NATIONAL NATIVE TITLE TRIBUNAL

***Bradford and Julie Young v Kariyarra and Another* [2014] NNTTA 117 (16 December 2014)**

Application Nos: WF2014/0011 & WF2014/0012

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Bradford John Young and Julie Lynne Young (grantee party)

- and -

TR (dec) and Others on behalf of Kariyarra (WC1999/003) (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION THAT THE ACTS MAY BE DONE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 16 December 2014

Catchwords: Native title – future acts – no agreement with native title party – application for determination for the grant of mining leases – s 39 criteria considered – determination that the acts may be done

Legislation: *Native Title Act 1993* (Cth), ss 29, 30, 30A, 31, 35, 36, 38, 39, 47, 47A, 47B, 109, 151

Mining Act 1978 (WA), ss 82, 84, 85

Mining Regulations 1981 (WA), reg 20, 21, 23AB

Aboriginal Heritage Act 1972 (WA), ss 5, 17, 18, 62

Environmental Protection Act 1986 (WA) Part V, Division 2

Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA), reg 5

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*’)

Bradford and Julie Young v Kariyarra and Another [2014] NNTTA 103 (‘*Bradford and Julie Young v Kariyarra*’)

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*’)

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

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

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

Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (‘*Western Desert v Holocene*’)

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

Representative of the grantee party: Mr Ken Green, Green Legal

Representative of the native title party: Ms Kylie Chalmers, Yamatji Marlpa Aboriginal Corporation

Representatives of the Government party: Ms Christine Weetman, Department of Mines and Petroleum
Ms Sarah Power, State Solicitor’s Office

REASONS FOR DECISION

Background

[1] On the notification days of 31 January 2007 and 14 November 2012 respectively, the Government party, through the Department of Mines and Petroleum ('DMP'), gave notice ('s 29 notice') under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of two future acts ('proposed leases'), namely the grant of mining lease application M45/800 to Bradford John Young and M45/1228 to Bradford John Young and Julie Lynne Young ('grantee parties'/'grantee party').

[2] Any person who, four months after the notification day, is a native title party (that is, a registered native title claimant or a body corporate according to the specified time frames in s 30(1) of the Act) in relation to any of the land or waters that will be affected by the future act, has a procedural right to negotiate in relation to the future act (see s 30(1)(a) and s 31 of the Act).

[3] At the four month closing days for these matters, being 31 May 2007 and 14 March 2013 respectively, the native title claim of Kariyarra (WC1999/003) – registered from 22 April 1999) wholly overlapped the proposed leases and was on the Register of Native Title Claims. The claim remains on the Register and is the native title party in respect of these proceedings (see s 29(2)(b)(i) of the Act).

[4] The proposed leases are situated in Port Hedland Town. The location and size of each lease (according to the National Native Title Tribunal ('the Tribunal') spatial analysis) is outlined in the table below:

Proposed lease	*Approximate size of proposed lease (km²)*	*Location*
M45/800	1.0197	13km South of Port Hedland
M45/1228	4.0951	14km South of Port Hedland

[5] The rights which would be conferred by the proposed leases (if granted) are set out in s 85 of the *Mining Act 1978* (WA) ('*Mining Act*').

[6] Following the notification of each of the proposed leases, the Government party commenced negotiations with the grantee parties and the native title party by letters dated 2 February 2007 for M4/800 and 14 January 2013 for M45/1228. Parties also

attended mediations convened by the Tribunal. Neither negotiations between parties nor mediation assistance led to an agreement of the kind specified in s 31(1)(b) of the Act.

The section 35 future act determination applications

[7] On 16 June 2014, the grantee parties made applications, pursuant to s 35 of the Act, for the Tribunal to make a future act determination under s 38 of the Act in relation to each of the proposed leases. The applications were made on the basis that the negotiation parties had not been able to reach agreement of the kind mentioned in s 31(1)(b) of the Act, and at least six months had passed since the notification days specified in the s 29 notices (see s 35 of the Act). On 17 June 2014, I was appointed as Member to conduct the inquiry into the applications.

[8] Following the preliminary conference held on 10 July 2014, the native title party alleged the grantee parties had failed to negotiate in good faith and accordingly, the Tribunal was required to consider the allegation prior to making a determination in relation to the applications (see s 36(2) of the Act). Directions were made requiring each of the parties to make submissions regarding the good faith allegation (the preliminary issue) and the s 39 criteria (the substantive issue). On 23 October 2014, the Tribunal determined the grantee parties had negotiated in the manner required by s 31(1)(b) that is, in good faith, and, according to s 36(2) of the Act, it has the power to proceed to make a determination in the substantive issue.

The Inquiry

[9] The inquiry directions required the parties to provide contentions and documentary evidence in relation to the s 39 criteria, and also set dates for the hearing of the matter, should a hearing be required.

[10] On 31 October 2014, the Government party provided a statement of contentions ('GVP Contentions'), together with the following copies of documents:

GVP1 Application for Mining Tenement M45/800.

GVP2 s 29 notice for M45/800.

GVP3 Initial negotiation letters for M45/800 from the Department of Mines and Petroleum ('DMP'), to the grantee parties and native title party dated 2 February 2007.

GVP4 Application for Mining Tenement M45/1228.

GVP5 s 29 notice for M45/1228.

GVP6 Initial negotiation letters for M45/1228 from the Department of Mines and Petroleum ('DMP'), to the grantee parties and native title party dated 14 January 2013.

GVP7 Extract from the Register of Native Title Claims for the native title party.

GVP8 DMP Map of M45/800.

GVP9 DMP Map of M45/1228.

GVP10 Tengraph Quick Appraisal for M45/800, dated 29 October 2014. The Government party subsequently provided a replacement Tengraph Quick Appraisal for M45/800, dated 5 December 2014.

GVP11 Tengraph Quick Appraisal for M45/1228, dated 29 October 2014.

GVP12 DMP draft endorsements and conditions for M45/800, dated 1 July 2014.

GVP13 DMP draft endorsements and conditions for M45/1228, dated 1 July 2014.

GVP14 Search results of the Department of Aboriginal Affairs Register of Aboriginal Sites ('DAA Register') for Sites within M45/800, dated 1 July 2014.

GVP15 Search results of the DAA Register for Sites within M45/1228, dated 1 July 2014.

GVP16 Search results of the DAA Register for Other Heritage Places within M45/800, dated 1 July 2014.

GVP17 Search results of the DAA Register for Other Heritage Places within M45/1228, dated 1 July 2014.

[11] On 31 October 2014, the grantee parties provided a statement of contentions submissions ('GP Contentions') and the following copies of documents in addition to those submitted for the good faith matter ('*Bradford and Julie Young v Kariyarra*' at Attachment A of that matter and listed GP GF1 to 22):

GP23 Extract from the Register of Native Title Claims for the native title party.

GP24 Search results of the DAA Register for Sites within M45/800, dated 27 October 2014.

GP25 Search results of the DAA Register for Other Heritage Places within M45/800, dated 27 October 2014.

GP26 Search results of the DAA Register for Sites within M45/1228, dated 27 October 2014.

GP27 Search results of the DAA Register for Other Heritage Places within M45/1228, dated 27 October 2014.

GP28 Tengraph Quick Appraisal for M45/800, dated 27 October 2014.

GP29 Tengraph Quick Appraisal for M45/1228, dated 27 October 2014.

GP30 Email from DMP attaching updated conditions and endorsements for M45/800, dated 28 October 2014.

GP31 Historical lease 394/781.

[12] On 26 November 2014, the native title party provided a statement of contentions ('NTP Contentions'), and the following copies of documents on the next day:

NTP1 Extract from the Register of Native Title Claims for the native title party.

NTP2 Aboriginal Heritage Survey Report, Anthropos Australis, dated September 2012 (also at GP GF5).

NTP3 Email from native title party representative attaching marked up agreement, dated 17 October 2014.

NTP4 Letter from grantee parties representative to native title party representative, Tribunal staff and DMP attaching proposed agreements, dated 7 April 2014 (also at GP GF19).

NTP5 Schedule of costs for conduct of a survey

[13] On 5 December 2014, the grantee parties and the Government party lodged their replies to the native title party submissions ('GP Reply' and 'GVP Reply').

[14] On 8 December 2014, the Tribunal wrote to all parties requesting their view as to whether a listing hearing should be held or whether an inquiry could be conducted on the papers. All parties agreed to proceed on the papers and, having considered all materials provided in this matter, I am satisfied that it is appropriate to do so in accordance with s 151(2) of the Act.

Legal principles

[15] 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;

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

[16] 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 criteria, and the outcome of the assessment will depend on the evidence provided in relation to each criterion (see *Western Desert Lands v Holocene* at [37]). In addition, for example, in *Western Australia v Thomas*, the Tribunal explained the approach to criteria in s 39 of the Act (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.

[17] Section 36(1) of the Act requires the Tribunal to take all reasonable steps to make a determination as soon as practicable (subject to s 37 of the Act). 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).

Evidence in relation to the proposed leases

Location of proposed leases, underlying tenure and historical mining activity

[18] According to mapping (NTP2 at p5), the proposed leases are located in close proximity to South Hedland town site, amongst an existing industrial area containing two haulage railways owned by iron ore companies FMG and BHP, a quarry road, a number of other roads, the Pippingarra sandpit and the town landfill site. M45/800 is located less than 500 metres from the nearest dwellings and M45/1228 is located within 2.5 kilometres of the same.

[19] According to the DMP Quick Appraisals (GVP10 and 11), Pippingarra Indigenous held pastoral lease I3114/860 overlaps M45/800 and M45/ 1228 at 96.6 and 100 per cent respectively. The remaining 3.4 per cent of M45/800 comprises vacant crown land parcel 400. Historical lease 394/781 also entirely overlaps both proposed leases. The grantee parties supporting documents (GP31) indicate the historical lease was pastoral lease 394/781, registered in 1935 for a term of 49 years and in lieu of a pre existing pastoral lease 2734/96. The lease was surrendered in 1969 and included in a new pastoral lease 88/69.

[20] The DMP Quick Appraisals note M45/800 contains one minor road, three tracks and a fence line. M45/1228 contains a fence line. The Quick Appraisal for M45/1228 also notes the grantee parties' 'Flash Butt Sand/Young' open pit mine which is proposed for the proposed lease.

[21] The DMP Quick Appraisals show M45/800 is overlapped by two miscellaneous licences: L45/275 held by the grantee parties and L45/303 pending for Pippingarra Holdings, at one and four per cent respectively. M45/1228 is entirely overlapped by exploration licence E45/3239, held by the grantee parties. Both M45/800 and M45/1228 were subject to: a previously surrendered exploration licence E45/1532 held from 1995 to 1998 and overlapping at 99.7 and 4 per cent respectively; and a cancelled temporary reserve held from 1959 to 1964 which entirely overlapped the

proposed leases.

Rights conferred by the proposed leases

[22] Under the *Mining Act*, the holder of a mining lease can exercise the rights set out in s 85, subject to the lessee covenants and various conditions set out in s 82. It is also possible for the Minister to impose further conditions under s 84 relating to the 'prevention or reduction of injury to land'. Endorsements can also be placed on the lease - these differ from conditions in that the lessee will not be liable to forfeit the lease if endorsements are breached. In addition to those conditions set out in s 82 of the *Mining Act*, the Government party has indicated it intends to impose on both leases the following endorsements and conditions set out in the draft tenement endorsement and conditions extract, as follows (note, the numbering for each set of endorsements is slightly different for each lease, but they have been numbered as per below in this decision for ease of reference):

ENDORSEMENTS

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

2. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

In respect to Water Resource Management Areas (WRMA) the following endorsements apply:

3. The Lessee [sic] 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 endorsements apply:

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 endorsements apply:

7. Advice shall be sought from the DOW if proposing any mining/activity in respect to mining operations 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.

8. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimise erosion and sedimentation of receiving catchments and adjacent areas.

In respect to Proclaimed Surface Water and Irrigation District Areas the following endorsements apply:

9. The abstraction of surface water from any watercourse is prohibited unless a current licence to take surface water has been issued by the DoW.

10. All activities to be undertaken with minimal disturbance to riparian vegetation.

11. No mining/activities in respect to mining operations being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence to take surface water or permit to obstruct or interfere with beds of [*sic* - or] banks issued by the DoW.

12. Advice shall be sought from the DoW and the relevant service provider if proposing mining/activities in respect to mining operations being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

13. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimize erosion and sedimentation of receiving catchments and adjacent areas.

In respect to Proclaimed Ground Water Areas the following endorsement applies:

14. The abstraction of groundwater is prohibited unless a current licence to construct/alter a well and a licence to take groundwater has been issued by the DoW.

CONDITIONS

1. Survey.

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

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

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

5. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of 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.

6. The Lessee 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.

7. The Lessee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - the grant of the Lease; or
   - registration of a transfer introducing a new Lessee; advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

8. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DoIR for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.

[23] With respect to M45/1228, the following additional endorsement is noted:

- The Lessee's attention is drawn to the existence of a licence for investigations to support haul road for the trucking of iron ore granted pursuant to section 91 of the Land Administrations Act 1997 and which is shown designated as File Notation Area (FNA) 9629 in TENGRAPH.

[24] With respect to M45/800, the following additional conditions are noted:

9. The rights of ingress to and egress from Miscellaneous Licence 45/275 being at all times preserved to the licensee and no interference with the purpose of installations connected to the licence.

10. Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface.

Grantee parties' proposed activities

[25] Based on the proposed work programmes submitted by the grantee parties, the proposed leases will be used for sand mining (GP GF4 and GP GF9). The proposed work programmes for M45/800 and M45/1228 were sent to the native title party (and copied to the Government party) on 15 February 2007 and 1 May 2013 respectively, as part of their initial negotiation submissions.

[26] For M45/800, the programme states:

> BJ Young Earthmoving Pty Ltd (BJY) proposes to develop a small-scale shallow sand mining pit within M45/800. The proposed mining area is located on flat sand plains country covered by a low Acacia Spinifex dominated heath (Photo 1).
>
> The material is a red pindan sand that will be used for construction purposes, mainly house pads. The extraction rate is estimated at between 0 and 20,000 m^3, depending on local demand. This equates to approximately one (1) ha of area being disturbed each year. The pit depth is expected to be approximately two (2) metres or less. Mining operations will involve excavation using front end loader and direct loading onto tip trucks for cartage off site. No processing, screening or stockpiling is required. There will be no infrastructure on site apart from an access road and a gate.
>
> BJY has an already established sand operation on their neighbouring tenement M45/531. In 17 years, approximately 10 ha of ground has been mined.
>
> BJY is committed to maintaining high standards of environmental management and rehabilitation. Prior to mining, topsoil will be pushed to each side of the proposed pit and stockpiled for later use in rehabilitation. Progressively so, or at the end of mine life, the pit edges will be battered back and the mined-out area landscaped to resemble natural conditions. A layer of subsoil will be spread across the quarry floor, followed by a layer of topsoil and the entire area deep ripped. Reseeding using local seeds will occur if topsoil fails to produce adequate regrowth...
>
> BJY is committed to maintaining a safe working site and in ensuring that public safety is minimized through restricted access and signage...
>
> A vegetation and fauna survey has already been conducted... No rare plants or animals were located during the survey...
>
> Over the past 20 years, Brad Young has been involved in numerous mine and exploration rehabilitation contracts and has developed extensive expertise in the area of environmental management, rehabilitation and safety. (GP GF4)

[27] On M45/1228, the grantee parties propose immediate mining as part of their 'Flash Butt Sand Project':

> **MINING TIMEFRAME**
>
> There is a strong and immediate demand for large volumes of General Fill and Subcourse material in the Port Hedland region due to the construction requirements of a large number of major resource projects as well as ongoing residential, municipal and commercial developments.... Due to the vagaries of the sand and fill market, mining will occur on a campaign basis, ranging from smaller contracts of $<100m^3$ to larger projects that could involve $>500,000m^3$...
>
> Three [flora, fauna and Aboriginal heritage] surveys are currently in the preparation stage. From the preliminary results:

- No Aboriginal sites were located in M45/1228.
- No Threatened Flora were recorded in M45/1228. A Priority Flora species was recorded in a location that is not within the mine disturbance footprint.
- No Threatened Flora [sic – Fauna] or Priority Fauna were recorded in M45/1228.

METHOD OF MINING

The proposed mining method is a simple sand extraction quarry operation using 30 to 50t excavators to loosen material at the face. Front-end loaders will then load on-road tip trucks for haulage off site. Either single tippers, doubles or triple semi-trailer combinations will be used.

All sand will be won 'run-of-mine' and is free dig. There is no processing or screening of product required. Some blending of material may occur to meet contractual obligations for the plastic index ('PI'). Generally, blending occurs at the excavation face, during the initial material handling process using excavators and front-end loaders to mix different layers of material. Water may also be added to obtain the required moisture content.

There will be no secondary processing occurring. All material won will be run-of-mine, apart from blending and wetting, as required. Material may be stockpiled at a laydown area near the entrance to M45/1228 for the cyclone season to allow continued product accessibility.

It is likely that two or three pits will be opened at once. The primary pit will be a low PI pindan sand quarry for General Fill. A second pit will target the higher clay content material with calcrete gravels. This second pit will provide Subcourse Material. The third pit, if required, will be a General Fill Blend pit.

It is likely that pit excavations will vary from 3 to 4m, to a maximum depth of 6m, material permitting. The low PI pindan sand material occurs primarily in the top 1 to 2m.

All topsoil will be pushed into windrows ahead of mining operations and stockpiled for rehabilitation purposes.

There is a hard rock potential in the southeast corner of M45/1228. At this stage the potential is unknown and further exploration will be undertaken. Hard rock mining therefore not considered as being part of the currently proposed mining operations at M45/1228....

SITE PLANS

...Three resourced types will be targeted:

- General Fill: Low PI pindan sand material with depth from surface of 2m or greater. Low PI's were sub 10%. Low PI sand is sold as General Fill.
- General Fill Blend: Low PI pindan sand material with shallow depth from surface of approximately 1m but were overlying moderately high PI sand material. These two layers are blendable to produce a General Fill with a marketable average PI.
- Subcourse Material: Clayey sands with high PIs, generally > 15% and often associated with calcrete gravels. This basement material occurs below the pindan sands at a variable depth of between 1 to 6m, and typically 2 to 4m.

The site layout for mining developments is provided in Figure 5. A General Fill pit will be established in the top northwest corner of M45/1228. This pit will then be developed progressively along the western boundary of M45/1228.

A Subcourse Material pit will be developed in the lower central section of M45/1228 (Figure 5). A Stage 2 Subcourse Material pit will be developed as required.

Depending on contractual specifications, a General Fill Blend pit may be developed at the middle of the eastern boundary on M45/1228 (Figure 5). This pit will required the top metre of low PI sand to be blended with the underlying higher PI material.

A laydown and stockpile area will be developed at the top northeast corner of M45/1228 (Figure 5). Material may be stockpiled as precaution against cyclonic rainfall in the wet season making the pits inoperable. The laydown and stockpile area will also be used as park-up area for road trains. During large haulage campaigns, up to 40 road trains with double or triple trailer combinations will be utilised. The laydown area will also be used as a road train parking bay after work hours.

A miscellaneous licence has been applied for to connect the laydown and stockpile area to Buttweld Road (Figure 5). Buttweld Road then connects with the Great Northern Highway. For safety reasons, a double carriageway or double lane road configuration will be constructed.

A mine camp, office and workshop facilities will be located next to the laydown and stockpile area (Figure 5). It is expected that accommodation will be required for up to 10 BJ Young employees

> and contractors on an ongoing basis. Additional rooms may be considered to house the road train workforce, cooks, cleaners and other support staff.
>
> A water exploration program will be undertaken in late 2012 or early 2013. Potential areas have been identified in the southern areas of M45/1228, in areas associated with deeper calcretes and taller vegetation. Bores will be developed, if possible, to supply water for dust suppression and material water content specification.

[28] Given the size of the proposed leases (approximately 1 and 4 square kilometres or 100 and 400 hectares) and the nature of the mining proposed, it would be reasonable to assume that only portions of the proposed leases will be subject to mining at any given time.

Aboriginal communities and Aboriginal cultural heritage

[29] There is no evidence of any Aboriginal communities within or on the near vicinity of the proposed leases; however, given their proximity to Port Hedland and South Hedland town sites, it is likely there are Aboriginal communities within or nearby.

[30] Searches of the Aboriginal Sites Database provided by the Government party and grantee parties indicate there are no registered sites or other heritage places within the proposed leases.

[31] As part of its good faith submissions in *Bradford and Julie Young v Kariyarra*, the grantee parties provided an Aboriginal Heritage Survey Report prepared by Anthropos Australia and commissioned by the grantee parties (GP GF5)('Anthropos report'). The native title party seeks to rely upon the Anthropos report in this inquiry (NTP2).

The regulatory context

[32] The proposed leases will be subject to the deemed conditions in s 82 of the *Mining Act*, as well as those enumerated in the lists of proposed endorsements and conditions provided by the Government party (as outlined above at [22]-[24]).

[33] The Government party contends the exercise of the rights conferred by the proposed leases will be regulated by both State and Federal regulatory regimes relating to the environment, wildlife, water and Aboriginal heritage, including the *Aboriginal Heritage Act* 1972 (WA) ('AHA') (GVP Contentions at 38). The Government party (at 53) refers the findings made by the Tribunal in *Western Australia v Thomas* (at 209-211). Briefly, the Government party outlines that the AHA provides for the

protection and preservation of Aboriginal sites and objects. It is an offence under s 17 of the AHA to excavate, destroy, damage, conceal or in any way alter any Aboriginal site. Section 18 of the AHA provides that the Minister may give consent to the use of land for a purpose likely to result in a breach of s 17. It is a defence to a breach of the AHA if the person charged can prove that he or she did not know, and could not reasonably be expected to have known, that the place was an Aboriginal site (s 62 AHA). It applies to all Aboriginal sites as defined in s 5, whether or not the site appears on the Register of Aboriginal sites.

[34] The proposed leases will also be subject to the *Environmental Protection Act* 1986 (WA) ('EPA'). The procedures under the EPA were outlined by the Tribunal in *Minister for Mines v Evans* (at [53]-[58]) and I adopt the findings outlined in those passages. Briefly, a proposal must be referred to the Environmental Protection Authority for assessment where the proposal is likely, if implemented, to have a significant effect on the environment. The referral of *Mining Act* tenements is administered under a memorandum of understanding entered into between the Environmental Protection Authority and DMP.

[35] The EPA was amended in 2003 to incorporate provisions requiring approval before clearing native vegetation (Part V, Division 2). According to the *Environmental Protection (Clearing of Native Vegetation) Regulations* 2004 (WA), mineral activities are exempt from this requirement if carried out pursuant to an authority granted under the *Mining Act* and not carried out in designated areas (reg 5, item 20 and schedule 1).

Registered native title rights and interests

[36] As noted above, the proposed leases are overlapped by Pippingarra Indigenous held pastoral lease with the exception of a 3.4 per cent portion of M45/800 which comprises vacant crown land parcel 400. In the absence of any evidence to the contrary, the proposed leases fall within Area A of the native title party's claim application area (to which ss 47, 47A and 47B of the Act applies). In Area A, the native title party claims 'the right to possess, occupy, use and enjoy the area as against the whole world' (exclusive native title).

Summary of contentions and evidence relevant to the s 39 criteria

[37] The directions required the grantee parties and the Government party to lodge

contentions and evidence first, the native title party second, and allowed the grantee parties and the Government party a right of reply to the native title party's submissions. Both the GP Contentions and GVP Contentions are limited and both contend that, in the absence of any specific evidence from the native title party, they are uncertain as to the effect the grant of the proposed leases will have upon the criteria outlined in s 39(1)(a) and (b) and s39(2). The GP Reply and the GVP Reply provide specific responses to each of the native title party's contentions and will be addressed in the relevant sections below.

[38] In support of its contentions concerning the s 39 criteria, the native title party relies solely upon the Anthropos Report. No other evidence has been provided by way of affidavits from members of the native title party or otherwise.

The Anthropos report: Relevant facts

[39] The Anthropos Report covers an area south of Port Hedland town site which includes the areas of the proposed leases, a fact that was verified by Government party mapping provided to all the parties and the Tribunal during the course of the good faith inquiry ('GVP Map', see *Bradford and Julie Young v Kariyarra* at [26]). Survey Area A covers M45/800, M45/689, the area of M45/531 not excluded by Pippingarra sandpit and L45/275. Survey area B covers M45/1228 and another portion along Buttweld road (Anthropos Report map p5, GVP Map, GVP8 and annexure to GVP Reply).

[40] The Anthropos Report confirms '*Marapikurrinya* Pty Ltd (MPL) manages the conduct of Aboriginal heritage surveys on behalf of the *Kariyarra* native title claimants... The survey was conducted with the cooperation and involvement of the *Kariyarra* native title claimants nominated by the MPL' (pp1-2). Three of the nine Indigenous consultants who participated in the survey are listed on the Register of Native Title Claims as persons claiming to hold native title for the native title party – Mr Kerry Robinson, Ms Diana Robinson and Mr Thomas Monaghan.

[41] According to the Anthropos report, both survey areas A and B were cleared for the grantee party to conduct its activities, with the exception of a small area within survey area A (p42, 'not cleared area'). It is clear from the mapping (p44) that the not cleared area is located within L45/275, approximately one kilometre northeast of the

easternmost boundary of M45/800. Eight 'isolated stone artefacts' and three 'isolated shell fragments' were recorded in survey area A and it is clear from the coordinates that none of these are located within M45/800 (p42-43). Part of survey area A intersected with a tributary of South Creek which is connected to a large ethnographic site downstream (pp36 and 42). However, the GVP Map confirmed this intersection was not within the proposed leases (see *Bradford and Julie Young v Kariyarra* at [26]). It is also apparent from the coordinates provided in the Anthropos report (p36) that the area is not within the proposed leases. Furthermore, the GVP map delineates all known watercourses within the map area, none of which intersect any portions of the proposed leases. One 'isolated shell fragment' was recorded in survey area B and the coordinates indicate this fragment is within M45/1228.

[42] The Anthropos Report contains eight recommendations (at 45-46) for the grantee parties (emphasis in original):

> **[1]** It is **recommended** that BJ Young Earthmoving ensure that its employees and contractors, as appropriate, are advised that:
> 1. Survey Area A contains **one** Not Cleared Work Area which contains Aboriginal archaeological values pursuant to the *Aboriginal Heritage Act* 1972, which is **not cleared** for the proposed works to proceed, and should be avoided;
> 2. The remainder of Survey Area A is **cleared** for the proposed works to proceed; and
> 3. Survey Area B is **cleared** for the proposed works to proceed.
>
> **[2]** It is **recommended** that BJ Young Earthmoving avoids all isolated stone artefacts, however, if BJ Young Earthmoving determine it is necessary to move the isolated artefacts, then BJ Young Earthmoving may be required to contact the Department of Indigenous Affairs to determine the most cultural appropriate way to relocate the isolated artefacts.
>
> **[3]** It is **recommended** that BJ Young Earthmoving avoid impacting the natural flow of the South Creek tributary found within Survey Area A, as this area was identified by the Senior *Marapikurrinya* Consultants as being of continual ethnographic significance.
>
> **[4]** It is **recommended** that should BJ Young Earthmoving be unable to avoid the Not Cleared Work Area located during this Survey, then that Not Cleared Work Area will need to be recorded to Site Identification standard and be the subject of a Cultural Significance Assessment undertaken by *Marapikurrinya* Pty Ltd prior to BJ Young Earthmoving lodging a Section 18 Notice with the Department of Indigenous Affairs.
>
> **[5]** It is **recommended** that, given the potential for Aboriginal cultural material to be disturbed, two Marapikurrinya Pty Ltd nominated Marapikurrinya Heritage Monitors be engaged by BJ Young Earthmoving through Marapikurrinya Pty Ltd during all initial ground disturbing activity associated with the proposed works.
>
> **[6]** It is **recommended** that, if any Aboriginal cultural material, including skeletal, is found during ground disturbing activity, then works stop and the Marapikurrinya People are consulted.
>
> **[7]** It is **recommended** that BJ Young Earthmoving implements the following Stop Work Procedure should any sub-surface skeletal material and other cultural material be uncovered during the proposed ground disturbing activity:
> 1. Should any sub-surface skeletal material (or any other cultural material) be uncovered during excavation work associated with the proposed construction, contractors are to cease **all work immediately** and the area cordoned off;
> 2. Contractors are to formally notify the South Hedland Detectives (in the case of skeletal material), *Marapikurrinya* Pty Ltd and the Department of Indigenous Affairs;
> 3. BJ Young Earthmoving appoints a Bio-Archaeologist via Anthropos Australis to document and record the skeletal material (or any other cultural material); and

> 4. Further mitigation strategies and consultation with *Marapikurrinya* Pty Ltd and Anthropos Australis Pty Ltd will need to be instigated by BJ Young Earthmoving in response to this Stop Work Procedure.
>
> **[8]** Finally, it is **recommended** that BJ Young Earthmoving keep *Marapikurrinya* Pty Ltd regularly informed regarding the development of the Project.

[43] The native title party requests that all the recommendations be made as conditions, should the Tribunal make a determination that the proposed leases be granted. Given the evidence provided in this matter, recommendations 1, 2, 3 and 4 are not relevant to the proposed leases. Recommendation 2 refers to the 'isolated stone artefacts' identified, recommendation 3 refers to 'the South Creek Tributary' and recommendation 1 and 4 refers to the not cleared area. According to the coordinates noted in the Anthropos report, none of these sites or tributaries are located within either of the proposed leases, or the relevant area has been cleared (p.42-43.). On this basis, no further consideration will be given below to recommendations 1, 2, 3 and 4, and any contentions or replies relating to the isolated stone artefacts, South Creek and the not cleared area.

Consideration of the Section 39 Criteria

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

[44] As noted previously, in the absence of any evidence to the contrary, the area of the proposed leases falls under Area A of the native title party's claim application area, in which the native title party claims exclusive native title. However, for reasons not articulated in its contentions, the native title party refers only to the list of registered non exclusive rights and interests it claims in Area B which, subject to some exclusions, is defined as 'land and waters within the application area that is not included in Area A'. The Native Title Party submits that a number of these rights are to be specifically curtailed and/or hindered by the proposed tenements' (at 16) notably:

> a. The right to manage and protect their sites, their secret societies and lodges or fraternities to ensure that rituals of religious significance, mystery and solemnity relating to the Dreamtime can continue which gives authority to the survival instruction or actives that have evolved over centuries and will allow for the gathering of people to come together to carry out ceremonies and activities required under customary law and culture; and,
>
> b. The right to freely move upon their land to teach their young about their country, culture and traditions, how to look after the fauna and flora for both sustenance and to protect the land, waters, the environment and the natural habitat.

[45] The native title party contends the findings in the Anthropos Report 'supports the rights and interests identified by the native title party' (at 19) and follows on to make a number of contentions regarding the Tribunal's powers and limitations concerning these rights and interests (at 22). In relation to the enjoyment of the above rights and interests, the native title party contends (emphasis in original):

> 23. Specifically, should there exists [sic] any subsurface skeletal remains, which would appear to be an area of concern raised within the Grantees' survey report, then any disturbance of same by way of mining activity would create direct physical impact to the Native Title Party's ability to "*Freely move upon their land to teach their young about their country, culture and traditions…*", in turn preventing them from managing or learning from such a discovery.
>
> 24. Moreover, it is apparent that there exists both man-made rock formations and cultural material within the proposed tenements of a significant kind that the Grantees' survey has recommended the employing of <u>two indigenous (Marapikurrinya) monitors for all ground disturbing activities</u>. It is submitted that such a recommendation could not, or would not be made in the absence of acknowledging an actual, physical connection to the land, in line with those rights listed on the native title register, specifically those rights relating to the management of sacred sites and/or objects of cultural significance...
>
> 26. The ability to teach their young about scattered artefacts or rock formations, as identified by Anthropos, requires a physical presence by the Native Title Party. It is not that the Native Title Party needs to demonstrate to the Tribunal a presently active native title right and/or interest, which with respect, is what it would appear the Grantees suggest. We submit that the authority on this issue merely requires <u>the Native Title Party to demonstrate that one of the rights and/or interests (as listed on the register), may require a physical presence on the land</u>. To use a hypothetical, if a significant object was discovered beneath the surface there would be an automatic need for the Native Title Party to have a physical presence upon that site, so as to identify, inform and manage that discovery.

[46] In its reply, the grantee parties contend (at 4.2) (emphasis in original):

> There is nothing in the Aboriginal Heritage Survey Report by Anthropos Australis Pty Ltd (see GP Doc 5, NTP Doc 02) ("**Anthropos Report**") which even remotely suggests there are "man-*made rock formations*" or "*cultural "material*" within the Inquiry Tenements.
>
> It is significant that:
>
> (1) the NTP Contentions fail to refer to any relevant part of the Anthropos Report in support of the above contention;
>
> (2) the NTP does not refer to any evidence of excavations undertaken on, or proximate to, the Inquiry Tenements which have yielded "*man-made rock formations*" or "*cultural "material*".

[47] In its reply, the Government party contends (at 14):

> The Native Title Party has not provided any evidence of any exercise of any rights in respect of the area of either of the proposed tenements. There is no evidence that the Native Title Party carries out any teaching activities in respect of these areas, nor is there any evidence that any areas or sites are managed or protected by the Native Title Party in respect of this area (contra, Native Title Party's contentions at 23-26). The Report does not assist.

[48] I have perused the Anthropos Report and find there is no evidence that the native title party currently exercises the right to teach their young about their country on the

proposed leases. As for the right to manage and protect their sites, I note the Anthropos Report shows that members of the native title party participated in a detailed and lengthy archaeological and ethnographic survey of the proposed leases and subsequently 'cleared' the proposed leases for the grantee parties' activities. There is no evidence that there is any, or likely to be any, manmade rock formations, cultural or skeletal material significant to the native title party within the proposed leases. In the event that any cultural or skeletal material is excavated during the grantee parties activities, it is reasonable to assume the regulatory regime described under s 39(1)(a)(v) below would provide some protection.

[49] I have also taken into consideration the fact that the native title party's claim area comprises approximately 16,638 square kilometres and the area of the proposed leases represents approximately 5 square kilometres or approximately 0.03 per cent of the claim area. Furthermore, the proposed leases are located in close proximity to South Hedland town site, amongst an existing industrial area already containing two haulage railways owned by iron ore companies FMG and BHP, a quarry road, a number of other roads, the Pippingarra sandpit and the town landfill site. I also note that, with the exception of a very small portion of M45/800, the entire of the proposed leases are overlapped by Pippingarra Indigenous owned pastoral lease. Whilst there is no evidence to indicate the lease is held by members of the native title party, the Government party's conditions require the grantee parties to notify the leaseholder prior to undertaking any ground disturbing activities.

[50] Based on the evidence provided in this matter, I find the grant of the proposed leases will have a minimal effect on the native title party's enjoyment of their registered native title rights and interests.

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

[51] The native title party submits the Anthropos Report 'has identified concerns as to manmade rock formations, artefacts and the possibility of sub-surface skeletal remains within the proposed tenements which would have a direct effect on their life, culture and traditions' (at 29). As noted above, there is no evidence that there is any, or likely to be any, manmade rock formations, cultural or skeletal material significant to the

native title party within the proposed leases. In the event that Aboriginal skeletal material or other cultural material is uncovered during the grantee parties activities, it is reasonable to assume the regulatory regime described under s 39(1)(a)(v) below would provide for the appropriate and respectful treatment of that material with due regard to the native title party's way of life, culture and traditions.

[52] There is no evidence before me to support a conclusion that the native title party's way of life, culture and traditions will be affected as a result of the grant of the proposed leases.

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

[53] The native title party state '[w]e acknowledge the lack of evidence as to any effect on social and/or economic structures however do not concede the possibility of their existence' (at 33). In the absence of any evidence, I cannot conclude the grant of the proposed leases will affect the social cultural and economic structures of the native title party.

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

[54] The Government party contends there is no evidence that any rites, ceremonies or other activities are currently conducted on the proposed leases (at 32). It also appears the native title party is in agreement when they state (at 34)(emphasis in original):

> It is not that the Native Title Party demonstrate an immediate or currently present physical existence but that they may undertake or require access to engage in a physically present activity such as, but not limited to, camping; hunting; gathering; collecting medicine; teaching younger generations; and/or managing sacred artefacts, sites or remains which have been discovered but not yet registered.

[55] The Government party contends that in any event, mining leases 'do not confer a right on the holder to restrict access to native title holders exercising their rights and interest, except in the interests of safety and to prevent interference with activities carried out lawfully pursuant to the tenements' (at 32- 33). I accept the Government party's contention in this regard.

[56] Given there is no evidence that any rites, ceremonies or other activities are currently

carried out on the proposed leases, it is not possible to make any finding regarding how these may be affected should the proposed leases be granted.

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

[57] As noted above, the DAA Register searches provided by the Government party indicate there are no registered sites or 'other heritage places' within the proposed leases. The native title party does not contend there are any sites of significance on the proposed leases, but suggests that the grantee parties' ground disturbing activities may result in 'the discovery of any significant site, artefact or skeletal remains' (at 39). As noted above, the Anthropos Report indicates members of the native title party have cleared the area for the grantee parties' activities, and there is no evidence that there is any, or likely to be any, cultural or skeletal material significant to the native title party within the proposed leases. The Government party contends '[e]ven if sites of particular significance to the Native Title Party were identified, the AHA regime would apply...and would be sufficient to address the prospect of interference' (at 37). There is no evidence that the AHA would be insufficient in this circumstance, or that the grantee parties would not comply with the provisions.

[58] There is no evidence from the native title party regarding areas or sites of particular significance to them within the proposed leases and, therefore, I cannot find the grant of the proposed leases will have any effect on the elements covered by this criterion.

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

[59] The native title party contends it has engaged in 'rather open dialogue with the Grantees' in an attempt to reach an agreement (at 41-44). While the Tribunal is obliged to have regard to the interests, proposals, opinions or wishes of a native title party in relation to the management, use or control of the land or waters concerned, the fact that a native title party has not been able to negotiate an agreement that is satisfactory to it is not, on its own, sufficient justification for a determination that the act cannot be done (see *Adani Mining v Diver* at [98] and cases cited therein).

[60] The native title party contends the Tribunal should impose a number of conditions on

the grant of the proposed leases (at 45). The appropriateness of those conditions will be considered below.

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

[61] The Government party and the grantee parties contend the grant of the proposed leases is of potential economic significance to the State and the local region. The benefits include the development of a local resource, the engagement of local businesses to provide services to the grantee parties and the payment of royalties to the State (GP contentions (at 11) and GVP contentions (at 56)).

[62] The Tribunal has consistently accepted the economic benefits arising from the grant of mining tenure in Western Australia and therefore, in the absence of any evidence to the contrary, I accept the proposed leases are likely to generate some economic benefits, although I cannot draw any conclusions as to the extent of such benefits.

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

[63] The Government party contends the public interest is served by the development of mines on the proposed licence which will lead to economic benefits accruing at a local, state and national level (GVP contentions at 57). I accept that any economic benefits arising from this mining are likely to serve the public interest.

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

[64] The Government party contends the effect of the proposed leases on the natural environment may be a relevant factor (GVP contentions at 58, citing *WMC Resources v Evans* at [81]). It submits that any effects on the local environment will be regulated and minimised by:

a) the limitations imposed by the *Mining Act* and *Mining Regulations*, including the conditions deemed to apply by s 82 of the *Mining Act*;

b) the proposed conditions and endorsements the Government party will apply; and

c) the State and Federal regulatory regime with respect to environmental protection and the protection of Aboriginal heritage (citing *WMC Resources v Evans* at [82])

[65] I agree that the Tribunal may have regard to the environmental impact of the future act. The Tribunal may also have regard to the environmental protection regime as described *Minister for Mines v Evans* and noted earlier in this decision.

[66] It is likely the grantee parties will undertake a range of ground-disturbing activities over the proposed licence. However, these activities will be regulated by the conditions of grant and the environmental protection regime. Specifically, the *Mining Act* requires a programme of work to be lodged and approved before ground-disturbing equipment may be used. In accordance with its memorandum of understanding with the Environmental Protection Authority, DMP will refer the programme of work for assessment under the EPA if it is likely to have a significant effect on the environment. The grantee party will also be required to comply with the rehabilitation measures outlined in the proposed conditions.

[67] In the absence of evidence regarding any specific environmental considerations that might be associated with the grant of the proposed leases, I am satisfied that the regulatory regime is likely to ensure the proposed leases have minimal impact on the environment.

Conditions

Consideration of Conditions

[68] The Tribunal has a broad discretion to impose conditions, though 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]).

[69] The native title party contends the Tribunal should impose a number of conditions on the grant of the proposed leases. The first conditions to consider are those where the native title party suggests the grantee parties implement the Anthropos Report recommendations as conditions. These are outlined in full at [42] of this decision -

note that I have not outlined all of those recommendations in the consideration of conditions, as given the facts outlined at [39]-[43] in this decision, not all of the recommendations are relevant. The following are those recommendations which are relevant (emphasis in original):

- It is **recommended** that, given the potential for Aboriginal cultural material to be disturbed, two *Marapikurrinya Pty Ltd* nominated Marapikurrinya Heritage Monitors be engaged by BJ Young Earthmoving through *Marapikurrinya Pty Ltd* during all initial ground disturbing activity associated with the proposed works.
- It is **recommended** that, if any Aboriginal cultural material, including skeletal, is found during ground disturbing activity, then works stop and the *Marapikurrinya People* are consulted.
- It is **recommended** that BJ Young Earthmoving implements the following Stop Work Procedure should any sub-surface skeletal material and other cultural material be uncovered during the proposed ground disturbing activity:
    1. Should any sub-surface skeletal material (or any other cultural material) be uncovered during excavation work associated with the proposed construction, contractors are to cease **all work immediately** and the area cordoned off;
    2. Contractors are to formally notify the South Hedland Detectives (in the case of skeletal material), *Marapikurrinya Pty Ltd* and the Department of Indigenous Affairs;
    3. BJ Young Earthmoving appoints a Bio-Archaeologist via Anthropos Australis to document and record the skeletal material (or any other cultural material); and
    4. Further mitigation strategies and consultation with *Marapikurrinya Pty Ltd* and Anthropos Australis Pty Ltd will need to be instigated by BJ Young Earthmoving in response to this Stop Work Procedure.
- Finally, it is **recommended** that BJ Young Earthmoving keep *Marapikurrinya Pty Ltd* regularly informed regarding the development of the Project.

[70] The native title party also submits, as conditions (emphasis in the original):

- ...that the Grantees employ no less than two (2) authorised members of the Native Title Party to act as Monitors whilst undertaking ground disturbing work within the boundaries of the proposed tenements....
- That the remuneration for Aboriginal Monitors be equal to the daily *rate*, regional uplift, and daily expenses allowances, outlined at schedule 5 of the *Government Standard Heritage Agreement,* a copy of which is ......marked “NTP Doc 5”.
- That the Tribunal make standard orders as to Grantees’ obligation regarding the rehabilitation of vegetation and environment once the Grantees’ right to use the proposed tenements has ceased.

Conclusions regarding Conditions

[71] As outlined under ‘Section 39(1)(f) – any other relevant matters’, there is no evidence of any specific environmental considerations that might be associated with the grant of the proposed leases, nor is there any evidence that the regulatory regime relating to the proposed leases would be insufficient in the circumstances, for example in relation to rehabilitation of the area or in relation to heritage issues. The Tribunal can only

impose conditions where the evidence provided supports the imposition of such – in this matter, based on the available evidence, I have concluded it is not appropriate for the Tribunal to impose such conditions, over and above those which the Government party already intends to impose.

Conclusion

[72] After taking into account the effect of the proposed acts on the matters set out in s 39(1), as outlined in this decision, I conclude that the acts may be done and that it is not an appropriate case for the Tribunal to impose conditions.

Determination

[73] The determination of the Tribunal is that the acts, being the grant of mining leases M45/800 to Bradford John Young and M45/1228 to Bradford John Young and Julie Lynne Young, may be done.

Helen Shurven
Member
16 December 2014