**NATIONAL NATIVE TITLE TRIBUNAL**

***FMG Pilbara Pty Ltd and Another v Yindjibarndi Aboriginal Corporation RNTBC* [2014] NNTTA 82 (6 August 2014)**

**Application No: WF2014/0006**

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

- and -

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

**FMG Pilbara Pty Ltd (grantee party)**

- and -

**Yindjibarndi Aboriginal Corporation RNTBC (WCD2005/001) (native title party)**

- and -

**The State of Western Australia (Government party)**

**FUTURE ACT DETERMINATION**

**Tribunal:** Member Helen Shurven
**Place:** Perth
**Date of decision:** 6 August 2014

**Hearing dates:** On the papers

**Catchwords:** Native title – future act – no agreement with native title party – application for determination for the grant of exploration licence – s 39 criteria considered – no evidence from native title party – determination that the act may be done subject to conditions

**Legislation:** *Native Title Act* 1993 (Cth), ss 26(1)(c)(i), 28, 29, 30, 31, 35, 36(2), 36A, 38, 39, 76, 109(3)

*Mining Act* 1978 (WA), ss 63, 66

*Aboriginal Heritage Act* 1972 (WA)

**Cases:** *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People* [2008] NNTTA 38 (‘*Australian Manganese v Nyiyaparli*’)

*Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/ Queensland* [2006] NNTTA 3 (‘*Cameron v Gugu Badhun*’)

*Daniel v Western Australia* [2005] FCA 536 (‘*Daniel v Western Australia*’)

*Delores Cheinmora v Striker Resources NL & Ors; Jack Dann v Western Australia* [1996] FCA 1147 (‘*Cheinmora v Striker Resources*’)

*Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia* [2006] NNTTA 19 (‘*Griffin Coal v Nyungar People*’)

*Moses v State of Western Australia (2007) 160 FCR 148; FCAFC 78 (‘Moses v Western Australia’)*

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

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

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

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

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| **Grantee party representative:** | Mr Ken Green, Green Legal |
| **Native title party representative:** | Mr Jack Paparone, Yindjibarndi Aboriginal Corporation RNTBC |
| **Government party representatives:** | Mr Warren Fitt, State Solicitor’s Office<br>Ms Anita Kearney, State Solicitor’s Office<br>Mr Dennis Jacobs, Department of Mines and Petroleum |

## REASONS FOR DECISION

### Background

[1] On 18 December 2009, the Government party, through the Department of Mines and Petroleum (DMP), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E47/1818 ('the proposed licence') under the *Mining Act* 1978 (WA) ('*Mining* Act') to FMG Pilbara Pty Ltd ('the grantee party').

[2] The s 29 notice provides that 'persons have until 3 months after the notification day to take certain steps to become native title parties in relation to applications' (see s 30 of the Act). This effectively provides for the native title party to have a procedural right to negotiate in relation to the future act (see s 30(1)(a) and s 31 of the Act). The 3 month period ended on 18 March 2010.

[3] At the end of the notification period, the determination made in favour of the Yindjibarndi native title claim (WCD2005/001 – *Daniel v Western Australia* on 2 May 2005, varied by the Full Federal Court in *Moses v Western Australia* on 27 August 2007) wholly overlapped the proposed licence. As there were no other registered claims or determinations overlapping the proposed licence on that date, the Yindjibarndi Aboriginal Corporation RNTBC is the only native title party for the purpose of this determination (see s 29(2)(b)(i) and s 30(1) of the Act). The native title party is a registered body corporate under the Act, and holds determined native title rights and interests in trust for the Yindjibarndi People.

[4] According to the s 29 notice, the grant of the proposed licence would authorise the grantee party to explore for minerals for a term of five years from the date of grant. The notice specifies the size of the proposed licence to be approximately 82.64 square kilometres, located 71 kilometres north west of Wittenoom in the Shire of Ashburton.

[5] The proposed licence is a future act covered by s 26(1)(c)(i) of the Act and so, unless there is compliance with s 28 of the Act, the future act will be invalid to the extent that it affects native title. In this case, s 28(1)(g) of the Act is the relevant requirement, that is, invalidity of the future act can be avoided if 'a determination is made [by the National Native Title

Tribunal ('the Tribunal')] under section 36A or 38 that the act may be done, or may be done subject to conditions being complied with'.

**The section 35 future act determination application**

[6] On 17 February 2014, the grantee party made an application to the Tribunal to make a determination under s 38 of the Act. The application was made on the basis that the negotiation parties had not been able to reach agreement of the kind mentioned in s 31(1)(b) and at least six months had passed since the notification day specified in the s 29 notice (see s 35 of the Act). On 21 February 2014, President Raelene Webb QC appointed me for the purpose of making the determination in respect of the proposed licence. On 6 March 2014, I considered the conditions outlined in s 76 of the Act and accepted the determination application.

**The inquiry**

[7] If alleged that the grantee or Government party's conduct had not been in good faith, the Tribunal would have to consider the contentions and evidence on that issue. The Tribunal would only have power to determine the substantive issue under s 39 of the Act if it were satisfied that the relevant party had negotiated in good faith.

[8] At the preliminary conference on 26 March 2014, and with agreement from all parties, I made directions in relation to the inquiry. On 28 April 2014, the native title party indicated it did not intend to submit the grantee party or Government party had not negotiated in good faith (see ss 31(1)(b) and 36(2) of the Act). The directions were amended on 6 May 2014 to vacate the dates in relation to the good faith inquiry. Amongst other things, the amended directions required the parties to submit contentions and evidence in relation to the criteria under s 39 of the Act.

[9] In compliance with the amended directions the grantee party submitted:

(a) Statement of Contentions, dated 2 June 2014 (amended 3 June 2014), with Annexures. GP1 though to GP31 (as listed at Attachment A of this decision); and

(b) Affidavit of Thomas James Weaver (Annexure GP32), Native Title Manager of Fortescue Metals Group Ltd, sworn 2 June 2014, with Annexures TJW1 through to TJW13 (as listed at Attachment A of this decision). I note Mr Weaver's affidavit (at

2), refers to M47/1818, but take this to be a typographical error and that it should read E47/1818.

[10] It is noted that Mr Weaver is employed by Fortescue Metals Group Limited, as opposed to the grantee party, FMG Pilbara Pty Ltd. President Webb QC dealt with this issue in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [32]-[35]), and concluded that 'the conduct and actions of the grantee party's controlling entity, Fortescue Metals Group Limited, and of its other wholly owned subsidiaries, are relevant to the Tribunal's consideration in this matter.' I accept and adopt that reasoning (at [35]) for the purposes of this decision.

[11] In compliance with the amended directions, the Government party submitted:

(a) Statement of contentions, dated 3 June 2014; and

(b) Mining tenement register search, s 29 notice, email from the native title party to the Tribunal dated 28 April 2014, Tengraph Quick Appraisal, Extract of Ngarluma/Yindjibarndi native title determination, details of underlying Pastoral Leases 3114/1228 (Coolawanyah) and 3114/465 (Mt Florance), mapping, Extract from the National Native Title Register dated 28 February 2014, draft Tenement Endorsement and Conditions Extract, and a search of the Department of Aboriginal Affairs (DAA) Aboriginal Heritage Inquiry System. All documents relate to the proposed licence.

[12] On 5 June 2014, the Government party wrote to all parties to advise that 'the Government Party proposes to impose the following condition on exploration licence 47/1818, should it be granted:

> In respect of the area covered by the licence the licensee, if so required in writing by the Yindjibarndi Aboriginal Corporation, the native title prescribed body corporate holding the determined native title of the Yindjibarndi recognised in the Federal Court application No. WAD 6017/96, such request being sent by pre-paid post to reach the licensee's address not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Yindjibarndi the Regional Standard Heritage Agreement ("RSHA") endorsed by peak industry groups (Yamatji Land and Sea Council RSHA) and offered by Yindjibarndi Aboriginal Corporation.

I will refer to this as the 'RSHA' Condition.

[13] On 13 June 2014, the native title party wrote to the Tribunal, copying in all parties, to advise 'In light of the [RSHA] condition, the Native Title Party advise that it will not be filing contentions and evidence opposing the grant of the exploration licence.'

[14] In an email to all parties dated 16 June 2014, the Tribunal proposed vacating the directions as amended on 6 May 2014 and proceeding to making a determination under s 38 of the Act. No party objected to this course of action.

**Evidence in relation to the proposed licence**

[15] The Tengraph Quick Appraisal provided by the Government party indicates the following current and past interests granted over the proposed licence:

(a) Mt Florance Pastoral Lease 3114/465 overlapping at 52.5 per cent;
(b) Coolawanyah Pastoral Lease 3114/1228 overlapping at 47 per cent;
(c) Historical Lease 394/432 overlapping at 52.9 per cent;
(d) Historical Lease 394/664 overlapping at 47.1 per cent;
(e) two surrendered exploration licences E47/571 and E47/1168 held from 1992 to 2007 and overlapping at 0.6 and 99.2 per cent respectively;
(f) three cancelled temporary reserves held from 1977 to 1982 overlapping at 35.2, 51.8 and 6.9 per cent respectively.

[16] Search results from the DAA Aboriginal Heritage Inquiry System show no 'other heritage places' and one registered site within the proposed licence:

- Site ID 10676 – No Gender Restrictions – Whim Creek 17, Packsaddle – Artefacts / Scatter, Modified Tree

[17] Via the affidavit of Mr Weaver, Native Title Manager of Fortescue Metals Group Ltd, the grantee party submits:

> 12. FMG has an Aboriginal Heritage Department. That Department is responsible for ensuring that FMG meets its obligations under the AHA...under agreements between FMG and third parties...and in respect of other areas which FMG accepts are of particular importance or significance to Aboriginal people...
>
> 13. FMG has adopted a Ground Disturbance Permit Procedure ("GDP Procedure") [under which] FMG personnel and contractors must not disturb any area unless a Ground Disturbance Permit has been issued for that area. The issue of a Ground Disturbance Permit is dependent on a number of matters [including] Aboriginal heritage.

> 14. FMG has adopted Guidelines for the Management of Aboriginal Cultural Heritage for its project areas ("Heritage Guidelines")...All FMG personnel and contractors are required to comply with the Heritage Guidelines.
>
> 20. It is the policy of FMG not to undertake ground disturbing activities without a heritage survey having first been undertaken. The policy is inherent in...the GDP Procedure [and] the Heritage Guidelines.
>
> 21. FMG regularly conducts Aboriginal heritage surveys with the participation of Yindjibarndi People.
>
> 24. I am unaware of any reason why FMG might not, prior to undertaking ground disturbing works within the area the subject of the Yindjibarndi #1 Native Title Claim or the subject of the Ngarluma/Yindjibarndi Determination of Native Title, including over the area of the Inquiry Tenement, undertake Aboriginal heritage surveys with the participation of Yindjibarndi People with a view to identifying Aboriginal sites which might be registrable as Registered Sites.

## Conditions of grant

[18] Under the *Mining Act* 1978, the holder of an exploration licence can exercise the rights set out in s 66, subject to the lessee covenants and various conditions set out in s 63. The Government party's draft tenement endorsement and conditions extract is as follows:

> **ENDORSEMENTS**
>
> 1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
>
> 2. The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.
>
> **In respect to Water Resource Management Areas (WRMA) the following endorsements apply:**
>
> 3. The Licensee attention is drawn to the provisions of the:
>    - Waterways Conservation Act, 1976
>    - Rights in Water and Irrigation Act, 1914
>    - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
>    - Country Areas Water Supply Act, 1947
>    - Water Agencies (Powers) Act 1984
>    - Water Resources Legislation Amendment Act 2007
>
> 4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
>
> 5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DOWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.
>
> **In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:**
>
> 6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for the activities has been issued by the DoW.

**In respect to Waterways the following endorsement applies:**

7. Advice shall be sought from the DOW if proposing any exploration within a defined waterway and within a lateral distance of:
   - 50 metres from the outer-most water dependent vegetation of any perennial waterway, and
   - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.

**CONDITIONS**

1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.

2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.

3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program

4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.

5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs, water carting equipment or other mechanised equipment.

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - the grant of the Licence; or
   - registration of a transfer introducing a new Licensee;

   advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

7. No activities being carried out within the proposed railway corridor (designated FNA 7279) that interfere or restrict any rail route investigation activities being undertaken by the rail line component.

8. No interference with the use of the Aerial Landing Ground and mining thereon being confined to below a depth of 15 metres from the natural surface.

[19] I note the grantee party refers to a set of endorsements and conditions which are different to those proposed by the Government party. It appears the grantee party are referring to the set of endorsements and conditions which the Government party indicated, in 2010, they would place on the grant when this tenement was going through the Tribunal expedited procedure objection process (WO2010/0393). However, the endorsement and conditions referred to in [18] of this decision are those the Government party have put forward for this present inquiry, dated 26 May 2014. The grantee party have raised no objections to these endorsements and conditions being imposed. As those are the endorsements and conditions

which the Government party have put forward for this inquiry, and they are the most recent endorsements and conditions proposed, I take those as being the endorsements and conditions that will be placed on E47/1818 on grant, and not those referred to by the grantee party.

## Legal Principles

[20] The Tribunal must determine whether the act must not be done, or that the act may be done, or that the act may be done subject to conditions (see s 38 of the Act). Section 38(2) prohibits the Tribunal from imposing a profit-sharing condition with its decision. The Tribunal must assess the evidence provided by each party in terms of the criteria in s 39 of the Act, which reads as follows:

> **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.

[21] The Tribunal must weigh the various s 39 criteria, and the Act does not require greater weight to be given to some criteria over others. It is a discretionary exercise in assessing the s 39 criteria, and the outcome of the assessment will depend on the evidence provided in relation to each criterion (see *Western Desert Lands v Western Australia* at [37]). In addition, for example, in *Western Australia v Thomas,* the Tribunal explained (at 165-166):

> 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.

[22] Section 109(3) of the Act outlines the Tribunal is not bound by technicalities, legal forms or rules of evidence. Although there is no burden of proof incumbent on any of the parties during a future act determination inquiry, the Tribunal relies on the evidence provided in relation to the criteria (see *Western Australia v Thomas* at 157-158). Ultimately, a common sense approach to evidence is required and the determination will be based on logically probative evidence and application of the law (see *Western Australia v Thomas* at 162-163).

**No evidence from the native title party**

[23] The Tribunal has, on a number of occasions, made determinations without evidence from the native title party involved and, in doing so, has confirmed and adopted the authority in *Western Australia v Thomas* (at 162).

[24] In *Cameron v Gugu Badhun*, Deputy President Sosso noted the mandatory nature of s 39, and held the Tribunal has the power to make a determination in absence of evidence from the native title party, and there is no obligation to go beyond the evidence submitted by the parties in an endeavour to perform the statutory obligation imposed by s 39 (at [17]).

[25] In *Griffin Coal v Nyungar People*, the native title party instructed its representatives not to submit contentions or evidence in regard to the s 35 determination after the good faith negotiations challenge failed. The Tribunal confirmed (at [8]):

> The Tribunal's present view, subject to receipt of submissions to the contrary in a future matter, is that despite the cost and inconvenience to the other parties and Tribunal, the Act imposes an obligation to consider and take into account the criteria in s 39 for the purposes of making one of the required determinations. The mandatory nature of ss 38 and 39 means that even where a native title party says before compliance by the Government party and grantee party that it will not be making contentions or providing evidence, the Tribunal is obliged to conduct an inquiry which requires the other parties to address the issues dealt with in s 39. In such circumstances there is no means whereby the Tribunal can in a summary manner proceed to make a determination.

[26] In *Western Australia v Thalanyji and Gnulli*, the Thalanyji native title party representative advised they would not be making any submission due to lack of resources. With reference to *Western Australia v Thomas* Deputy President Sumner noted (at [18]-[19]):

> The Tribunal must act on the basis of evidence which ordinarily will be provided by the parties. There is no onus of proof as such but a commonsense approach to evidence which means that parties will produce evidence to support their contentions particularly where facts are peculiarly within their knowledge. The Tribunal will not normally conduct its own inquiries and obtain evidence, particularly where a party is represented before the Tribunal. If a party fails to provide relevant evidence the Tribunal is normally entitled to proceed to make a determination without it.
>
> In this matter the Thalanyji native title party have been represented throughout .... In these circumstances the Tribunal has fulfilled its statutory obligations under the Act by giving the native title party an opportunity to provide contentions and evidence and proceeding to make a determination on the papers if that opportunity is not taken up.

[27] I adopt the principles as outlined in the decisions cited (at [23]-[26]) for the purposes of this matter, and make my decision based on the materials provided to the Tribunal by the grantee and Government parties.

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

[28] The Government party contends:

- The effect of the future act on this criteria will depend on the activities the grantee party proposes to undertake, and the extent to which the native title party currently enjoys its rights (at 33).

- The limited rights conferred by an exploration licence are unlikely to interfere with the native title party's exercise of their rights and interests. The slight risk of intersection between the grantee party's activities and the exercise of native title rights and interests should be given minimal weight relative to the public interest of the doing of the act (at 34).

- Any intersection between law ceremonies and the activities of the grantee party will be during a limited period and given the limited nature of the risk it should be given minimal weight relative to the public interest of the doing of the act (at 35).

- The native title party's right to hunt and take fauna have been previously found to be able to co-exist with the grantee party exploration activities, unless there is compelling evidence to the contrary (at 36).

- The impact of the grantee party's activities on the environment and Aboriginal heritage is regulated and minimised by statutory regimes and the conditions and endorsements imposed on the grant of licence (at 37).

- The proposed licence is almost wholly overlapped by pastoral leases and was previously almost wholly overlapped by an exploration licence during which time exploration activities and the native title party's enjoyment of their rights and interests were able to coexist (at 38).

- In the absence of any evidence from the native title party, the Tribunal should conclude there will be no relevant effects on these criteria (at 33).

[29] I accept these contentions. Even if evidence were provided by the native title party, it would be difficult to contemplate any effect given the grantee party's procedures in for the

management of Aboriginal cultural heritage and ground disturbance permits in relation to exploration activities (affidavit of Mr Weaver at 13-15).

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

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

[30] In the absence of any evidence from the native title party, the Government party contends the Tribunal should conclude there will not be any relevant effects on the above (at 39 and 41). I accept that contention. There is no material before me to make a conclusion that the grant of the proposed licence will have any effect on the native title party's way of life, culture or traditions, or development of their social, cultural or economic structures.

**Section 39(1)(a)(iv) – freedom of access and freedom to carry out rites and ceremonies or other activities of cultural significance**

[31] The Government party contends there is no evidence that rites, ceremonies or other activities of cultural significance are conducted within the area of the proposed licence and, therefore, no evidence that the grant of the proposed licence will have an adverse effect on the freedom of the native title party to conduct these activities. In the absence of any evidence from the native title party, the Government party contends the Tribunal should conclude there will be no effects, or no significant effects on the above (at 42). I accept that contention. There is no material before me to make a conclusion that the grant of the proposed licence will have any effect on the native title party's freedom to access the area.

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

[32] The Government party contends the native title party must identify and establish there are areas or sites of particular significance to them in accordance with their traditions (at 56, citing *Cheinmora v Striker Resources* (at 34)). It also contends the Tribunal must take into account the grantee party's program and the *Aboriginal Heritage Act* (AHA). The Government party notes the existence of one registered site within the area of the proposed licence, but contends that in the absence of evidence as to the particular significance of the site to the native title party, the Tribunal should find there will be no effect on any area or site of particular significance to the native title party.

[33] I accept the Government party's contention that the Tribunal should not lightly find the AHA insufficient to provide protection for sites (at 48, citing *Western Australia v Thomas* (at 209-211) and *Australian Manganese v Nyiyaparli* (at [52]-[54])). In the absence of any evidence from the native title party regarding areas or sites of particular significance to them, I cannot find the grant of the proposed licence will have any effect on this criterion.

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

[34] I am unable to consider the above given no evidence is provided by the native title party.

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

[35] The Government party contends (at 51), the Tribunal has often found the grant of mining leases and exploration licences will be of economic benefit to the State, as well as regional or local areas and that there is no reason why a similar finding should not be made in this matter. I accept that contention. The Tribunal has consistently accepted the economic benefits arising from the grant of mining and exploration tenure in Western Australia, in the absence of any evidence to the contrary.

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

[36] The Government party contends (at 52) the public interest will be served by the grant of the proposed licence and that the Tribunal has repeatedly held that mining and exploration activities are in the public interest for the purpose of s 39(1)(e) of the Act. I accept the contentions. The Tribunal has consistently accepted that the economic benefits arising from exploration and mining will serve the public interest, in the absence of any evidence to the contrary.

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

[37] Given the evidence before me, I cannot find any other relevant matters which need to be considered.

**Conclusion**

[38] Taking into account the matters referred to above, I consider the evidence favours a determination that the proposed act may be done. The Government party has outlined conditions which are proposed to be imposed on the grant of the proposed licence (outlined

at [18]), together with endorsements. The Government party has also outlined an additional condition, the 'RSHA Condition' (as outlined at [12]), which was central to parties' negotiations in this matter and led to, in effect, an uncontested future act determination application. As such, and for the absence of any doubt, the Tribunal will impose this condition on the grant of the proposed licence.

**Determination**

[39] The determination of the Tribunal is that the act, being the grant of exploration licence E47/1818 to FMG Pilbara Pty Ltd, may be done, subject to the following condition:

> In respect of the area covered by the licence the licensee, if so required in writing by the Yindjibarndi Aboriginal Corporation, the native title prescribed body corporate holding the determined native title of the Yindjibarndi recognised in the Federal Court application No. WAD 6017/96, such request being sent by pre-paid post to reach the licensee's address not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Yindjibarndi the Regional Standard Heritage Agreement ("RSHA") endorsed by peak industry groups (Yamatji Land and Sea Council RSHA) and offered by Yindjibarndi Aboriginal Corporation.

**Helen Shurven**
**Member**
**6 August 2014**

**Attachment A: Grantee party contentions and evidence**

The grantee party provided a statement of contentions on 2 June 2014 (amended on 3 June 2014) ('GP Contentions'), together with the following documents:

GP1. Government party documents on WO2010/0393

GP2. *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia*, [2011] NNTTA 107

GP3. *FMG Pilbara Pty Ltd / Ned Cheedy and Others on behalf of the Yindjibarndi People / Western Australia*, [2012] NNTTA 11

GP4. Fortescue Metals Group Limited ('FMGL') Media Release dated 23 November 2012 – New Aboriginal contractor

GP5. FMGL Media Release dated 12 December 2012– Survey discovers 41,000 year old heritage

GP6. Iron Ore Profile 2012 published by Department of State Development, Government of Western Australia

GP7. FMGL Media Release dated 21 February 2013 – Traditional Owners form historic mining JV

GP8. FMGL Media Release dated 7 March 2013 - Traditional Owners – Economic Independence

GP9. FMGL Media Release dated 18 March 2013 – Close Indigenous Health Gap

GP10. FMGL 2012 Environment Report dated 6 June 2013

GP11. FMGL Media Release dated 11 June 2013 – VTEC-grad216

GP12. 2013 Annual Report for FMGL

GP13. Minderoo Foundation Annual Report for 2012/2013

GP14. FMGL Media Release dated 6 August 2013 – Fortescue awards largest ever parcel of contracts to Traditional Owners

GP15. The West Australian Newspaper article dated 14 October 2013 – *Forrest to donate $65m for WA education*

GP16. The Australian Newspaper article dated 15 October 2013 – *Andrew Forrest to donate $65m to University of Western Australia*

GP17. The Australian Newspaper article dated 16 October 2013 – *Andrew Forrest's record $65m gift boosts philanthropic stakes*

GP18. FMGL Investor Site Tour Presentation

GP19. Extract from *Uniview* (Vol 32 No 3 Spring 2013) published by the University of Western Australia

GP20. ASIC Current Extract – Minderoo Group Pty Ltd – as at 4 December 2013

GP21. Extract ASIC Company Summary – Minderoo Group Pty Ltd – as at 9 December 2013

GP22. Email in WF2013/0015 – 0016 from the National Native Title Tribunal ('NNTT') to parties dated 28 March 2014 regarding the NNTT's determination regarding a request for an on country hearing

GP23. FMGL Quarterly Report for period ending 31 March 2014

GP24. Extract from the Department of Aboriginal Affairs ('DAA') Aboriginal Heritage Inquiry System database showing search results for registered sites within E47/1818

GP25. Extract from the Department of Aboriginal Affairs ('DAA') Aboriginal Heritage Inquiry System database showing search results for 'Other Heritage Places' within E47/1818

GP26. Extract from the Department of Aboriginal Affairs ('DAA') Aboriginal Heritage Inquiry System database showing search results for heritage surveys conducted within E47/1818

GP27. Department of Mines and Petroleum Quick Appraisal for E47/1818 dated 30 May 2014

GP28. Extract from FMGL Web Site – Chichester Hub

GP29. Extract from FMGL Web Site – Solomon Hub

GP30. Extract from FMGL Web Site – Port and Rail Infrastructure

GP31. Map of E47/1818

GP32. Affidavit of Thomas James Weaver together with the following documents:

TJW1. Statement which accompanied the Grantee Party's application for the Inquiry Tenement in accordance with s58(1)(b)(i) of the Mining Act

TJW2. Media Announcement to the Australian Stock Exchange dated 6 August 2013: *Fortescue awards more than $1 billion in contracts to Aboriginal businesses*

TJW3. Letter dated 3 July 2013 from KPMG confirming "*that the target of awarding a cumulative value of $1 billion opportunities to Aboriginal Contractors (including Joint Ventures and sub-contracts)by the end of 2013 has been achieved*"

TJW4. Media Release dated 6 August 2012: *Fortescue awards more than $200 million to Aboriginal joint venture at Solomon*

TJW5. Constitution of the Ngarluma Yindjibarndi Foundation Limited

TJW6. Resolution of 02 December 2003 altering Constitution of Ngarluma Yindjibarndi Foundation Limited passed 20 September 2008

TJW7. Resolution of 20 September 2008 altering Constitution of Ngarluma Yindjibarndi Foundation Limited

TJW8. ASIC Current Company Extract: Wirlu Murra Yindjibarndi Contracting No 1 Pty Ltd (ACN152 706 397) – as at 29 November 2013

TJW9. Rule Book of the Wirlu-Murra Yindjibarndi Aboriginal Corporation

TJW10. Media Announcement to the Australian Stock Exchange dated 24 June 2013: *Fortescue awards $1.3 billion Kings contract to Leighton Contractors*

TJW11. ASIC Current Company Extract: Process Resources Group Pty Ltd – as at 21 November 2013

TJW12. FMGL Ground Disturbance Permit Procedure

TJW13. FMGL Guidelines for the Management of Aboriginal Cultural Heritage