions a general 3000 metre 'Risk, Nose and Air Quality' buffer around the ANSIA itself and a 1000 metre 'Land Use Sensitivity' buffer around Transient Workforce Accommodation sites (GP16, page 48). This suggests that there will be a buffer around Area 7. However, it was submitted that the proposed buffer will merely limit the development that can occur in the area and will not inhibit the native title party's access to the area or the enjoyment of its registered rights and interests.

[189] I accept that the proposed buffer around Area 7 is not an industrial buffer of the kind that might be required in the case of heavy industry and does not imply that the areas surrounding the development will be affected by noise or air pollution. I also accept that the proposed buffer will not involve a further taking of native title or restrict the native title party's access to the area around the proposed development. Accordingly, I do not accept the native title party's contention that the proposed buffer will impair the exercise or enjoyment of the native title party's registered rights and interests in this instance.

Conclusion

[190] Whether or not the proposed acquisitions extinguish native title, they will nonetheless have the effect of reducing the area available for the exercise and enjoyment of the native title party's registered rights and interests. However, it is apparent that existing industrial and residential development has already significantly affected the native title party's enjoyment of its registered rights and interests in these areas, to the point that many of these rights and interests such as right to hunt, camp and engage in ritual and ceremony are no longer exercised. I have also taken into account of the existing non-native title interests outlined above at [82]-[85], which are likely to have already constrained the exercise or enjoyment of the relevant native title rights and interests to some degree.

[191] There is evidence that bush resources can still be found in the areas proposed to be acquired, and it can be inferred that Thalanyji people still collect resources from these areas. However, the evidence of Ms Hayes in particular suggests there are other places within the determination area that are outside the ANSIA and the town of Onslow (for example, the places on the Ashburton River referred to at [198] below) which are far more significant for the exercise and enjoyment of the native title party's registered rights and interests. While I acknowledge that Thalanyji people have certain rights and responsibilities in relation to significant sites, there is no evidence of any sites to which these rights and responsibilities might attach in the areas that are subject to the proposed acquisitions. Consequently, I do not consider the proposed acquisitions will have a direct and immediate effect on the exercise or enjoyment of the native title party's registered native title rights and interests.

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

[192] The native title party submits that the native title party will be prevented, or alternatively restricted, from engaging in or preserving any way of life, culture or traditions that are, or could have been carried out in the areas of the proposed acquisitions (NTP Statement, paragraph 4(ii)). In its closing submissions, the native title party conceded that the footprint of the proposed acquisitions is not large in the context of the entire determination area, but contended that the proposed acquisitions will involve the taking of an area in which members of the native title party practice important cultural and traditional activities.

[193] The Government party and the grantee party contend that the areas are already situated near existing development, namely the Macedon and Wheatstone projects in the ANSIA and the residential development surrounding Area 6. In particular, the Government party and the grantee party note that a major road has already been constructed adjacent to Areas 1, 2 and 7 and the Wheatstone construction village has been constructed adjacent to Area 7 and opposite the Western part of Area 1. The Government party and the grantee party also note that other heavy industry is likely to be located within the ANISA (GP Contentions, paragraphs 74-75, 117-118, 156). In relation to Area 6, the Government party and the grantee party submit that part of the land is adjacent to existing housing within the Onslow townsite and others are adjacent to existing semi-rural developments outside the townsite (GP Contentions, paragraph 194).

[194] In their closing submissions, the Government party and the grantee party accepted that the area available for cultural practices such as hunting and camping will be reduced and the proposed development will have an impact on areas where the native title rights and interests can be exercised. However, the Government party and the grantee party submitted that the effect will be marginal, particularly in light of the evidence of Ms Hayes which, though it dealt in general terms with activities carried on throughout the determination area, should not be understood as relating specifically to the areas proposed to be acquired.

[195] As noted above at [190]-[191], the evidence of Ms Hayes does not suggest the proposed acquisitions will have a direct and immediate effect on the exercise or enjoyment of the native title party's registered native title rights and interests.

However, the native title party contends that the proposed acquisitions will reduce the area in which its culture and traditions may be practised. In her oral evidence, Ms Hayes expressed the concern that Thalanyji people 'were going to be pushed further back' and would 'become refugees in our own traditional lands.'

[196] The Government party and the grantee party accepted the possibility of a cumulative impact on the way of life, customs and traditions of the native title party. However, it was noted that, compared to the size of the existing development in the ANSIA, the areas are relatively small and immediately adjacent to areas subject to development, so will not have the effect of 'cutting off' another part of country. In relation to Area 6, it was also noted that the land proposed to be acquired is only comprised of particular cadastral lots surrounded by areas of non-native title.

[197] It is not disputed that the proposed acquisitions will result in a reduction of the area available for the exercise of the native title party's registered rights and therefore the practice of the native title party's way of life, culture and traditions. However, in the context of existing and planned development in the ANSIA and the development associated with the expansion of the Onslow townsite, I accept that the impact of the proposed acquisitions will be minor. The areas proposed to be taken are not significant in size and the evidence of Ms Hayes does not indicate that they are significant for the observance of the native title party's cultural practices. Rather, the evidence suggests that the amenity of these areas has already been affected by surrounding development.

[198] The evidence of Ms Hayes also suggests the taking of these areas will be unlikely to affect the ongoing cultural practices of the native title party. Although Ms Hayes indicated that bush resources can still be found in the ANSIA, she gave evidence that these resources can be and are collected along the Ashburton River. Ms Hayes also indicated that hunting mainly takes place at Five Mile, Ten Mile and other sites along the Ashburton River west of the ANSIA, as well as on the Cane River to the south-east, along the coast, and in other areas east of Onslow. The Hayes Map confirms these places are situated well outside the ANSIA and the town of Onslow. In relation to camping, Ms Hayes gave evidence that this occurs in places such as Barradale, which is further south of Onslow along the North-West Coast Highway, and along the Ashburton River, especially at the Five Mile and Ten Mile sites. In light of this

evidence, I do not find that the proposed acquisitions will have a significant detrimental effect on the way of life, culture or traditions of the native title party.

[199] The Government party and the grantee party submit that the proposed development may have a positive effect on the native title party's way of life through employment and contracting opportunities and, in relation to Area 6, the opportunity to obtain new housing (GP Contentions, paragraphs 76, 119, 158, 195). I discuss the availability and affordability of housing and the other economic benefits that may result from the proposed development later in these reasons. However, for present purposes, it will suffice to note that, while Ms Hayes expressed some doubt about the capacity of the members of the Thalanyji community to enjoy the benefits arising from the proposed acquisitions, the proposed development may have a positive effect on the native title party's way of life.

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

[200] In considering the effect on the development of the native title party's social, cultural and economic structures, the Tribunal may also take into account the positive effect of the future act: *Western Australia v Thomas* at 170.

[201] The native title party contends that, as a result of the proposed acquisitions, the native title party will have no capacity (or alternatively, impaired capacity) to develop social, cultural or economic structures in respect of the land concerned (NTP Statement, paragraph 4(iii)).

[202] There is no evidence that these particular acquisitions will have any adverse effect on the development of the native title party's social, cultural or economic structures. However, there is some evidence that the native title party has and will continue to receive payments associated with the Wheatstone and Macedon projects, and it is likely these payments will have a positive effect on its social, cultural and economic structures. As the proposed acquisitions will support the continued development and operation of these projects, it is appropriate to take these payments into account.

[203] As noted above at [199] and subject to my comments there and below at [251]-[252], [258] and [263]-[265] regarding the economic and other significance of the proposed acquisitions to local Aboriginal people, I accept that the employment and contracting

opportunities created by the proposed acquisitions may have a positive effect on the social and economic structures of the native title party.

[204] I also have taken into account Mr Graham's statement that the grantee party will require its contractor to prepare and implement an Aboriginal participation plan in relation to Area 6, which will aim to create and encourage the education and employment of Aboriginal people and support Aboriginal economic development (Graham Affidavit, paragraphs 20-21). Although the plan has yet to be drafted and the details are presently unknown, I accept that the implementation of the plan may be of some benefit to the development of the native title party's social and economic structures.

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

[205] As noted above at [165]-[171], the native title party will have no freedom of access to areas proposed to be acquired other than by way of public roads and access ways and, in the case of Area 7, with the permission of the lessee.

[206] There is no evidence of any rituals, ceremonies or other activities of cultural significance are carried on in the areas proposed to be acquired. Although Ms Hayes gave evidence of a men's ceremony site in the town of Onslow, the area is not proposed for development and ceremonies have ceased to be carried on at the site. In cross-examination, Ms Hayes stated that ceremonies now take place at Cane River and have done so for years. Consequently, I find that the proposed acquisitions are unlikely to affect the native title party's freedom to carry out rites, ceremonies and other activities of cultural significance on the land.

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

[207] Section 39(1)(a)(v) requires the Tribunal to assess the likely effect of the proposed future act on areas or sites of 'particular significance'. The term also appears in s 237 of the Act, and in the context was interpreted by Carr J in *Cheinmora v Striker Resources* at 34-35 to mean areas and sites that are 'of special or more than ordinary significance' in accordance with the traditions of the native title party. This interpretation has subsequently been adopted in relation to s 39(1)(a)(v) of the Act: see *Jax Coal v Smallwood* at [69]; *Bissett v Mineral Deposits* at [83]-[84]; *Summons v Victoria* at 23.

[208] The focus of the inquiry under s 39(1)(a)(v) is on the effect of the proposed future act on relevant areas or sites 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 proposed future act area: see *Backreef Oil v JW* at [76], referring to *Xstrata Coal Queensland v Albury* at [103].

Areas and sites associated with Wanamangurra

[209] In her affidavit, Ms Hayes refers to a rainbow serpent that resides in the Ashburton River (Hayes Affidavit, paragraph 23). During the hearing, this being was also referred to by its Thalanyji name, Wanamangurra. According to the affidavit of Ms Hayes, the rainbow spirit also travels along a dreaming track that runs underground from the west of Area 2 to Areas 3, 7 and 1 (Hayes Affidavit, paragraph 23). In her oral evidence, Ms Hayes describes the dreaming track as travelling underground between Beadon Creek and a site called Buurabalayji in the town of Onslow, through Four Mile Creek further south along the coast to Five Mile on the Ashburton River, and then through the ANSIA and parts of the salt field.

[210] The Government party and the grantee party acknowledge that Buurabalayji is a site of particular significance in accordance with the traditions of the native title party. Although Buurabalayji appears on the search of the Aboriginal Sites Database for Area 6, both Ms Hayes and Dr Hook confirmed that the site is not actually situated in Area 6. This is consistent with the Hayes Map. In cross-examination, Ms Hayes indicated, while there are no particular sites where Wanamangurra 'comes up' in the areas around the Wheatstone and Macedon project areas, Thalanyji people do believe that Wanamangurra travels underground in these areas.

[211] During cross-examination, Ms Hayes was asked about the effect of the construction of the Macedon pipeline, which formed part of the works to which the native title party gave its consent under its agreement with Chevron:

> MR WRIGHT: And so when they build that Macedon pipeline under the ground, that didn't disturb the Rainbow Serpent track?

> MS HAYES: Well, it did, because it went across the creek near Five Mile, but I'm not too sure how far they dug down. I don't know whether they reached the fresh water mark underground or what.

[212] When asked whether development on the surface of the areas proposed to be acquired would interfere with Wanamangurra or the dreaming track, Ms Hayes stated that she did not know 'how far they're going to dig down'.

[213] The Government party and the grantee party submit that the evidence of Ms Hayes does not address the question of whether there is anything associated with Wanamangurra or the dreaming track that would qualify as an area or site of particular significance in relation to the areas proposed to be acquired. The Government party and the grantee party contend that, to the extent that Ms Hayes' affidavit suggests the dreaming track does affect these areas, in light of the cross-examination her evidence should not be understood in that way.

[214] I accept that the evidence of Ms Hayes establishes there are no particular sites associated with Wanamangurra within the areas proposed to be acquired. Ms Hayes' oral evidence suggests that the path of the dreaming track is more complicated than was suggested in her affidavit; however, she did indicate that it travels underground within the Wheatstone and Macedon project areas. Although she did not state in specific terms whether the dreaming track travels under the areas proposed to be acquired, I accept it is possible that it does intersect with these areas.

[215] Nevertheless, I am not satisfied that any points of intersection would therefore constitute sites or areas of particular significance to the native title party. In this regard, a distinction must be drawn between areas or sites that are generally culturally significant and specific culturally significant areas or sites that may be regarded as being of particular significance to the native title party (see *WF v Emergent Resources* at [39]; *Yindjibarndi v FMG Pilbara* at [130]). On one view of her evidence, Ms Hayes suggests that the dreaming track travels throughout the area south of Onslow and east of the Ashburton River. However, though Ms Hayes was quite specific about the path taken by Wanamangurra between sites in Onslow and those along the coast towards the river, Ms Hayes did not identify any sites or other geographical features associated with the dreaming track within the ANSIA. While it was suggested that the Macedon pipeline had crossed over and may have disturbed the dreaming track, Ms

Hayes did not indicate whether this had any consequences in terms of Thalanyji law and custom. In any event, it is reasonable to infer that the native title party was aware that the pipeline would intersect with the dreaming track when it gave its consent to the development, which suggests it is not regarded as something so significant that development would not be permitted if there was a risk of interference.

Ceremony Site

[216] As noted above at [180] and [206], it was accepted by Ms Hayes that the men's ceremony site is not located in one of the areas proposed for development. During the hearing on 12 November, Dr Hook stated that Area 6 is known as a men's site, but admitted she did not have any knowledge about matters that are restricted to men. In any case, the evidence does not support a finding that the site is of particular significance to the native title party, and there is no evidence that the proposed development will have any effect on the site.

Sites identified in LAS reports

[217] The archaeological survey commissioned by the grantee party and undertaken by LAS in respect of Area 7 and the eastern part of Area 1 identified one site of low archaeological significance (LCOR-1209) within the eastern part of Area 1. The survey undertaken by LAS in respect of Lot 350 in Area 6 and surrounding areas identified eight sites. With the exception of LCOR-1205, which was assigned a low to medium archaeological significance, the sites identified in Lot 350 were considered to be of low archaeological significance. It is noted by the Government party and the grantee party that the area surveyed in respect of Lot 350 was in fact larger than the area proposed to be acquired and a visual comparison suggests that perhaps only three of the sites (LCOR-1204, LCOR-1205 and LCOR-1207) actually fall within Lot 350. No sites were identified in the survey undertaken in relation to Lot 79 and the northern part of Lot 72.

[218] The reports define 'low' and 'medium' significance in the following terms:

> **Low Significance:** Aboriginal sites of a common class of site and/or contain minimal archaeological information with low research potential. Sites such as low-density artefact scatters, individual grinding patches or other archaeological features that do not have substantial archaeological importance are assigned this status.

> **Medium Significance**: Aboriginal sites of a relatively common class of site and/or contain good research potential to yield archaeological information to expand on what is known about regional archaeology. Sites such as high-density artefact scatters, small quarry/reduction areas, groups of grinding patches, individual engravings, and multi-component sites or other archaeological features that have moderate archaeological importance are assigned this status.

[219] All of the sites identified in the report for Lot 350 are described as shell middens with associated artefact scatters. In respect of the sites classified as being of low archaeological significance, the report notes the following:

> There is minimal additional scientific information this midden / artefact scatter can contribute to the regional archaeology of the Pilbara. This site contains no unusual archaeological features or stone artefact technology, and similar middens / artefact scatters are common throughout the Pilbara region.

[220] In relation to LCOR-1201, the report also notes that 'an association of food resources (shell) and manufactured tools (stone artefacts) indicate a definite use of area, however the low surface density of shell and stone artefacts do not provide a scope for wider analysis.' LCOR-1205 is also described as a shell midden / artefact scatter, but is assigned a higher level of significance as it was 'the best preserved of the midden sites, and excavation may identified [*sic*] buried and dateable archaeological material.'

[221] According to the report for Area 7 and the eastern part of Area 1, LCOR-1209 is located on the eastern margins of a relatively large claypan. The report describes the site as 'a low density artefact scatter with a low variety of raw materials and artefact types.' The report states that 'the artefacts appear to have been pushed to the margins of the claypan when water fills the claypan due to rains, particularly those associated with cyclones' and notes that the site is 'best characterised as a low but multiple use location where intermittent activities has [*sic*] led to the formation of an archaeological assemblage.' The report concludes that the site is similar to artefact scatters commonly found in the Pilbara region and its scientific significance is diminished due to the location of the site and the possibility of 'high hydrodynamic activity.'

[222] In cross-examination, Dr Hook agreed that the methodology employed by LAS was appropriate for identifying archaeological sites in the area and that it was a standard survey procedure, though she indicated that the ethnographic significance of the sites could not be determined in the absence of consultation with Thalanyji people. Dr Hook did not disagree with the assessment made in relation to LCOR-1205 or LCOR-1209, though she expressed some reservations with respect to the description of the

later site. Dr Hook did disagree with the assessments made in relation to the other sites identified in Lot 350 on the basis that shell dating may have provided further evidence of Aboriginal occupation, but did not offer any opinion on the significance of the sites.

[223] The Government party and the grantee party contend that the Act does not direct the Tribunal to take into account the existence of archaeological sites and there is no evidence that the native title party has undertaken its own ethnographic assessment. Although there is evidence that the s 18 applications made by the grantee party following the LAS reports were provided to the native title party before they were lodged with the ACMC, there is no evidence that the native title party made any submissions to the ACMC in respect of the applications or the sites identified in the reports.

[224] I accept the native title party's contention that artefact scatters may have significance in terms of providing evidence of the Thalanyji people's historical occupation of the area. Although the sites identified by LAS were classified as being of low archaeological significance, the evidence of Dr Hook suggests that further analysis could indicate a higher degree of significance from an archaeological perspective. However, s 39(1)(a)(v) is concerned with areas and sites of particular significance to the native title party *in accordance with its traditions*. Though I can accept the general proposition that archaeological sites can sometimes have an ethnographic dimension, there is no evidence of that in relation to the sites identified in the LAS reports.

[225] The native title party contends that Thalanyji people were not consulted in relation to the LAS reports. That issue is not in contention. However, it cannot support a finding that the sites identified in the LAS reports are of particular significance to the native title party. Although there is no burden of proof as such, the Tribunal is required to adopt a commonsense approach to the evidence. Consistent with that approach, where facts are peculiarly within the knowledge of a party, an unfavourable inference may be drawn against that party if it fails to produce evidence as to those facts (see *Ward v Western Australia* at 217).

[226] In the present matter, there is evidence that copies of the LAS reports were provided to the native title party. The reports contain the coordinates of the sites that were

identified. The native title party could have made an independent assessment into the sites, either at the time it was provided with the s 18 applications or in the course of preparing for these proceedings, but elected not to do so. It had the opportunity to comment on the s 18 applications, but did not act on it. In the circumstances, there is no basis for me to find that the LAS sites are of particular significance to the native title party.

Other sites

[227] The native title party contends that the density of sites around the areas proposed to be acquired means that it is highly likely that other, undiscovered sites exist in these areas (NTP Statement, paragraph 4(v)). In her oral evidence, Dr Hook said the Onslow area has a rich archaeological record, and an inference could be drawn from these surrounding areas that the areas proposed to be acquired also contain sites of archaeological and possibly ethnographic significance. In particular, Dr Hook stated that the presence of archaeological sites could suggest the existence of camping areas and associated ceremonial grounds, though she could not be sure of that. In cross-examination, Ms Hayes said that burial sites and skeletal remains have also been found around the project area, though no evidence was provided of any specific sites in or around the areas proposed to be acquired.

[228] The inquiry under s 39(1)(a)(v) requires the Tribunal to assess the impact on areas or sites of particular significance to the native title party. It is a precondition of that inquiry that areas or sites of particular significance are identified (see *Yindjibarndi v FMG Pilbara* at [125]; *Peregrine Resources v Ashwin* at [88]). If a proposed future act is said to affect an area or site of particular significance, the area or site must be identified and the nature of its significance explained (see *Silver v Northern Territory* at [91]). It is not relevant in this respect that the surveys were conducted without the participation of the native title party or have not been undertaken in some of the areas proposed to be acquired, as it cannot support an inference that there will therefore be a greater risk of interference with relevant areas or sites (see *Monadee v Western Australia* at [13]; *Peregrine Resources v Ashwin* at [88]).

[229] To the extent it is open to infer the existence of sites from the surrounding areas, the majority of the registered sites and ‘other heritage places’ recorded in these areas

appear to be of an archaeological nature. As the Government party and the grantee party contended in their closing submissions, only two of the sites are ethnographic, one being Buurabalayji and the other being the ceremonial site near the racecourse in Onslow, neither of which are located on or in the vicinity of the proposed acquisitions. Though I accept there is some evidence that artefact scatters, shell middens and other archaeological sites may have significance to the native title party in terms of contributing to the historical record of the area's occupation by Thalanyji people, there is no evidence of regarding the particular significance of these sites in Thalanyji law and custom.

Conclusion

[230] Based the evidence before me, I find there are no areas or sites of particular significance likely to be affected by the proposed acquisitions. In any event, the Tribunal is entitled to have regard to the protective effect of the AHA. The grantee party has already taken steps to comply with the AHA and I am satisfied that it takes its obligations seriously. Although the LAS surveys were undertaken without the participation of Thalanyji people, the Government party and the grantee party made significant efforts to involve the native title party in the process and consult with them regarding the proposed development. I am satisfied on this basis that the grantee party will continue to take steps to comply with its obligations under the AHA.

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

[231] In its written submissions, the native title party states that it wishes to reach agreement with the grantee party in relation to the management, use and control of the land to achieve recognition and protection of its interests (NTP Statement, paragraph 5). The native title party also outlines a variety of matters that it would like have dealt with in an agreement. With the exception of payments to the native title holders for the deprivation and use of the land and access roads, these matters are also outlined in the affidavit of Ms Hayes in terms of conditions that ought to be imposed by the Tribunal and are outlined below at [288].

[232] The Government party and the grantee party submit that the native title party's willingness to enter into agreements to allow the Wheatstone and Macedon projects to proceed demonstrates that it is not opposed to industrial development in the area (GP

Contentions, paragraphs 83, 126 and 165). In their submission, the development of the areas proposed to be acquired has become necessary due to the development of the Wheatstone and Macedon projects, and it was reasonably foreseeable that these larger projects would give rise to the need for smaller support industries and further residential development (GP Contentions, paragraphs 83, 126, 165 and 201).

[233] In her oral evidence, Ms Hayes stated that, when the Thalanyji people were approached in relation to the Wheatstone and Macedon projects, it was felt that they 'couldn't stop progress' but 'wanted to have a say in what's happening on our land.' In her affidavit, Ms Hayes states that the grantee party 'must work closely with the Thalanyji people so that they can understand what can and cannot be done' (Hayes Affidavit, paragraph 30). However, in cross-examination, Ms Hayes indicated that she had been part of negotiations with the Government party and the grantee party and agreed that there had been some consultation about the proposed acquisitions, though she queried why it had not occurred when the Wheatstone and Macedon projects were being discussed.

[234] The Government party and the grantee party say the native title party was consulted about the proposed acquisitions and no issue has been raised as to whether they had negotiated in good faith with the native title party. They submitted that an inference could not be drawn that the native title party had not been consulted, as there was evidence that negotiations did occur and offers had been made in relation to the proposed acquisitions. In reply, the native title party said that, while it is not contended that offers were not made, it was unreasonable for the Government party not to accept the terms proposed by the native title party, particularly given the Thalanyji people participated in surveys requested by other proponents.

[235] I accept that Ms Hayes genuinely believes the Thalanyji people were not adequately consulted about the proposed acquisitions. However, the evidence before the Tribunal suggests that the Government party and the grantee party did consult with the native title party from at least November 2011 to December 2012. As good faith was not raised in these proceedings, I have not been privy to the full scope of negotiations between the parties. Nevertheless, given the native title party elected not to raise the issue, I am entitled to presume that the parties negotiated in good faith (see *Moore v Mungeranie* at [33]).

[236] Although the Tribunal is obliged to have regard to the native title party's interests, proposals, opinions or wishes, the fact that it has not been able to negotiate an agreement satisfactory to it is not on its own sufficient justification for a determination that the proposed acquisitions may not proceed (see *Adani Mining v Diver* at [98]). In the circumstances, I do not accept that the native title party is unequivocally opposed to further development in Onslow or the ANSIA, and it was reasonable to expect that further development might occur in connection with the Wheatstone and Macedon projects. There is no evidence to support the native title party's contention that the non-acceptance of the terms it proposed was unreasonable, and as good faith has not been raised in these proceedings, it would not be appropriate for me to express a view on the matter.

[237] I have also taken into consideration the range of conditions outlined in the affidavit of Ms Hayes, many of which relate to the management, use and control of the land proposed to be acquired. I discuss these conditions in further detail later in these reasons. However, it will suffice to note for present purposes that Ms Hayes does not outline any basis for the imposition of these concerns and does not identify any particular concerns to which they might attach. In this regard, I have been unable to attach much weight to the conditions as an expression of the interests, proposals, opinions or wishes of the native title party.

[238] In its closing submissions, the native title party contended that the acts should not be done. This was the first time that the native title party's submissions were framed in these terms, though Ms Huynh sought to clarify that this was in fact the native title party's position, but if the acts were to be done, the native title party's view was that they should be made subject to the conditions outlined in its written submissions. Ms Huynh also alluded to the likelihood of grave consequences for the Thalanyji people if the land was disturbed, though she was unable to explain why the consequences were not so grave in respect of the land taken for the purpose of the Macedon and Wheatstone projects, except that Thalanyji people had given their consent and arrangements had been made in respect of heritage.

[239] In response to these contentions, the Government party and the grantee party reiterated the distinction made in their written submissions between the circumstances of the present applications and those considered by the Tribunal in *Western Desert*

Lands v Western Australia and *Weld Range Metals v Western Australia* (GP Contentions, paragraphs 42-44, 84, 127, 166 and 202). In those matters, particular weight had been given to the interests, proposals, opinions and wishes of the native title parties in the context of areas found to be highly significant and, in the case of *Western Desert Lands v Western Australia*, were subject to a determination of exclusive native title. I agree that this matter is distinguishable from these previous cases. Here, the determined native title rights are non-exclusive; nor is this a matter where sites of renowned significance of the kind in *Western Desert Lands v Western Australia* and *Weld Range Metals v Western Australia* will be affected by the proposed acquisitions. Given those matters, the evidence of Ms Hayes (see, for example, at [233] above) and the circumstances in which the contention was raised, I am not inclined to give much weight to the belated argument that the native title party does not wish the proposed future acts to be done whatsoever.

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

[240] Section 39(1)(c) requires the Tribunal to evaluate the economic or other significance of the proposed future act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples or Torres Strait Islanders who live in the area. The inquiry is not limited to the economic significance of the act, and the Tribunal may consider evidence regarding the non-economic significance of the act: *Western Australia v Thomas* at 170.

ANSIA

[241] The Government party and the grantee party submit that the economic significance of the proposed acquisitions must be seen in the context of the ANSIA as a whole (GP Contentions, paragraphs 85, 87, 128-129, 167-168 and 203-204).

[242] In the context of the Australian economy, the Government party and the grantee party contend that the ANSIA will facilitate business activity within Australia, which will generate taxation revenue; the development of offshore gas fields that may otherwise be uneconomic; and the export of LNG from Australia, improving the balance of trade (GP Contentions, paragraph 85). In the context of the Western Australian economy, it is contended that the ANSIA will facilitate business activity within Western Australia, which will generate employment, growth and taxation revenue; and the development

of offshore gas fields that might otherwise be uneconomical or processed offshore using floating LNG facilities (GP Contentions, paragraph 87).

[243] In his affidavit, Mr Clark states that the ANSIA has provided the opportunity to develop major projects such as Wheatstone and Macedon, which require associated infrastructure and services (Clark Affidavit, paragraph 20). The ANSIA also provides opportunities for smaller gas fields in the Carnarvon Basin and the Exmouth Gulf to be developed and commercialised, either through joint venture arrangements with the existing proponents or by utilising the port infrastructure independently under a third party access regime (Clark Affidavit, paragraph 21).

[244] According to Mr Clark, Chevron has publically committed to spending almost $10 billion on Australian goods and services during the construction of the Wheatstone project and $17 billion over the life of the project. It is anticipated that the project will contribute $20 billion in government revenue over the life of the project and is expected to create 6500 direct and indirect jobs during the peak construction period (Clark Affidavit, paragraph 26). Mr Clark states that, based on information provided by BHP to DSD, more than $850 million has been expended on Australian goods and services in constructing the Macedon project (Clark Affidavit, paragraph 27).

[245] The Macedon project is expected to increase Western Australia's domestic gas production capacity by nearly 20 per cent (Clark Affidavit, paragraph 28). The Wheatstone project will also involve the construction of domestic gas plant and is also expected to increase the supply of natural gas to the Western Australian market (Clark Affidavit, paragraph 30). These projects will also provide opportunities for downstream processing industries, which are likely to promote further economic growth in the region (Clark Affidavit, paragraph 32). Furthermore, the Wheatstone project will involve the construction of a public port, which is expected to increase the State's LNG export capacity (Clark Affidavit, paragraphs 30-31).

[246] I accept that the development of the ANSIA will not only deliver considerable economic benefits for Onslow, the Shire of Ashburton and the wider Pilbara region, but will also generate significant economic benefits that will accrue to Australia and the State. To the extent the proposed acquisitions can be regarded as facilitating the construction and continued operation of the Wheatstone and Macedon projects and

other developments in the ANSIA, I accept that the economic significance of the proposed acquisitions should be evaluated in the context of the broader development of the area.

Area 1 and Area 2

[247] The Government party and the grantee party contend that Areas 1 and 2 will allow for the establishment and operation of small to medium businesses providing support services to major industries within the ANSIA, as well as other businesses involved in port supply and general industry. In addition to facilitating economic activity in the ANSIA, the Government party and the grantee party submit that these businesses will also generate economic benefits for Australia and the State in terms of employment, economic growth and taxation revenue (GP Contentions, paragraphs 87-88, 129).

[248] In terms of the economic significance of Areas 1 and 2 to the local economy, the Government party and the grantee party say that it will address a shortage of port supply and general industrial land and provide the land necessary for the establishment of small to medium businesses in the Onslow area (GP Contentions, paragraphs 90 and 130). Without this additional land, the Government party and the grantee party contend that these businesses cannot locate in close proximity to the ANSIA projects and industries and, in the case of Area 2, in close proximity to the port, which would likely result in employment opportunities and expenditure being lost to other regional or urban centres (GP Contentions, paragraphs 91 and 131).

[249] Mr Brazier gave evidence regarding the demand for general industrial land in Onslow. In September 2011, the grantee party received 44 responses to a call for expressions of interest in purchasing or leasing industrial land in the ANSIA. A further call for expressions of interest in June 2012 resulted in 61 responses (Brazier Affidavit 1, paragraphs 24-25). Mr Brazier described the shortage of general industrial land in Onslow as critical and, in the context of the construction of the Wheatstone project, was likely to lead to large price spikes for any available industrial land in close proximity to the project; the loss of contracts for local and Australian businesses that cannot obtain land to undertake their activities; and a loss of efficiency, increase in costs and reduction in competitiveness for businesses required to locate in other areas,

which would have a corresponding effect on local and regional employment (Brazier Affidavit 1, paragraphs 32 and 48).

[250] In light of the evidence of Mr Brazier, I accept there is a current demand for general industrial land within Onslow and the ANSIA area, which is likely to increase with and following the construction of the Wheatstone project and port. I also accept that this land is required to accommodate industries that will facilitate the construction and operation of projects within the ANSIA. The development of these support industries is likely to generate further economic benefits for the State and the Onslow area.

[251] The native title party contends that there will be no specific economic benefits for the Thalanyji people arising from the development of the ANSIA. In this regard, Mr Clark confirmed that no industrial area had been set aside for Thalanyji people and no specific plans had been developed to support the Thalanyji people through education, training or financial assistance. The Government party and the grantee party contend that the development of Areas 1 and 2 will benefit Aboriginal people residing in the Onslow areas by providing employment, training and contracting opportunities and by avoiding anticipated increases in the price of general industrial land, which would operate as a barrier to the establishment of Indigenous enterprise (GP Contentions, paragraph 94). Ms Hayes suggested these benefits would not be available to many of the traditional owners in and around Onslow due to long-term unemployment and limited education. On the other hand, I note that Ms Hayes also gave evidence that the native title party is receiving payments in trust arising from its Wheatstone and Macedon agreements. As Mr Clark suggested, the development of the ANSIA area is likely to create opportunities for the native title party to negotiate agreements with other companies that may provide some economic benefit to local Aboriginal people.

[252] I accept there are significant barriers to employment and enterprise for some Aboriginal people residing in the Onslow area. It is likely these people will require additional support before they can enjoy the opportunities created by developments in the ANSIA. Though I doubt this represents a complete picture of the capacities and capabilities of the Aboriginal community in Onslow, I have not been directed to any evidence to the contrary. Nevertheless, I do not agree that the development of Areas 1 and 2 will have no significance for the economic outlook of Aboriginal people in the Onslow area. The evidence suggests that the development of Areas 1 and 2 will

facilitate the development of secondary industries within the ANSIA, which will in turn generate further demand for services within Onslow and additional opportunities for employment. In this context, it is more likely than not that the proposed development will benefit Aboriginal people residing in the Onslow area.

Area 7

[253] The Government party and the grantee party contend that the development of Area 7 will facilitate the development of the ANSIA and will therefore contribute to its economic significance to Australia and the State (GP Contentions, paragraph 168).

[254] In relation to the Onslow area, the Government party and the grantee party contend that the acquisition of Area 7 would provide the land necessary for the construction of workforce accommodation with the ANSIA and will address the shortage of such land in the ANSIA and the Onslow area. In the Government party and the grantee party's submission, the shortage of land for workforce accommodation in close proximity to the projects within the ANSIA will place additional pressure on housing and require workers to commute from other regional centres, resulting in a loss of employment opportunities and local expenditure. The Government party and the grantee party also contend that the shortage of workforce accommodation has already and will continue to create artificially high land, house and rental prices in the Onslow area, inhibiting the establishment of industries in the area and making it difficult for local industries and residents to remain in the Onslow area (GP Contentions, paragraphs 169-170).

[255] Mr Brazier states that Area 7 is required because of a critical shortage of accommodation in the town of Onslow due to the demand generated by the construction of the Wheatstone project. While residential developments are occurring in the townsite, Mr Brazier observed that construction timeframes and the lack of power and water services were likely to restrict the growth of the town for some time. According to Mr Brazier, the development of Area 7 is intended to relieve pressures on accommodation and prices in Onslow (Brazier Affidavit 1, paragraphs 35-36).

[256] Mr Graham gave further evidence about the nature of these pressures in his oral evidence. Mr Graham noted that housing affordability in Onslow was limited and described the market as 'overheated'. According to Mr Graham, the cost of rental accommodation at the time of the hearing was between $1,500 and $2,500 per week.

Mr Graham noted that the median price for a standard home in Onslow was from $800,000 to $1.2 million and upwards of $600,000 or $700,000 in the case of a one- or two-bedroom apartment, though it was closer to $300,000 at the 'cheaper end' of the market. Mr Graham said the supply of accommodation in an overheated market generally has the effect of lowering rental and retail housing prices, and observed that this was happening in Karratha and, to a lesser extent, Port Hedland.

[257] I accept that the construction of workforce accommodation within the ANSIA will facilitate the construction and operation of the Wheatstone project and other industries within the ANSIA. I also accept that the proposed development will relieve pressures on accommodation within Onslow and is likely to lead to a relative decrease in the cost of housing, taking into account the expected increase in demand. The location of the workforce accommodation within the ANSIA is also likely to generate further economic benefits for the town of Onslow, both in terms of employment and expenditure on local businesses.

[258] The Government party and the grantee party submit that the proposed development may provide employment and contracting opportunities for Aboriginal people who live in the Onslow area, both in the construction and the ongoing operation of the workforce accommodation (GP Contentions, paragraph 172). The Government party and the grantee party also submit that the proposed development will avoid the shortage of land for workforce accommodation and therefore avoid artificially high land, house and rental prices that operate as a barrier to the establishment of successful Indigenous contracting entities (GP Contentions, paragraph 173). As noted above at [252] in relation to Areas 1 and 2, it is difficult to evaluate the extent to which the opportunities associated with the specific development will be available to local Aboriginal people. However, I accept that the location of the workforce near Onslow is likely to stimulate growth in the town, which will in turn create additional opportunities for employment and Indigenous enterprise. Accordingly, I find that, on balance, the development of Area 7 and the further development of the ANSIA will be of benefit to local Aboriginal people residing in Onslow area. Subject to my comments in relation to Area 6 below at [263]-[265], I also accept that the proposed development will possibly benefit local Aboriginal people by relieving the upward pressure on land prices in the Onslow area.

Area 6

[259] The Government party and the grantee party contend that the significance of Area 6 to Australian and Western Australian economies must also be seen in the context of the ANSIA, as the proposed development will provide for the future housing needs of workers within the ANSIA (GP Contentions, paragraph 203).

[260] In terms of its economic significance to the Onslow area, the Government party and the grantee party contend (at GP Contentions, paragraph 205-207) that Area 6 will provide the land necessary for a significant amount of additional residences within Onslow, which will:

- create considerable economic activity in the town by providing demand for goods and services involved in land development and housing construction;
- enable more people to live permanently within Onslow, providing additional opportunities for local businesses to supply goods and services on an ongoing basis;
- alleviate the current housing shortage in Onslow, which would otherwise discourage workers, including those involved in the ANSIA, from taking up residence within the town; and
- alleviate the shortage of land for residential development and associated increase in the price of land, which inhibits the establishment of businesses and industries in the area and makes it difficult for local business, industries and residents to remain in the Onslow area.

[261] In his oral evidence, Mr Graham stated that, following the development of residential lots within Area 6, the grantee party proposes to sell the lots at around $200,000. This is a consequence of the ability to develop smaller blocks of land than are otherwise found in Onslow, and represents a reduction from around $300,000 at the bottom end of the market. Mr Graham also stated that the grantee party intends to implement a local-only preference, which would give priority to existing residents. Two sites have also been set aside for the provision of key service worker accommodation, which is

designed to provide housing for workers in Onslow who are not engaged in the resources industry.

[262] In light of the evidence of Mr Graham, I accept the development of residential lots in Area 6 will help to facilitate the development and operation of industries in the ANSIA, and will produce economic dividends for the town of Onslow.

[263] The Government party and the grantee party contend that the development of residential land and the ongoing economic impact of a larger population will provide employment and contracting opportunities for Aboriginal people residing in the Onslow area, and avoid a shortage in residential land and associated increase in prices that operate as a barrier to Aboriginal people living or owning their own homes in the Onslow (GP Contentions, paragraph 208-209). The native title party accepted there is a public benefit in the provision of housing, but queried whether these benefits would be available to Thalanyji people living in Onslow.

[264] During the hearing, Ms Hayes indicated that a reduction in price to $200,000 would still be unaffordable for a Thalanyji person, though she said that Thalanyji people are already unable to access accommodation in Onslow. In cross-examination, Mr Graham confirmed that, while there had been discussions of a special preference for Thalanyji people, there were no plans to implement such a scheme.

[265] I accept that residential land and other types of accommodation in Onslow are presently unaffordable. I also accept that, while the proposed development of Area 6 will help to ameliorate the present and anticipated shortage in residential land, such land will continue to be unaffordable for many Thalanyji people and presumably other Aboriginal people residing in the Onslow area. However, while it is not possible to quantify the benefit of the proposed development to Aboriginal people in the area, I consider it will nevertheless help to put housing in closer reach of such people. I also note that the native title party is the beneficiary of trust funds associated with the Wheatstone and Macedon projects, and one of the conceivable ends to which these funds could be put is the purchase of housing for the local Aboriginal community. The increased availability of residential land would contribute to that effort. Consequently, I find that the proposed acquisition of Area 6 will have some economic benefit to Aboriginal people in the Onslow area.

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

[266] Section 39(1)(e) requires the Tribunal to determine whether the proposed future act is 'in the public interest'. This expression imports a discretionary value judgment made by reference to undefined factual matters, and only confined by the subject matter, scope and purpose of the legislation (see *Coalpac v Gundungurra Tribal Council* at [141], citing the High Court in *O'Sullivan v Farrer* at 216). There can be a public interest in the act proceeding or not proceeding, and the public interest is not limited to economic considerations: *Western Australia v Thomas* at 176.

[267] The Government party and the grantee party contend (at GP Contentions, paragraphs 95, 135, 174, 210) that, in addition to the economic and other significance of the proposed acquisitions, there is a public interest in the development and successful operation of the ANSIA, in that it will facilitate:

- the construction and operation of a public port;
- further sources for the supply of natural gas, which are critical to the development of the State and its economy and is a clean form of energy; and
- the creation of employment opportunities and improve business confidence in the region, which will in turn improve the economic outlook for the State and the nation.

[268] I accept that the ANSIA is a project of significant economic importance and will provide considerable benefits at a regional, State and national level. To the extent the proposed acquisitions contribute and facilitate the development and operation of the ANSIA, they are also in the public interest. As Mr Brazier outlines in his affidavit of 5 September 2013, the proposed development is being undertaken in fulfilment of the grantee party's statutory function to provide and develop land for the social and economic needs of the State, and will require a Government contribution to meet the specified rate of return with respect to Areas 1, 2 and 7 (Brazier Affidavit 1, paragraphs 18-22). I also accept there is a public interest in the development and provision of residential accommodation in Onslow, particularly given the current pressures on residential land within the town.

[269] Although the native title party concedes there is a public benefit in the provision of housing, it submits that it would not be in the public interest for residential development to proceed where steps have not been taken to improve infrastructure to support the expected growth in population (NTP Statement, paragraph 6). In support of this submission, the native title party refers to the *Ashburton North Strategic Industrial Area Structure Plan* prepared by Taylor Burrell Barnett in December 2010, which states that an increase in population 'would add pressure to already stretched infrastructure and community services unless these services are upgraded and/or extended' (GP13, 'ANSIA Structure Plan', page 31).

[270] During the hearing, Mr Clark gave evidence of the state development agreement entered into between Chevron and the State in respect of the Wheatstone project and the provision for social and critical services infrastructure in and around Onslow. According to Mr Clark, Chevron has agreed to contribute approximately $70 million to the development of social infrastructure, $120 million in critical services and $100 million in power and water services. These funds are intended to contribute to the development of the airport; an aquatic centre; school and childcare facilities; the redevelopment of the hospital and other emergency services; an update to waste water facilities and the connection of the Bindi Bindi Aboriginal Community to these facilities; the maintenance of the Onslow Road and the construction of a ring road; and other amenities, such as picnic and playground areas.

[271] In light of the evidence of Mr Clark, I am satisfied that the proposed development in Area 6 is in the public interest, notwithstanding the expected increase in the population of Onslow.

Section 39(1)(f) – any other relevant matters

[272] The term 'any other matter' provides the Tribunal with a broad charter to take into consideration a range of matters that may be of relevance in making a s 38 determination.

Environmental impact

[273] The Tribunal may have regard to the environmental impact of the proposed future act, as well as the relevant State and Federal environmental protection regimes (see *WMC Resources v Evans* at [81]; *Minister for Mines v Evans* at [53]-[58]).

[274] The Government party and the grantee party submit that the Tribunal should take into account the fact that the proposed acquisitions and the ANSIA generally have been the subject of an extensive planning exercise to minimise the environmental impact and maximise the public utility of the areas (GP Contentions, paragraphs 98, 138, 177 and 212). I have considered and given weight to these matters.

[275] In its statement of effect, the native title party (at NTP Statement, paragraph 6) submits that Areas 1, 2 and 7 will destroy native flora and fauna, ecosystems and vegetation that are unique to the determination area. The native title party refer specifically to six threatened terrestrial fauna habitats that are likely to be cleared in the ANISA, as well as four threatened species of flora (namely, *Abutilon uncinatum*, *helichrysum oligochaetum*, *carpobrotus* sp. Thenard Island and *Triumfetta echinata*).

[276] In reply, the Government party and the grantee party refer to studies commissioned by the grantee party during the planning process and listed in Mr Brazier's affidavit of 5 September 2013. These studies include a biological desktop review of the ANSIA, as well as flora and fauna surveys, all of which were prepared by ENV Australia Pty Ltd (GP16: Annexures 2, 3 and 4). According to the Government party and the grantee party, these studies concluded there were no threatened species or particular habitats that would be threatened by development.

[277] The biological desktop review indicates that three habitat types occur in the ANSIA, namely samphire claypan, tussock on clay and sand/loam plain, and low sandy dunes with poorly defined drainage lines. The review concludes that these habitat types are 'widespread in the Onslow region and not of elevated conservation significance,' though 44 fauna species of conservation significance had been recorded within 50 kilometres of the study area and were considered likely to occur in the area. Furthermore, the report concluded that four species listed by the Department of Environment and Conservation as 'priority flora' (namely, *atriplex flabelliformis*, *eremophila forrestii* subsp. *viridis*, *Triumfetta echinata* and *Vigna* sp. Central) were

likely to occur in the area and one species listed as 'threatened' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Eleocharis papillose*, was considered to possibly occur. Although *Abutilon uncinatum, helichrysum oligochaetum, carpobrotus* sp. Thenard Island were recorded between 15 and 50 kilometres from the study area, these species were considered unlikely to occur as the area was not considered a suitable habitat.

[278] I accept that the proposed development may have some effect on species of fauna and flora that are considered to have conservation significance, including a threatened species of flora. However, I have also taken into account the fact that significant development has already occurred in the ANSIA, and it is likely this has already had an effect on these species. The proposed acquisitions represent a small part of the broader development in the ANSIA and the Onslow area and, while the proposed development may have some effect on the flora and fauna in the area, the impact is unlikely to be significant.

Previous investment by the grantee party

[279] The Government party and the grantee party contend that the grantee party has already invested significant time and resources in the development of proposed acquisitions and the ANSIA generally (GP Contentions, paragraphs 98, 138 and 177).

[280] The Tribunal is entitled to take into account the interests of the grantee party, including the previous expenditure associated with the proposed development (see *Western Australia v Thomas* at 176; *Weld Range Metals v Western Australia* at [332]).

[281] It is clear from the discussion above at [107]-[121] that the grantee party has engaged in a lengthy and involved planning process in respect of the proposed acquisitions and the ANSIA generally. In his affidavit of 5 September 2013, Mr Brazier states that the grantee party 'has invested significant time and resources to assist the State in securing the technical information and approvals necessary to make Areas 1, 2 and 7 ready ahead of the main construction period of the Wheatstone LNG Plant.' Mr Brazier notes that the grantee party has spent 'in the order of $1.5 million' on the planning process and the associated studies. In my view, it is appropriate to give some weight to these matters.

Staged approach to development

[282] In the submission of the Government party and the grantee party, it is also relevant that the ANSIA is being developed in a staged way such that native title is only extinguished as and when required (GP Contentions, paragraph 99).

[283] Mr Brazier states that the size of Areas 1, 2 and 7 were determined on the basis of the land actually required in the immediate and medium term to support and complement the development of the Macedon and Wheatstone projects and the creation of the port (Brazier Affidavit 1, paragraph 46). Mr Clark indicates that the Government party has also taken the deliberate approach of limiting the acquisition of land in the ANSIA, including native title rights and interests, to areas actually required for current projects and related industry. According to Mr Clark, this staged approach 'reduces the potential impact on all parties with an interest in the land' and 'ensures ongoing opportunities to benefit for all parties with an interest within the ANSIA, including the Thalanyji, should further proponents comes forward in future and more land be required for industrial development' (Clark Affidavit, paragraphs 40-44).

[284] The native title party contended that, by taking the land in such a piecemeal way, it is possible to lose sight of the total reduction in the land available for the exercise and enjoyment of the native title party's registered rights and interests. There is some merit in this contention. However, it is only relevant to the extent that it may possibly form part of discussions with the State and proponents or, alternatively, to the extent it is relevant to the exercise of the Tribunal's discretion in proceedings such as these.

[285] In the present matter, I have concluded that the proposed acquisitions will not have a direct effect on the exercise or enjoyment of the native title party's registered rights and interests or a significant impact on its way of life, culture and traditions. I accept that the proposed acquisitions will reduce the area available for the exercise or enjoyment of the native title party's rights and interests. However, the policies adopted by the Government party and the grantee party mean that no further reduction will occur unless required, in which case the native title party will have further opportunities for consultation. In this regard, it is legitimate to give some weight to these policies.

Consultation with the native title party

[286] Another matter that was raised in the inquiry was the degree of consultation with the native title party in relation to the proposed acquisitions, particularly with respect to heritage. Although this matter is relevant to ss 39(1)(a)(i), 39(1)(a)(v) and 39(1)(b), I appreciate that it also has relevance apart from these specific criteria. Nevertheless, I am satisfied the issue is dealt with sufficiently in my reasons above at [182]-[184] and [233]-[236].

Conditions

[287] Although the Tribunal has a broad discretion to impose conditions, it must be exercised by reference to the s 39 criteria and it is controlled by the subject matter, scope and purpose of the Act (see *Re Koara People* at 93). Conditions will not normally be imposed unless the evidence suggests a need for them (see *Magnesium Resources v Puuntu Kunti Kurruma and Pinikura* at [92]-[96]).

Conditions proposed by the native title party

[288] The native title party submits that, if the proposed acquisitions are to be done, they should be made on the following conditions:

1. A prohibition on damage to or interference with, and an obligation to report, Aboriginal sites and significant Aboriginal areas or objects.

2. The grantee party entering into the native title party's standard heritage agreement and carrying out heritage surveys pursuant to the agreement prior to the proposed acquisitions.

3. Each third party proponent applicable to the proposed acquisitions entering into the native title party's standard heritage agreement and carrying out heritage surveys pursuant to the agreement prior to the proposed acquisitions.

4. The grantee party providing work programmes to the native title party.

5. Minimisation of environmental impact and rehabilitation of disturbed areas.

6. Ongoing consultation between the native title party, anthropologists, archaeologists and the grantee party in regard to the carrying out of future heritage surveys.

7. Ongoing consultation between the native title party, anthropologists, archaeologists and the grantee party in regard to the recording of significant sites on the Aboriginal Heritage Inquiry System.

8. Ongoing consultation between the native title party, anthropologists, archaeologists and the grantee party in regard to the proposed disturbance of any sites which are significant to the native title party.

9. Permits for grantee party personnel to enter the area, prescribing conditions of entry.

10. Cooperation between the grantee party in the development and avoidance of disruption of Aboriginal social, cultural and economic structures.

11. Use of roads and grantee party facilities by the native title holders.

12. Freedom of movement and pursuit of traditional and customary activities on the land by the native title holders, where possible and applicable.

13. Instruction of grantee party personnel in Aboriginal culture.

14. Prohibition of liquor in the area without the consent of the native title party.

15. Employment and contract preferences to the native title party, taking into account cultural needs and trading in job skills and accommodation to Aboriginal employees.

16. Regulation of transport, access and accommodation within the area.

17. Rights of the native title party to inspect and gather information concerning the grantee party's activities, subject to confidentiality conditions.

[289] The Government party and the grantee party observed that the conditions proposed are fairly formulaic in terms of being standard heads of agreement that might be found in a native title agreement, but in any event are not supported by the evidence. It was

also observed that several conditions would be inappropriate for the development of residential and industrial estates; Condition 9 for example, requires permits for access.

[290] As for the proposed heritage conditions (Conditions 1-3 and 6-8), there is no evidence to suggest there are any areas or sites of particular significance to the native title party that are likely to be affected by the proposed development. Although there was evidence that archaeological sites such as artefact scatters and shell middens may have some significance to the native title party in terms of providing evidence of the historical occupation of the Onslow area, I am satisfied the grantee party has taken and will take further steps to comply with its obligations under the AHA, which will ensure that any sites are identified and given appropriate protection. Although the native title party was not involved in previous surveys commissioned by the grantee party, I am satisfied that the grantee party will continue to seek the participation of the native title party in future surveys and consult with them on heritage issues.

[291] While I accept there may be further negotiation as to the terms on which future surveys might be conducted, it will essentially be a matter for the native title party as to whether they choose to participate in those surveys. Although the conditions proposed by the native title party contemplate that surveys will be undertaken on the terms of its standard heritage agreement, that agreement has not been put before the Tribunal and no evidence has been adduced as to what might constitute reasonable rates. In the present case, the evidence does not support the imposition of any specific heritage conditions.

[292] Several of the conditions (namely, Conditions 5, 10 and 16) do not offer any certainty as to the obligations imposed on the parties. For example, there is no method of measuring whether the environmental impact has been minimised to an acceptable standard. There is also a question of what rehabilitation would involve in the context of developing industrial and residential estates. Similar questions may be posed in relation to cooperation on the development of social, cultural and economic structures and the regulation of transport, access and accommodation.

[293] Other conditions are, as the Government party and the grantee party note in relation to Condition 9, inappropriate for this kind of development. In relation to Condition 9, it is also unclear what purpose the permits would serve, as the native title party has not

outlined the kind of conditions that might be attached to them. Conditions 11 and 12, to the extent that they give native title holders the right to enter areas or use roads and facilities that would not otherwise be open to the public, are similarly incompatible with the intended use of the areas.

[294] In relation to the conditions regarding the provision of work programmes (Condition 4), instruction in Aboriginal culture (Condition 13), the prohibition on liquor without the consent of the native title holders (Condition 14), and the right to inspect and gather information on the grantee party's activities (Condition 17), the native title party has not sought to explain why these conditions are necessary and I do not consider the evidence supports them.

[295] Condition 15 contemplates a system of preferential employment and contracting for members of the native title party. I agree with Deputy President Sumner in *Minister for Lands v Strickland* that there must be doubt about the capacity of the Tribunal to require the Government party to give preference in employment to Aboriginal people. In that matter, specific conditions relating to contracting and employment were imposed by the Tribunal in relation to the development of the Mungari Industrial Park near Kalgoorlie. Those conditions required the Government party to give information and assistance to entities nominated by the native title parties to enable them to identify contract opportunities and apply for pre-qualification to tender for contracts for major works. The conditions also required the Government party to include in all tender documents any list provided by the native title parties of eligible persons seeking employment and training.

[296] The conditions imposed in *Minister for Lands v Strickland* were based upon evidence of the Government party's general policy on Aboriginal employment in respect of the Park. There was no such evidence in the present matter, nor was it suggested that similar conditions be imposed in respect of the proposed acquisitions.

Compensation

[297] Section 38(2) of the Act prohibits the Tribunal from imposing any condition that has the effect that a native title party is entitled to payments worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party. However, it may be appropriate to impose conditions involving the payment of

money if it is necessary to give effective protection to native title rights and interests and other matters of concern to the native title party by reference to the criteria in s 39 of the Act: see *Adani Mining v Diver* at [127], referring to *Western Australia v Thomas* at 151; *Minister for Mines v Evans* at 284.

[298] The Act provides that native title holders are entitled to compensation on just terms for the compulsory acquisition of their native title rights and interests. If just terms compensation is provided for under a law of the State, then compensation provisions in Part 2 Division 5 of the Act do not apply: see ss 24MD(2)(d) and (e) NTA. The Government party and the grantee party submit that the LAA provides for compensation for the compulsory acquisition of native title and satisfies the just terms requirement in the Act (GP Contentions, paragraphs 56-57). The native title party did not dispute this. Pursuant to ss 166 and 167 of the LAA, the State is liable to pay any compensation in connection with the proposed acquisitions.

[299] the Tribunal may impose a condition requiring an amount to be paid in trust until it can be dealt with under s 52A of the Act, or requiring a party to secure an amount by bank guarantee in favour of the native title registrar until it can be dealt with under s 52 of the Act: see ss 41(3) and (5) NTA.

[300] The Government party and the grantee party contend (at GP Contentions, paragraph 216) that a condition of this nature should not be imposed because:

- the State has and will continue to have sufficient resources to meet any compensation liability; and
- in the absence of any judicial authority as to the likely amount of compensation payable for the extinguishment of native title, there is no basis upon which the Tribunal could determine the amount to be held in trust or secured by bank guarantee.

[301] The submissions of the Government party and the grantee party are consistent with the Tribunal's findings *Xstrata Coal Queensland v Albury* at [270], to which I subsequently referred in *Adani Mining v Diver* at [125]. The native title party has not offered any reasons why I should depart from those findings and, in any event, I am

satisfied the State will be able to meet any future liability arising from the proposed acquisitions.

Conclusion

[302] The ANSIA is a project of considerable economic importance and will deliver a range of economic benefits to the nation and the State of Western Australia, as well as the town of Onslow and the wider region. I am satisfied that the areas proposed to be acquired are needed for the future development and expansion of the ANSIA and will facilitate the construction and operation of industries within the ANSIA. I am also satisfied that the proposed acquisitions will relieve pressures on residential and industrial land within Onslow and create direct and indirect benefits for local communities. For these reasons, I accept that the proposed acquisitions are in the public interest.

[303] The native title party contends that Thalanyji people were not adequately consulted about the proposed acquisitions. This is difficult to accept, given that good faith was not raised as an issue in the inquiry. While it appears the parties were unable to come to an agreement on the proposed acquisitions, this does not on its own justify a determination that the proposed acquisitions must not be done. Much time and effort was spent on the point that Thalanyji people did not participate in heritage surveys commissioned by the grantee party. However, it is clear that both the Government party and the grantee party went to considerable effort to obtain the participation of Thalanyji people. That the parties were unable to reach agreement on the terms of Thalanyji's involvement does not mean the acts should not proceed.

[304] The native title party also placed particular emphasis on the argument that land available for the Thalanyji's cultural activities will be reduced as a consequence of the proposed acquisitions. This argument was not contested. However, the evidence in this inquiry suggests that existing industrial and residential development in the ANSIA and the Onslow area has already had a considerable impact on the enjoyment of the native title party's registered native title rights and interests in the relevant areas. Although the native title party will not, for the most part, be able to access the land and waters concerned due to the nature of the proposed development, the evidence does not suggest these areas are significant for the performance of the native title party's cultural practices. In the context of the existing development, the effect of

the proposed acquisitions on the native title party's way of life is likely to be marginal. On the other hand, the proposed acquisitions will create opportunities that are likely to be enjoyed by Aboriginal people residing in Onslow and the wider region, and may contribute to the social and economic development of the Thalanyji people and their communities.

[305] In terms of impact on Aboriginal heritage, there is evidence of a considerable number of archaeological sites such as artefact scatters and shell middens in the surrounding area, and it is possible that similar sites can be found in the areas proposed to be acquired. The surveys commissioned by the grantee party identified several of these sites, though they were classified as being of low or low-to-medium significance. While Dr Hook disagreed with or expressed reservations about how some of the sites were classified, she did not disagree with the methodology used in the surveys. Although I accept that some archaeological sites may have greater significance than others in terms of providing a record of the Thalanyji people's occupation of the area, there was no evidence that any of the sites identified in the surveys are sites of this kind. I am satisfied that the grantee party is aware of its obligations under the AHA and will seek to consult with the native title party in relation to areas that have yet to be surveyed so that sites are identified and appropriately managed.

[306] There is no doubt the proposed acquisitions will have some effect on native title and the natural environment. However, this is far outweighed by the public interest in the proposed development and the potential economic benefits that will accrue to the nation, the State, the region and local Aboriginal people. In light of these matters, I have concluded that the proposed acquisitions may be done without conditions.

Determination

[307] The determination of the Tribunal is that the proposed acquisitions, being the future acts described in the August 2012 notices, may be done.

Raelene Webb QC
President
18 August 2014

APPENDIX 1:
LIST OF GOVERNMENT PARTY & GRANTEE PARTY EXHIBITS

GP1 Ashburton North Strategic Industrial Area: Factsheet – Onslow Infrastructure

GP2 Ashburton North Strategic Industrial Area: Factsheet.

GP3 Western Australian Planning Commission, *Statutory Planning Committee Minutes 22 March 2011*.

GP4 Shire of Ashburton, *Town Planning Scheme No. 7 incorporating the entire district of the Shire of Ashburton*, original Town Planning Scheme gazettal 24 December 2004 (updated to include AMD 14 GG - 23 April 2013).

GP5 Western Australian Planning Commission, *Endorsement of Ashburton North Strategic Industrial Area Structure Plan*, receipt date 17 October 2011.

GP6 ARUP, *Ashburton North Strategic Industrial Area: Concept Design Planning Study*, September 2010.

GP7 Topography map of Area 6 and Onslow town site boundary.

GP8 Topography map of Areas 1, 2, 6 and 7 (block shaded).

GP9 Topography map of Areas 1, 2, 6 and 7 (outlined).

GP10 Mining Tenement Map.

GP11 LandCorp, *Onslow Expansion Plan: The Star of the North, Building blocks for a vibrant, sustainable and prosperous future*, 2012.

GP12 Shire of Ashburton, *Amendment No. 9 to the Shire of Ashburton Town Planning Scheme No. 7*, November 2010.

GP13 Taylor Burrell Barnett, *Shire of Ashburton, Local Planning Scheme No. 7, Amendment 10*, August 2011.

GP14 LandCorp, *Ashburton North Strategic Industrial Areas EOI Survey Results*, September 2011.

GP15 Taylor Burrell Barnett, *Ashburton North Strategic Industrial Area Structure Plan*, December 2010.

GP16 TPG, *Ashburton North Strategic Industrial Area Stage 1B and 1C Development Plan Report*, November 2012.

GP17 Urbis, *Ashburton North Expressions of Interest: Summary of Outcomes*, June 2012.

GP18 Taylor Burrell Barnett (for Chevron), *Wheatstone Project: Wheatstone Development Plan*, July 2012.

GP19 Land Access Solutions, *Section 18 Archaeological Survey and Ethnographic Desktop Study for the Proposed Onslow Development Area: Area* 3, *Pilbara, WA*, October 2012.

GP20 TPG, *Shire of Ashburton Local Planning Scheme No 7. Amendment No. 17 Report*, November 2012.

GP21 TPG, *Shire of Ashburton Local Planning Scheme No. 7. Amendment No. 18 Report*, November 2012.

GP22 Letter from Minister for Indigenous Affairs to LandCorp regarding Section 18 Application for Areas 1 and 7 dated 10 January 2013.

GP23 Urbis, *Ashburton North Strategic Industrial Area: General Industrial Area – Eastern Portion Outline Development Plan*, April 2013.

GP24 Deed for Compulsory Acquisition of any Native Title Rights and Interests (Macedon) between the State of Western Australia, Buurabalayji Thalanyji Aboriginal Corporation and BHP Billiton Petroleum Pty Ltd dated 17 December 2010, signed in counter-part.

GP25 Deed for Compulsory Acquisition of any Native Title Rights and Interests (Wheatstone) between the State of Western Australia, Buurabalayji Thalanyji Aboriginal Corporation and Chevron Australia Pty Ltd dated 9 November 2011.

GP26 Land Access Solutions, *Section 18 Archaeological Survey and Ethnographic Desktop Study for the Proposed Onslow Development Area: "Expanded Area", Pilbara, WA*, October 2012.

GP28 Letter from Minister for Indigenous Affairs to LandCorp regarding Section 18 Approval dated 10 January 2013.

GP29 Shire of Ashburton, *Onslow Townsite Strategy Background Report*, January 2010.

GP30 Shire of Ashburton, *Onslow Townsite Strategy*, July 2011.

GP31 Western Australian Planning Commission, *Onslow Regional Hotspots Land Supply Update*, November 2011.

GP32 TPG, *Onslow Townsite Expansion Stage 1 Development Plan*, January 2013.

GP33 Letter from Department of Premier and Cabinet to Desert Management Strategy dated 18 November 2011.

GP34 Letter from Department of State Development to Buurabalayji Thalanyji Aboriginal Corporation RNTBC dated 23 April 2012.

GP35 Letter from LandCorp to Desert Management Strategy dated 26 June 2012.

GP36 Letter from State Solicitor's Office to Templeton Knight Lawyers dated 31 July 2012.

GP37 Department of Mines, Mining *Tenement Summary Report, Miscellaneous Licence 08/40*, dated 20 August 2013.

GP38 Department of Mines, *Mining Tenement Summary Report, Exploration Licence 08/888*, dated 20 August 2013.

GP39 Department of Mines, *Mining Tenement Summary Report, Exploration Licence 08/2059*, dated 20 August 2013.

GP40 Department of Mines, *Mining Tenement Summary Report, Exploration Licence 08/2009*, dated 20 August 2013.

GP41 Department of Mines, *Mining Tenement Summary Report, Miscellaneous Licence 08/41*, dated 20 August 2013.

GP42 Geothermal Exploration Permit No. GEP 35.

GP43 Department of Mines, *Mining Tenement Summary Report, General Purpose Lease 08/62*, dated 20 August 2013.

GP44 Smartplan of Areas 1, 2 and 7.

GP45 Smartplan of Area 6.

GP46 Smartplan of Lot 79 (part of Area 6).

GP47 Certificate of Crown Land Title Volume 3054 Folio 771 for Lot 72 on Deposited Plan 214441.

GP48 Certificate of Crown Land Title Volume 3054 Folio 772 for Lot 79 on Deposited Plan 214441.

GP49 Certificate of Crown Land Title Volume 3020 Folio 843 for Lot 350 on Deposited Plan 72964.

GP50 Certificate of Crown Land Title Volume 3098 Folio 710 for Lot 152 on Deposited Plan 220265.

GP51 Certificate of Crown Land Title Volume 3135 Folio 585 for Lot 153 on Deposited Plan 220110.

GP52 Renewal of Exploration Permit No. 110 (R5).

GP53 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Aboriginal Sites Database and Survey Report Catalogue, for Area 1.

GP54 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Aboriginal Sites Database and Survey Report Catalogue, for Area 2.

GP55 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Aboriginal Sites Database and Survey Report Catalogue, for an area including Area 6.

GP56 Google Earth Topography map of Areas 1, 2, 6 and 7, and Wheatstone and Macedon.

GP57 Topography map of Areas 1, 2, 6 and 7, and Wheatstone and Macedon (block shaded).

GP58 Topography map of Areas 1, 2, 6 and 7, and Wheatstone and Macedon (outlined).

GP59 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Aboriginal Sites Database and Survey Report Catalogue, for an area including Area 7.

GP60 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Screen shot for Area 1.

GP61 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Screen shot for Area 2.

GP62 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Screen shot for Area 6.

GP63 Department of Aboriginal Affairs, Aboriginal Heritage Inquiry System: Screen shot for Area 7.

GP64 Topography map of Area 1, 2, 6 and 7 showing registered Aboriginal Sites.

GP65 Topography map of Area 6 - Onslow showing registered Aboriginal Sites.

GP66 Native Title Determination of Thalanyji People, No WAD 6113 of 1998, made by Justice North on 18 September 2008.

GP67 Letter from Department of Regional Development and Lands dated 20 August 2012 to Buurabalayji Thalanyji Aboriginal Corporation.

GP68 Letter from Desert Management Pty Ltd dated 17 October 2012 to Department of Regional Development and Lands.

GP69 Bevis Yeo, *Chevron Secures Wheatstone Native Title Agreement*, Energy News Bulletin dated 29 July 2010.

GP70 Chevron Australia, *Chevron Welcomes Native Title HOA for Wheatstone Gas Project*, Chevron Media Statement dated 18 July 2010.

GP71 Map of Onslow Townsite as at 23 December 1996, certified by LandGate on 29 August 2013.

GP72 Satellite Photograph Showing Section 18 Application Areas – Context.

GP73 LandCorp, Section 18 Notice Application, 26 October 2012.

GP74 Map Pilbara Projects.

GP75 Land Access Solutions, Aboriginal Site Recording Form, 19 October 2012.

GP76 Department of Regional Development and Lands, Letter of Authority to Appoint Agent for Section 18 Approval, 26 October 2012.

GP77 Whelans, Map of Onslow – Industrial Section 18 Survey Area, Application Area and Proposed Development Footprint, 25 October 2012.

GP78 Topography map of Macedon State Development Agreement.

GP79 Western Australian Planning Commission, Approval of the Wheatstone Stage 1A Development Plan, 11 October 2012.

GP80 Onslow Townsite Expansion Development Plan.

GP81 Shire of Ashburton, *Minutes of Ordinary Council Meeting – 21 August 2013*, Item 14.8 – Outline Development Plan (Eastern Portion Ashburton North General Industrial Area) for Adoption.

GP82 Shire of Ashburton, *Attachments to Minutes of Ordinary Council Meeting – 21 August 2013*, Attachment 14.8B – Summary of Submissions, Draft Ashburton North Strategic Industrial Area Eastern Portion – Outline Development Plan.

GP83 Map of the Onslow Townsite Full Development Plan.

GP84 National Native Title Tribunal Map – Urala Station Onslow Pastoral Lease (CL330/1967; LR3135/584).

GP85 National Native Title Tribunal Map – Minderoo Pastoral Lease (CL56/1967; LR3098/710).

GP86 Land Access Solutions, *Section 18 Archaeological Survey and Ethnographic Desktop Study for the Proposed Onslow Residential and Industrial Area: Area 1, Pilbara, WA*, October 2012.

GP87 Map of Chevron Superlot Subdivision.

GP88a Whelans, Map of Onslow – Residential Section 18 Survey Area, Application Area and Proposed Development Footprint, 25 October 2012

GP88b TPG, Map of Onslow Development Plan Staging Plan, 21 June 2012

GP89 Affidavit of Ben William Graham, sworn 6 September 2013

GP90 Affidavit of Vaughan Peter Murray Brazier, sworn 5 September 2013

GP91 Affidavit of Vaughan Peter Murray Brazier, sworn 1 November 2013

GP92 Affidavit of Christopher John Clark, sworn 6 September 2013

GP93 Australian Archaeological Association, *Code of Ethics* (extract from www.australianarchaeology.com/about-2/code-of-ethics, accessed 11 November 2013)

GP94 Letter from State Solicitor's Office to Corser & Corser dated 13 December 2012

GP95 Map of Onslow and surrounding areas marked by Trudy Hayes on 19 November 2013

APPENDIX 2:
LIST OF NATIVE TITLE PARTY EXHIBITS

NTP1	Map of Thalanyji Native Title Claim indicating places of cultural significance, dated 20 April 2005
NTP2	Search of Aboriginal Sites Database maintained by the Department of Aboriginal Affairs for registered sites within the determination area
NTP3	Search of Aboriginal Sites Database for 'Other Heritage Places' within the determination area
NTP4	Search of Aboriginal Sites Database for registered sites within Areas 1, 3 and 7
NTP5	Search of Aboriginal Sites Database for 'Other Heritage Places' within Areas 1, 3 and 7
NTP6	Search of Aboriginal Sites Database for registered sites within Areas 4, 5 and 6
NTP7	Search of Aboriginal Sites Database for 'Other Heritage Places within Areas 4, 5 and 6
NTP8	Fiona Hook 'Discussion of the Heritage Values of the Onslow Area to the Thalanyji' (October 2013)
NTP9	Affidavit of Meachum Kelly, sworn 7 November 2013
NTP10	Affidavit of Trudy Hayes, sworn 15 November 2013