

NATIONAL NATIVE TITLE TRIBUNAL

Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation
[2014] NNTTA 70 (25 July 2014)

Application No: **WF2013/0012**

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

- and -

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

Areva Resources Australia Pty Ltd (grantee party)

- and -

Walalakoo Aboriginal Corporation (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE

Tribunal: Member James McNamara
Place: Perth
Date of decision: 25 July 2014
Hearing dates: On the papers

Catchwords: Native title – future act – application for determination for the grant of an exploration licence – s 39 criteria considered – effect on registered native title rights and interests – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – any other matters the Tribunal considered relevant – determination that the act may be done.

Legislation: *Native Title Act 1993* (Cth), ss 26, 28, 29, 30, 31, 35, 36, 36A, 38, 39, 56, 109(3), 151(2), 233, 238
 Aboriginal Heritage Act 1972 (WA)
 Mining Act 1978 (WA), s 66
 Mines Safety and Inspection Regulations 1995 (WA), reg 16

Cases:

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

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

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

Cheedy on behalf of the Yindjibarndi People v Western Australia (includes Corrigendum dated 6 July 2010) [2010] FCA 690 ('*Cheedy v Western Australia*')

Cheinmora v Striker Resources NL & Ors; Dann v State of Western Australia and Others [1996] FCA 1147; (1996) 142 ALR 21 ('*Cheinmora v Striker Resources NL*')

Daisy Lungunan & Others on behalf of the Nyikina & Mangala Native Title Claimants/Western Australia/AFMECO Mining and Exploration Pty Ltd [2011] NNTTA 137 ('*Lungunan v AFMECO*')

FMG Pilbara Pty Ltd; Flinders Mines Ltd/Western Australia/Wintawari Gurama Aboriginal Corporation [2009] NNTTA 69 ('*FMG Pilbara v Wintawari*')

FMG Pilbara Pty Ltd; Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 91 ('*FMG Pilbara v Cheedy 1*')

FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia [2011] NNTTA 107 ('*FMG Pilbara v Cheedy 2*')

Minister for Mines (WA) v Evans and Others (1998) 163 FLR 274; [1998] NNTTA 5 ('*Minister for Mines v Evans*')

Nicholas Cooke & Others on behalf of Innawonga People/Western Australia/Dioro Exploration NL [2008] NNTTA 108 ('*Cooke v Dioro Exploration*')

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

Watson on behalf of Nyikina & Mangala v Backreef Oil Pty Ltd [2013] FCA 1432 ('*Watson v Backreef Oil*')

Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6) (includes Corrigendum dated 1 July 2014) [2014] FCA 545 ('Watson v Western Australia')

Western Australia v Thomas and Others (1996) 133 FLR 124; [1996] NNTA 30 ('Waljen')

Western Desert Lands Aboriginal Corporation v Western Australia and Another (2009) 232 FLR 169; [2009] NNTA 49; (2009) 2 ARLR 214 ('Western Desert Lands Aboriginal Corporation v Western Australia')

Weld Range Metals Ltd/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji [2011] NNTA 172; (2011) 258 FLR 9 ('Weld Range Metals v Simpson')

White Mining (NSW) Pty Ltd/Franks/New South Wales [2011] NNTA 110 ('White Mining (NSW) v Franks')

Wilma Freddie & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Globe Uranium Ltd [2007] NNTA 37 ('Freddie v Globe Uranium')

WMC Resources v Evans (1999) 163 FLR 333 [1999] NNTA 372 ('WMC Resources v Evans')

Xstrata Coal Queensland Pty Ltd & Others/Mark Albury & Others on behalf of Karingbal #2; Brendan Wyman & Others on behalf of Bidjara People/Queensland [2012] NNTA 93 ('Xstrata Coal Queensland v Albury')

Representatives of the grantee party:	Mr Joe Potter, Areva Resources Australia Pty Ltd
Representatives of the native title party:	Ms Hayley Haas, KRED Enterprises Pty Ltd Mr Mark Ritter SC
Representatives of the Government party:	Mr Matthew Pudovskis, State Solicitor's Office Ms Faye Mitchell, Department of Mines and Petroleum

REASONS FOR DECISION

Background

1. On 4 November 2009, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of a future act, namely the grant of exploration licence E04/1940 ('the proposed licence') under the *Mining Act 1978* (WA) ('*Mining Act*') to AFMECO Mining and Exploration Pty Ltd, and included in the notice a statement that it considered that the grant attracted the expedited procedure (that is, one which can be done without the normal negotiations required by s 31 of the Act). On 20 August 2012, AFMECO Mining and Exploration Pty Ltd changed the name of the company to Areva Resources Australia Pty Ltd ('the grantee party').
2. According to the s 29 notice, the proposed licence comprises 326.44 square kilometres, located 20 kilometres south east of Derby in the Shire of Derby-West Kimberley.
3. At the conclusion of the s 29 notice period (4 March 2010), the Nyikina Mangala native title claim (WC1999/025 – registered from 28 September 1999) overlapped the proposed licence by 48.83 per cent (according to Tribunal geospatial analysis), and was on the Register of Native Title Claims ('RNTC').
4. The Nyikina Mangala claim remained on the RNTC until it was entered onto the National Native Title Register ('NNTR') on 18 June 2014, following a determination by the Federal Court of Australia on 29 May 2014: *Watson v Western Australia*. Tribunal overlap analysis indicates that the proposed licence now comprises 326.6525 square kilometres (a 48.54 per cent overlap with the Nyikina Mangala determined area), with the following post-determination composition:
 - *exclusive* native title exists in 3.32 per cent of the proposed licence (10.859 square kilometres);
 - *non-exclusive* native title exists in 41.53 per cent of the proposed licence (135.6501 square kilometres);

- native title *does not exist* in 3.69 per cent of the proposed licence (12.0665 square kilometres).
5. There is no longer any future act in relation to the area of the proposed licence where native title has been found not to exist: see s 233 of the Act. Therefore the Tribunal no longer has power to make a determination in relation to that 3.69 per cent portion of the proposed licence which previously overlapped with the Nyikina Mangala claim prior to determination.
 6. The Mawadjala Gadjidgar native title claim (WC2011/003 – registered from 23 June 2011) and the Warrwa #2 native title claim (WC2012/009 – registered from 9 November 2012) also overlap the proposed licence area. However, neither claim was lodged within three months following the notification day (that is, by 4 February 2010). Therefore, neither of the applicants for these claims are a ‘native title party’ in respect of these proceedings (see ss 29(2)(a) and (b) and s 30(1)(a) of the Act).
 7. To the extent the Nyikina Mangala determination overlaps the proposed licence area in portions where native title has been found to exist, the Walalakoo Aboriginal Corporation holds the determined native title in trust for the native title holders pursuant to s 56(2)(b) of the Act: *Watson v Western Australia*. The Walalakoo Aboriginal Corporation (‘the native title party’) is now the native title party in respect of these proceedings: see s 30(2) of the Act. (Note: for convenience, however, ‘the native title party’ is also used in the remainder of this decision to reference submissions filed by that entity prior to determination and entry onto the NNTR).
 8. On 4 March 2010, Daisy Lungunan and Others on behalf of the Nyikina Mangala claimants made an expedited procedure objection application to the Tribunal in respect of the proposed licence (designated Tribunal number WO2010/0305).
 9. On 20 July 2011, The Tribunal determined that the grant of the proposed licence was not an act attracting the expedited procedure (*Lungunan v AFMECO*).
 10. The matter subsequently proceeded under the right to negotiate provisions of the Act. Under those provisions (Part 2, Division 3, Subdivision P (ss 25-44)), unless one of the conditions found in s 28 is met, the grant of the proposed licence will be invalid to the extent that it affects native title.

11. A request for mediation assistance by the Tribunal under s 31(3) was made by the grantee party on 14 March 2012, and the matter was subsequently mediated by Member O'Dea (designated Tribunal number WM2012/0014). However, the mediation did not result in an agreement of the kind mentioned in s 31(1)(b) between the negotiation parties, and was discontinued on 8 May 2012.
12. On 5 September 2013, being a date more than six months after the s 29 notice was given, the grantee party made an application pursuant to s 35 of the Act for the Tribunal to make a future act 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 within six months of the Government party giving notice of its intention to do the act.
13. The proposed licence (other than the portion where native title does not exist), is a future act covered by s 26(1)(c)(i) of the Act and so, unless there is compliance with s 28, the act will be invalid to the extent that it affects native title. Section 28(1)(g) of the Act provides that such an act will be valid to the extent it affects native title if a determination is made under ss 36A or 38 that the act may be done, or may be done subject to conditions being complied with.
14. On 10 September 2013, President Webb appointed herself as Member to conduct the inquiry into the s 35 application, and on 25 September 2013 she accepted the future act determination application pursuant to ss 76 and 77 of the Act.
15. On 2 April 2014, President Webb appointed me to assume conduct of the inquiry.

Good faith negotiations – power to conduct inquiry

16. On 6 December 2013, the native title party advised that they would not challenge the Tribunal's power to make a determination on the basis that the grantee party or the Government party had not negotiated in good faith (ss 31(1)(b), 36(2) NTA). I therefore have power to conduct the present inquiry.

The Inquiry

Directions for the inquiry

17. President Webb issued directions on 14 October 2013 for the substantive inquiry. Pursuant to these directions, contentions from the Government party and grantee party were each filed on 22 November 2013.
18. On 17 December 2013, the Government party wrote to the Tribunal requesting an amendment to directions to allow for further documents in its Schedule of Documents to be lodged. After consultation with parties, President Webb varied directions on 18 December 2013 to permit the Government party to provide these documents on or before 24 December 2013. On 19 December 2013, the Government party filed these further documents with the Tribunal.
19. On 9 January 2014, the native title party sought an extension to their compliance date on the basis that ongoing law business had delayed obtaining instructions to finalise their contentions. On 10 January 2014, President Webb again amended directions to allow the native title party until 13 January 2014 to provide its contentions and the native title party filed their contentions and evidence on that date.
20. On 16 January 2014, President Webb granted leave for the native title party to provide a further affidavit in support of evidence already provided in their initial contentions by 20 January 2014. This affidavit was provided on 17 January 2014.
21. On 3 February 2014, in line with the amended directions of 10 January 2014, the grantee party and Government party provided contentions in reply to the native title party.
22. At a listing hearing held on 11 February 2014, the native title party sought leave to provide a further affidavit and a short supporting statement. The native title party stated that these contentions would not raise any new issues and would be clarificatory in nature only. The native title party stated that by providing these submissions in writing, they sought to avoid the need for the Tribunal to convene an oral hearing. Accordingly, President Webb granted the native title party leave to provide these documents by 18 February 2014, and these were filed on that date.

23. On 21 February 2014, both the grantee party and Government party raised objections to the native title party's contentions of 18 February 2014, on the basis that it raised new issues rather than merely clarifying existing issues, as per President Webb's direction. In subsequent correspondence with the Tribunal, it was confirmed that the Government party sought to file a reply on the basis of prejudice arising from the native title party's submission, while the grantee party did not seek to file a reply. On 6 March 2014, President Webb directed that the Government party could file a reply by 21 March 2014, and a reply was received on that date.
24. All parties agreed that the matter should proceed 'on the papers' pursuant to s 151(2) of the Act. President Webb was satisfied that the issues could be adequately determined on that basis, and the Tribunal informed parties that it would proceed to make a determination without a hearing.
25. As mentioned at [15], on 2 April 2014, President Webb appointed me as Member to undertake the determination into this matter. Upon review of the matter, I agreed that determination of the matter should proceed 'on the papers'.
26. On 1 May 2014, the Tribunal circulated a map prepared by the Tribunal's Geospatial Services to parties, advising that it would be relied upon for the purpose of the determination. On 9 May 2014, the native title party requested an amendment to the map. This amendment was subsequently made, and a further copy was distributed to parties. No further objections were received.

Government party contentions and evidence

27. The Government party provided the following contentions and documentary evidence:
 - Government party Contentions, dated 22 November 2013 ('GVP Contentions');
 - Government party documents, provided 22 November 2013 ('GVP Documents 1-9');
 - Additional Government party documents, provided 19 December 2013;
 - Government Party Reply to the native title party's Contentions, dated 3 February 2014 ('GVP Reply'); and

- Government party Further Reply to the native title party's Contentions, dated 21 March 2014 ('GVP Further Reply').

28. Government party documentation establishes that the underlying tenure of the proposed licence area includes:

- A wholly overlapping Exploration Permit Application (PA67-5/07-8 EP);
- An Indigenous Owned Lease (Mowanjum - 3114/1008) at 52.7 per cent;
- Historical Leases (396/414, 396/412 and 396/450) at 21.9 per cent, 27.2 per cent and 2.9 per cent respectively;
- A Pastoral Licence to Occupy (295/109) at 11.5 per cent;
- File Notation Areas (2884, 8670, 10939, 10982) at between less than 0.1 per cent and 22.8 per cent overlap;
- A Stopping Place for Travellers and Stock Water (CR1484) at 0.5 per cent;
- A Reserve for Harbour Purposes and Proposed Water Reserve at 2.7 per cent and less than 0.1 per cent respectively;
- A Common (CR1326) at 5.4 per cent;
- A Radio Station Site (CR41473) at less than 0.1 per cent;
- A Stock Route (CR12474) at 0.5 per cent;
- A Sand Quarry (CR46060) at less than 0.1 per cent;
- A Stock Route (CR12474) at 0.5 per cent;
- A Commonage, Travellers and Stock (CR1325) at 0.4 per cent;
- Four parcels of Vacant Crown Land, at between 0.1 per cent and 7 per cent;
- A General Lease and Pastoral Lease (Meda) at 3.9 per cent and 1.4 per cent respectively;
- Five parcels of Private Land, at between 0.1 per cent and 2.0 per cent;

- The Derby Townsite Boundary at 15.7 per cent; and
 - 20 parcels of Road Reserve, all at less than 0.1 per cent each.
29. The documentation also indicates the proposed licence has previously been subject to one temporary reserve granted in 1920 and cancelled in 1921 (which wholly overlapped the proposed licence), five temporary reserves granted between 1965 and 1979 and cancelled between 1966 and 1980 (which overlapped the proposed licence between 1.3 per cent and 99.8 per cent), an exploration licence granted in 1994 and forfeited in 1995 (which overlapped the proposed licence 0.7 per cent), a mineral claim granted in 1971 and surrendered in 1976 (which overlapped the proposed licence at less than 0.1 per cent), and a machinery lease granted in 1976 and forfeited in 1984 (which overlapped the proposed licence at less than 0.1 per cent).
30. I note and adopt Member Shurven’s finding in the expedited procedure decision concerning this proposed licence (*Lungunan v AFMECO*), that information from DMP shows previous exploration, mining and/or pastoral activities appears to have occurred predominantly outside of the proposed licence/claim area overlap, with some activity within the bottom south west portion of the proposed licence/claim area overlap: at [16].
31. An extract of the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs (‘DAA’) pursuant to the *Aboriginal Heritage Act 1972* (WA) (‘AHA’) provided by the Government party indicates that the following registered site is located within the proposed permit:
- Site ID 12393 – Kunumudj – open access – no gender restrictions – ceremonial, mythological.
32. The DIA extract also indicates that there are a further two ‘other heritage places’ recorded within the proposed licence, being:
- Site ID 14086 – Munkayarra Pool – open access – no gender restrictions – ceremonial;
 - Site ID 14617 – Mowanjum Mission – closed access – no gender restrictions – repository/cache, artefacts/scatter.

33. Tribunal mapping establishes that of these sites, Munkayarra Pool (ID 14086) is the only one within the overlap between the claim and the proposed licence.
34. Tribunal mapping indicates a number of sites approximately two to 15 kilometres north-west of the proposed licence boundary (Site ID: 1019, 1020, 12390, 12391, 12394, 14029, 17269, 17270, and 17272).
35. Tribunal mapping also indicates one Aboriginal community, Mowanjum, within the proposed licence, but this community is not within the portion of the native title determination proposed licence overlap.
36. The tengraph quick appraisal establishes that services affected by the proposed licence include: one 25 Geodetic Survey Stations, 28 major roads (including Derby Highway), eight minor roads, 37 tracks, eight causeway/bridges, one airfield runway, 27 buildings (including Boab Tree Prison, Birdwood Downs and Aboriginal Camp Sites), fence line, yards, four windmills, two well/bores, two well/bores with windmills, nine dams, three springs/soaks/waterholes, and transmission line.
37. The Government party states that it proposes to impose its Draft Conditions and Endorsements Extract on the grant of the proposed licence (GVP Contentions at paragraph 35, GVP Document 8, and extra document submitted on 19 December 2013 (which is the same version as GVP Document 8)). The Draft Extract includes the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia, which are:
 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.

38. The Government party also indicates that it will impose the following conditions on the proposed licence:

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, 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 excavation, excepting shafts, approaching closer to the Derby Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Derby Highway verge being confined to below a depth of 30 metres from the natural surface.
8. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Commonage and Travellers Stock Reserve 1325, Stopping Place for Travellers and Stock Reserve 1484, Radio Station Site Reserve 41473, Sand Quarry Reserve 46060 and Derby Townsite.
9. 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.
10. No interference with Geodetic Survey Stations DERBY 55-56, 74-81, 78A, DBY 71 and 117-120 and mining within 15 metres thereof being confined to a depth of 15 metres from the natural surface.
11. No interference with the transmission line or the installations in connection therewith, and the rights of ingress to and egress from the facility being at all times preserved to the owners thereof.

Consent to explore on Stock Route Reserve 12474 granted subject to:

12. No exploration activities being carried out on Stock Route Reserve 12474 which restrict the use of the reserve.
39. The Government party states that it will also impose the following endorsements on the proposed licence:
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 Environment Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.
 3. The land the subject of this licence may affect a heritage place located in the Derby Townsite, registered pursuant to the Heritage Act of WA 1990.
40. The GVP Contentions address each of the s 39 criteria, and are considered in the overall analysis further below, in addition to the GVP Reply and GVP Further Reply responses to the native title party.

Grantee party contentions and evidence

41. The grantee party provided the following contentions and documentary evidence:
- Statement of Contentions dated 22 November 2013 ('GP Contentions');
 - Annexures A-J to Statement of Contentions dated 22 November 2013;
 - Affidavit of Mr Ian John Potter affirmed 22 November 2013 (including Annexures 1-8) ('Potter Affidavit'); and
 - Grantee Party Reply to the Native Title Party's Contentions dated 3 February 2014 ('GP Reply')

GP Contentions

42. The grantee party's contentions are structured with reference to the s 39 criteria outlined in the Act, summarised as follows:

Existing non-native title interests in and uses of the land of the proposed licence (s 39(2) of the Act)

43. The grantee party states that there are currently 71 active exploration licences over the native title party's claim area, and another 37 applications pending. It states that whilst none of the previous mining and exploration over the claim area overlap the proposed licence area in this matter significantly, the large number of previous exploration licences granted in the claim area indicates the level of activity that has already been undertaken (GP Contentions paragraphs 4.2 - 4.3). It notes that the proposed licence area has been subject to previous petroleum exploration, and remains the subject of applications for petroleum exploration (GP Contentions paragraph 4.4). The grantee party also notes that in *Backreef Oil v JW (name withheld)*, the Tribunal approved the grant of petroleum exploration permit application 5/07-8 EP, which permit area includes the entire proposed licence area the subject of this inquiry (GP Contentions at paragraph 4.5).
44. The GP Contentions state that the proposed licence is one component of its broader program of uranium exploration in the area, which includes the granted exploration licences E04/1941, E04/1942 and E04/2050. Maps have been provided in the grantee party's Radiation Management Plan ('RMP') (Potter Affidavit, Annexure 5), and in Annexure H to the GP Contentions, which establish that the proposed licence E09/1940 is adjacent to these other granted exploration licences. Tribunal databases indicate the following regarding the other project exploration licences:
- E04/1941 was the subject of a determination by Member Shurven that the expedited procedure applies on 20 July 2011 (designated Tribunal number WO2010/1231);
 - E04/1942 was the subject of a determination by Member Shurven that the expedited procedure does not apply on 28 July 2011 (designated Tribunal number WO2010/1108);
 - the native title party's objection to the expedited procedure in relation to the grant of E04/2050 (designated Tribunal number WO2011/0250) was withdrawn on 17 May 2012, with no agreement reached as at the time of withdrawal.

45. The grantee party states that the project also includes E04/2144, which is the subject of 'ongoing negotiations' between the grantee party and the native title party (GP Contentions at paragraph 2.11).

Effect of the proposed licence on the enjoyment of the native title party's registered native title rights and interests (s 39(1)(a)(i) of the Act)

46. The grantee party submits that the grant of the proposed licence is unlikely to have an impact, or any significant impact, on any native title rights and interests taking into account the following (at paragraph 5.4 GP Contentions and Potter affidavit (at paragraphs indicated below)):

- a) The small portion of overlap between the proposed licence and the native title party's whole claim area (0.6 per cent);
- b) More than half of the proposed licence does not overlap with the claim area;
- c) The existing pastoral leases and other tenure within the proposed licence indicate that most of the overlap area is already used by other third parties;
- d) The nature of the grantee party's proposed activities:
 - i. the grantee party intends to use the proposed licence to explore for uranium deposits, with an exploration programme that consists of drilling widely-spaced, narrow diameter exploration holes to test the potential subsurface sedimentary layers. The diameter of the exploration drill holes would be approximately 25 centimetres, spaced five kilometres apart. The holes are almost exactly the same as water bore holes (and using a drilling rig that would otherwise be used for the drilling of water bores). The nature of the exploration target allows great flexibility around where the exploration holes can be located in the first few years of reconnaissance drilling (Potter Affidavit at paragraph 5);
 - ii. the first two to three years of the exploration programme may require limited construction of access tracks, and the clearing of small drill pads (flat areas of 25m x 25m) for the safe and level situation of drill rigs. Rehabilitation of drill sites will be completed in accordance with international best practice,

the grantee party's international certifications (ISO 14,001 and 18,001), as well as the rehabilitation conditions imposed by the State (Potter Affidavit at paragraph 6);

- iii. clearing will only be necessary for some drill holes for the 25m x 25m drill rig space, not the 50m buffer zone (Potter Affidavit at paragraph 20-21);
- iv. the planned exploration is part of a regional program targeting deep sediment-hosted mineralisation. Due to the geometry of the mineralisation, large areas can be tested by drilling only a few holes. The precise location of drill holes is not critical and as such the grantee party has the ability to relocate drill locations so as to avoid sensitive environmental and cultural heritage sites (Potter Affidavit at paragraph 24);
- v. with exploration success, the number of holes may increase to 20-50 holes in year two, 50-80 in year three, and 100-200 in years four to five (Potter Affidavit at paragraph 24);
- vi. exploration activities will be temporary and only a small amount of the proposed licence will be disturbed at any one time (Potter Affidavit at paragraph 25);
- vii. the grantee party only needs to restrict entry to the area in the immediate vicinity of a drill hole while drilling (limited to 25m x 25m square for drilling, plus a 50m buffer zone, for two to three days at a time) (Potter Affidavit at paragraph 25);
- viii. the grantee party will rehabilitate each drill site as soon as the works are completed for that drill site (Potter Affidavit at paragraph 26);
- ix. no lasting effects of exploration will result due to the nature of the low-impact exploration methodologies employed and rehabilitation practices and standards adopted that are consistent with world's best practice (Potter Affidavit at paragraph 26-33);
- x. the smaller area required to be cleared for each drill hole means that the grantee party will have a much greater ability to avoid areas of particular

significance to the native title party compared to the grantee party as raised in *Backreef Oil v JW (name withheld)*. The reduced time for drilling also allows the grantee party greater flexibility when drilling is conducted, enabling times of particular significance to the native title party (such as when ceremonies are to be conducted) to be avoided. In addition, there is significant flexibility as to the location of the grantee party's exploration holes compared to oil wells, and they are thus able to be moved to avoid culturally sensitive areas (Potter Affidavit at paragraph 42);

- e) statutory restrictions under the *Mining Act* will apply to the proposed licence and the activities authorised by it;
- f) in previous Tribunal decisions, it has been found that provisions of the *Mining Act* and the *Environmental Protection Act 1986* (WA) provide a legislative scheme to ensure that the grantee party meets its rehabilitation obligations and minimises its impact on the surrounding environment: *Waljen* (at [212]-[214] and *Re Koara People* (at [292]-[296], cited in *FMG Pilbara v Wintawari*, *FMG Pilbara v Cheedy 1* and *FMG Pilbara v Cheedy 2*).
- g) the grantee party is required to comply with the site protection requirements as prescribed in the AHA, and the grantee party has never been prosecuted for breach of the AHA nor found to be non-compliant with any other Australian cultural heritage legislation;
- h) the operation of the non-extinguishment principle (see s 238 of the Act) means that the grant of the proposed licence does not extinguish the native title rights and interests, and after the expiration of the proposed licence there will be no ongoing impacts.

Effect of the proposed licence on the native title party's way of life, culture and traditions (s 39(1)(a)(ii) of the Act)

- 47. The grantee party notes that it is required to develop and adhere to an RMP, which involves strict processes to be followed that will result in no ongoing effect to the native title party's way of life, culture and traditions (GP Contentions at paragraph 6.2).

48. The grantee party states that it will follow the Terms of Reference ('ToR'), outlined at Annexure 7 of the Potter Affidavit, to notify the native title party of planned activities and to work around cultural or social events planned, to mitigate any potential impact on the native title party (GP Contentions at paragraph 6.3). The ToR provides for a cultural heritage inspection by the native title party prior to any drilling activity by the grantee party, as well as heritage reporting and monitoring procedures.
49. The grantee party notes that it will only restrict access to small areas of the proposed licence for two to three days at a time in order to conduct drilling activities. It states that in *Backreef Oil v JW (name withheld)* (determination of Member Shurven concerning a petroleum permit application area which wholly contains the area of the proposed licence the subject of this inquiry), disturbance of 30 days to two months for each act (i.e. seismic surveys and drilling holes) over a large area of the claim was considered to only have a marginal impact on the native title party and did not support the conclusion that the act must not be done (GP Contentions at paragraph 6.4).

Effect of the proposed licence on the development of the native title party's social, cultural and economic structures (s 39(1)(a)(iii) of the Act)

50. The grantee party submits that the benefit to the local area, along with the opportunities in the ToR for participation in cultural surveys and other activities, means that the grant of the proposed licence will have some positive impact on the development of the native title party's social, cultural and economic structures (GP Contentions at paragraph 7.2).

Effect of the proposed licence on the native title party's freedom of access to the land including carrying out activities of cultural significance (s 39(1)(a)(iv) of the Act)

51. The grantee party states that the native title party's access to the proposed licence area is already impacted by other tenure and previous mining and exploration activity, and the grantee party's activities would not significantly increase or alter that impact. The grantee party notes that the Tribunal has previously accepted that the native title party's right to control access over the proposed licence area has been extinguished, or already significantly restrained (with the exception of some unallocated Crown Land and the Mowanjanum pastoral lease), citing *Backreef Oil v JW (name withheld)* at [62] (GP Contentions at paragraph 8.2).

52. The grantee party states that, to the extent that the native title party carries out activities of cultural significance on the proposed licence, the grantee party will not directly interfere or deny access to the area of overlap between the proposed licence and the claim (GP Contentions at paragraph 8.3). It also repeats its submissions regarding proposed drilling practices (outlined at [46(d)] above) (GP Contentions at paragraphs 8.4 and 8.5).

Effect of the proposed licence on any sites of particular significance to the native title party in accordance with their traditions (s 39(1)(a)(v) of the Act))

53. The grantee party notes that Site 12393 ('Kunumudji') is recorded on the DAA Register as being located on the proposed licence, but states that this is not actually situated within the claim area (GP Contentions at paragraph 9.1). It also notes that there are two 'Other Heritage Places' on the DAA Register search, being Site 14086 ('Munkayarra Pool') and Site 14617 ('Mowanjum'). However, it states that only Site 14086 is in the claim area, and notes that it is currently designated as an 'Other Heritage Place' due to insufficient information being held by DAA (GP Contentions at paragraph 9.2).
54. The grantee party states that in *Backreef Oil v JW (name withheld)*, the Tribunal considered evidence of various sites regarded as being of particular significance near E09/1940. It states that while the Tribunal was prepared to find that there are sites of significance within the claim area, these were unlikely to be within the area of the proposed licence in *Backreef Oil v JW (name withheld)* at [86] - [89]. The grantee party argues that since the proposed licence in this matter is wholly located within the *Backreef Oil v JW (name withheld)* permit area, the logical conclusion is that none of the sites of particular significance brought forward by the native title party in that determination are located within the claim/licence overlap area in this matter (GP Contentions at paragraph 9.4).
55. The grantee party acknowledges that there may be other sites of significance within the proposed licence that may be of particular significance to the native title party, and for this reason, state that they always wished to consult with the native title party regarding the exploration on the proposed licence with a view to reaching agreement on cultural heritage procedures (GP Contentions at paragraph 9.5).

56. In any event, the grantee party submits that the grant of the proposed licence is not likely to interfere with sites of particular significance to the native title party in accordance with their traditions because (GP Contentions at paragraph 9.6):
- a) The grantee party will follow its ToR for notifying and consulting with the native title party;
 - b) The grantee party has the ability to move planned or future drill holes so as not to impact on any areas of significance;
 - c) The grantee party has the ability to reschedule drilling activities so as not to interfere with any cultural events or ceremonies etc.;
 - d) The operation of the AHA and the relatively small footprint of planned exploration activities; and
 - e) The statutory restrictions under the *Mining Act* that will apply to the proposed licence.

The interest, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land (s 39(1)(b) of the Act)

57. The grantee party states that, subject to the adoption of the ToR proposed, there will be no impact upon the interests and proposals of the native title party (GP Contentions at paragraph 10.1).
58. The grantee party states that it has been informed that the native title party does not support uranium mining. However, it states that apart from stating that uranium exploration is the first step towards uranium mining, the native title party has not provided any information to the grantee party about why they do not support the grant of the proposed licence (GP Contentions at paragraph 10.2).
59. The grantee party states that it (as well as its parent company) are world leaders in uranium exploration and the operation and remediation of uranium mining operations. It notes that it is audited annually under its ISO Certifications and internal standards to ensure world's best practice (GP Contentions at paragraph 10.4). The grantee party submits that uranium exploration is as safe as, if not safer than, exploration for other

minerals (GP Contentions at paragraph 10.4 and Potter Affidavit at paragraphs 34-36 and 43).

60. The grantee party states that concerns regarding possible future mining are not within the scope of this determination (GP Contentions at paragraph 10.5) and that uranium exploration is not always the first step to uranium mining as exploration programs often rule out areas within exploration tenements (GP Contentions at paragraph 10.6).
61. The grantee party reiterates that it is able to relocate planned drill holes where required to avoid places and sites of significance (as outlined at [46(d)] above) (GP Contentions at 10.7).
62. The grantee party notes that it is willing to enter a Heritage Agreement with the native title party on reasonable terms, but in lieu of such an agreement has proposed the ToR to ensure that any effects on cultural heritage are minimised (GP Contentions at paragraph 10.8).

Economic or other significance of the grant of the proposed licence (s 39(1)(c) of the Act)

63. The grantee party submits that the grant of the proposed licence will improve the State's knowledge of the nature and extent of mineral deposits in Western Australia, and may lead to future development (GP Contentions at paragraph 11.2).
64. The grantee party states that it has committed to spending two to five million dollars over the next three years as part of its exploration program across the various project tenements (GP Contentions at paragraph 11.3 and Potter Affidavit at paragraphs 11-13). The grantee party notes that, as recognised in *Backreef Oil v JW (name withheld)*, exploration provides a benefit to the State in potentially attracting further investment in the area. It notes that State benefits from future mineral development and mining include royalties to the State for social and economic benefit, employment outcomes for the local community and a contribution to carbon free energy solutions (GP Contentions at paragraph 11.4).
65. The grantee party notes that the Chamber of Minerals and Energy, Western Australia, outlines that the resource sector is the most significant contributor to the Kimberley region's economy (GP Contentions at paragraph 11.5). It further submits that the

grant of the proposed licence may also have a direct economic benefit to the Aboriginal community through the employment of individuals, and notes that it employed a local Aboriginal individual as a technician for operations on two of the adjacent tenements (GP Contentions at paragraph 11.6).

Public interest in the grant of the tenement (s 39(1)(e) of the Act))

66. The grantee party submits that the grant of the proposed licence is in the public interest, citing the Tribunal's findings, for example, in *Waljen* at [215] - [216] (GP Contentions at paragraphs 12.1-12.2). It states that, in the long term, the grant of the proposed licence will contribute to the development and maintenance of a vibrant mining industry, will assist in expanding the knowledge of the mineral deposits in the area, and attract investment in infrastructure to the area. It also notes short-term benefits in the public interest, through upgrades to access tracks and roads by the grantee party in the proposed licence area, and direct support to the town of Derby and nearby areas (GP Contentions at paragraph 12.3).

Potter Affidavit and Annexures

67. Significant portions of the Potter Affidavit are already referenced above in the context of the GP Contentions regarding the s 39 NTA criteria. I note the Potter Affidavit and Potter Affidavit Annexure 1 (Proposed Exploration Programme) also provide the following further information regarding the grantee party's proposed works:
 - a) The exploration programme in the first year of the licence is intended to generate preliminary targets for more detailed drill-testing. The initial program would most likely comprise data compilation and interpretation, geological reconnaissance/mapping and reconnaissance drilling, typically using existing tracks where possible (at 1.3.1 Potter Affidavit Annexure 1);
 - b) The main exploration will be to drill-test preliminary targets, and drilling in close proximity to communities or places of significance is not contemplated. Furthermore, drilling is intended to proceed in consultation with local communities and any site custodians (at 1.3.1 Potter Affidavit Annexure 1);
 - c) Reconnaissance/follow-up drilling will be undertaken in several campaign areas targeted during initial research. These programs would involve one to two months

of field-based activities and involve teams of four to 10 persons using two to three 4WD vehicles, a drilling rig, support truck, including a water truck (at 1.3.1 Potter Affidavit Annexure 1);

- d) All exploration (uranium and other minerals) will be undertaken in conjunction with the grantee party's RMP that was approved by the DMP on 3 October 2013 for two of the grantee party's adjacent exploration licences – E04/1941 and E04/1942 (at 1.3.1 Potter Affidavit Annexure 1);
- e) All earth-disturbing exploration activity will be undertaken in compliance with State and Commonwealth environmental and heritage legislation and any native title heritage agreement reached with the Traditional Owners or site custodians for the area (1.3.1 Potter Affidavit Annexure 1);
- f) As part of routine exploration drilling, downhole geophysical logging will be conducted at the completion of every drillhole, and the main tool to be operated will be a gamma probe (1.3.2 Potter Affidavit Annexure 1);
- g) Any diamond drilling will be routinely photographed and geologically logged on-site prior to sampling for geochemical assaying and other testing in either Perth or Adelaide. All samples of radioactive material will be packaged and transported in accordance with all appropriate Acts and Regulations (1.3.3 Potter Affidavit Annexure 1);
- h) Greatest efficiency will be achieved by utilising existing infrastructure and accommodation in Derby, however, should suitable accommodation not be available, a temporary camp will be established within the project area (1.3.5 Potter Affidavit Annexure 1); and
- i) The proposed drilling programmes will occur during 'dry' seasons during each year of tenure. Depending on the amount of drilling to be performed, the programme is estimated to take two and a half to six months to complete and will ideally commence in May each year (1.3.6 Potter Affidavit Annexure 1).

68. The Potter Affidavit also annexes photographs of typical drilling operations to be used on the proposed licence, photographs of land rehabilitated by the grantee party, the grantee party's environmental management policy, information about radiation

safety in a document entitled ‘Understanding Uranium Exploration, Mining and Processing’, its RMP dated 2 October 2013, and the proposed ToR.

Native title party contentions and evidence

69. The native title party provided the following contentions and documentary evidence:
- Statement of Contentions dated 13 January 2014 (‘NTP Contentions’);
 - Affidavits of Ms Rona Anne Charles (‘Charles Affidavit’), Mr Ernest Nulgit (‘Nulgit Affidavit’) and Mr Jason Anthony Russ (‘Russ Affidavit’), each affirmed on 9 January 2014;
 - Heritage Survey Report by Ms Melissa Marshall, Consultant Anthropologist, dated December 2013 (Heritage Survey Report) and affidavit of Ms Marshall affirmed 16 January 2014 (‘Marshall Affidavit’);
 - Reply to the grantee and Government parties’ Contentions dated 18 February 2014 (‘NTP Reply’);
 - Affidavit of Mr Jason Anthony Russ (‘Russ Affidavit (2)’) affirmed 14 February 2014.

NTP Contentions

70. The native title party submits that they seek a determination from the Tribunal that the future act must not be done (NTP Contentions at paragraph 71).
71. The native title party state that to the extent that the grantee party seeks to urge the Tribunal to make findings based on the earlier decision in *Backreef Oil v JW (name withheld)*, evidence and information presented by the Nyikina and Mangala People in this matter is very different from *Backreef Oil v JW (name withheld)*. Additionally, it argues that the application for a determination in *Backreef Oil v JW (name withheld)* was for a different licence, and was seeking to exploit different natural resources (NTP Contentions at 19-20).

72. The native title party states that its opposition to uranium mining within the area of their registered claim is relevant and the Tribunal must have regard to it (NTP Contentions at paragraph 25).

73. The native title party has submitted three affidavits, which are summarised below:

Charles Affidavit

74. Ms Charles' affidavit states that:

- a) she is a named applicant in the Nyikina Mangala claim and has been nominated by the Nyikina Mangala people to speak for the country covered by the proposed licence because of her connection with the area (at paragraphs 6-7);
- b) she lived at the old Mowanjum Community from age two to age 12, and lived at the new Mowanjum Community until 2009, when she moved to Mt Barnet and then Pandanus Park in 2011 (at paragraphs 8-10);
- c) she has a long connection with the proposed licence area from visiting there in her childhood (at paragraphs 11 and 14);
- d) she currently goes to the proposed licence area, 'almost every week' 'to hunt with [her] family and to practice [her] culture and to teach [their] culture to the young children from Pandanus and Mowanjum communities' (at paragraph 12);
- e) every year, twice a year (once in April and once in July), she is involved in taking about 15 local kids to Munkajarra to teach them cultural practices – 'ceremony, dance, songs, hunting' – with activities spanning all over the proposed licence area to the east of the Derby Highway (at paragraph 16). Each year she is also involved in taking about 20 kids to Munkajarra from Mowanjum. She states that it's 'a very important time for them, especially some who have a lot of problems at home to live with. They come to us and learn about who they are, where they come from, their old people and the old ways. They really get a lot out of out trips to the tenement area' (at paragraph 17);
- f) She goes to Munkajarra with Mr Nulgitt, three 'old ladies' and three 'senior men' to 'teach the kids ceremony and dance and the cultural way' (at paragraph 19). She notes that these senior men are very knowledgeable – they can speak to the

Ngarinyin kids in the Ngarinyin language and the Nyikina kids in the Nyikina language (at paragraphs 19-21);

- g) the native title party use the paperbark trees in the proposed licence area around Munkajarra for ceremony, for example, making head-pieces for kids to wear for some corroborees (at paragraph 23);
- h) in September 2013, a group of about 20 kids came from Munkajarra from Pandanus and Mowanjum to learn how to use cameras to record the cultural traditions that the senior people were teaching (at paragraph 27);
- i) the native title party spend most of the school holidays out on the proposed licence area – hunting and collecting bush tucker – using Munkajarra as a base (at paragraph 28);
- j) the native title party has a very good relationship with Mr Jason Russ, the station manager, and they do not need to ask his permission to go on to the Mowanjum-held station lease (at paragraph 29);
- k) there is an old boab tree at waypoint 110, with engravings of kangaroo paw and snake ‘which are marked to show the good hunting [in the proposed licence area] for those animals’ (at paragraph 30);
- l) the native title party hunt kangaroo, and teach the kids how to cook what they catch in the traditional way (at 31). In a good wet season when there are good tides, the native title party members catch barramundi around Munkajarra and pass on the Nyikina story about how the barramundi got to Munkajarra ‘by coming from the clouds’ (at paragraphs 32-33);
- m) the native title party have a tradition of rubbing clay from the ant pit onto the skin of people grieving after somebody dies – applying it every day from the death of the person until the funeral (at paragraph 34);
- n) the native title party also hunt goanna using the ant pits because the goannas live there (at paragraph 36);

- o) the proposed licence area has a lot of water places such as an underground spring called *Wynjarranbul*, which is why it is used so much for hunting and teaching (at paragraph 37);
- p) there is a story attached to the big old *Larrkarrdiy* (boab) tree and there is a ritual done at the tree that can harm a person as a punishment (at paragraph 38);
- q) there are mental health problems affecting youth in the Mowanjum and Pandanus communities, and the proposed licence area is important to ‘show young people their identity’ (at paragraphs 39-45); and
- r) in regard to uranium mining, Ms Charles deposes that the native title party’s view of the environmental risks that are linked with uranium mining are unacceptable. She states that the native title party’s view is that any exploration for uranium is the first step towards mining of uranium, and this is a step they cannot take ‘because of the risk that something could go wrong’ (at 46). She states that the Fitzroy River is their life source and it only takes ‘one bad step, one mistake for it to be ruined for all of us and our future generations’ (at 47). She states that the grant of the proposed licence ‘will stop people from feeling the peace and calm that this area provides us. We will want to avoid places that the mining company goes – we will be restricted in where we go and hunt and camp and practice ceremony in a place where we have never been restricted before’ (at paragraph 53).

Nulgit Affidavit

75. Mr Nulgit’s affidavit states that:

- a) he is a Ngarinyin man (at paragraph 3);
- b) about 250 people live at the Mowanjum community, which is made up of about 15 families, including Nyikina, Ngarinyin, Worrorra and Wanambal people (at paragraph 13);
- c) Mowanjum has had a lot of problems with lack of prospects for youth and youth suicide (at paragraphs 15-21);

- d) there have been efforts made to combat the problems that may lead to suicide and the use of Mowanjum pastoral lease land as part of those efforts, for example through working as station hands (at paragraphs 22-30);
- e) apart from the jobs on the pastoral lease, he takes kids hunting and camping as often as he can, which is usually on the weekend and during the week in school holiday time (at 34). He recalls how in August 2013 he took three kids to Mowanjum and caught eight goannas to take back to the community (at paragraph 35);
- f) every year, two or three times a year, the native title party take a group of kids to Munkajarra and teach them traditional songs and dances for ceremony in preparation for a festival held in July each year (at paragraphs 40-42); and
- g) in regard to uranium mining, he notes the native title party's opposition and states that 'they will not want to be around it' (at 44). He states that '[w]e can see kids who really are different and feel different from having this land to learn from us the way of the station hand and the traditional culture – the way of our old people. We do not want anything to get in the way of what we are doing now and what we plan to do down the track' (at paragraph 45).

Russ Affidavit

76. Mr Russ' affidavit states that:

- a) he is employed as the station manager by the Mowanjum Aboriginal Corporation, a position he has held for three years (at paragraphs 2 and 4). Since starting as the station manager, he has overseen putting in paddocks, some bores and cattle yards so as to get the lease up and running as a cattle station and to provide job opportunities for people in the Mowanjum and Pandanus communities (at paragraph 10);
- b) through the Mowanjum pastoral lease, 'at-risk' kids have the opportunity to 'do something with their lives' (at paragraph 16);
- c) there are currently five full time station hands working at Mowanjum, but there is still half the property to be developed so more job opportunities will arise for the

local people. The half of the Mowanjum lease that has been developed, and the area that he is involved in taking kids to, falls over the southern half of the proposed licence area (at paragraph 18);

- d) this year they are planning to do some training with the kids to teach them how to ride horses and have skills to work on a pastoral property (at paragraph 19);
- e) there are '30 or 40 kids from the local communities that would have already come through the training system that we have at Mowanjum Station' (at paragraph 21);
- f) the Western Australian government has approached the Mowanjum Aboriginal Corporation about setting up a farming project on Mowanjum on the northern portion of the proposed licence area involving cropping and growing hay in the north of the pastoral station, which will be used to provide for other Aboriginal held pastoral leases up the Gibb River road (at paragraphs 22-24); and
- g) the level of community involvement in the Mowanjum station is high, and 'the negativity associated with uranium mining and exploration will have a big impact on the minds and attitudes of the local communities towards this land. It will be a very unwelcome interference to something that is currently providing so much benefit to the community' (at paragraph 27).

Heritage Survey Report

- 77. The native title party provides a Heritage Survey Report by Ms Melissa Marshall, consultant archaeologist, prepared in consultation with a heritage survey team made up of representatives of the native title party. The Heritage Survey Report states that field inspections occurred on 14 and 15 November 2013, and the survey team covered approximately 80 per cent of the claim/proposed licence area, with the remaining 20 per cent not being surveyed due to time limitations.
- 78. The Heritage Survey Report notes that there is one registered site, 'Kunumudj', recorded on the DAA Register. It states that this site is in close proximity to the DAA listed Prison Boab Tree on the Derby Commonage, and the survey team noted the route they traditionally took to Kunumudji - walking on the western side of the Derby highway through Munkayarra Pool to a dinner camp, where family members would

wait behind while others travelled in front to the ceremonial site of Kunumudji (at paragraph 5.1.1)

79. The Heritage Survey Report also notes the existence of 42 other sites and landscape features identified during the survey, including bush tucker/medicine places, culturally-modified/scarred trees, camping places, hunting grounds and artefact places. The Heritage Survey Report includes the following description of these sites:

- ‘Ringo bore’ – a historical place; ceremonial place; fresh water source. It is a traditional camping and trade place for travellers from Munkayarra and Old Mowanjam community moving through the area for ceremony and law business. There is ethnographic evidence of ongoing hunting of bush turkey, goanna, black-headed python, ducks and brolga in the area. There is also ethnographic evidence of the use of the area through the wet season for collection of boab nut for carving (at paragraph 4.1.1). (The NTP Reply notes that Ringo Bore is used in the wet season for the collection of boab nuts for carving, but that the remainder of the uses of Ringo Bore (hunting) is not limited to the wet season: at paragraph 24)
- ‘Munkayarra’ – a ceremonial place; mythological place; camping and hunting area. It is an historical and current location of traditional Nyikina Mangala and Ngarinyin ceremony and ceremonial teaching grounds. There is ethnographic evidence of bush tucker, including black duck, paperbark tree, cork tree, round fruit and barramundi (at paragraph 4.1.10). The NTP Reply notes that Munkajarra is a Nyikina Mangala and Ngarinyin ceremonial place and ceremonial teaching ground and is used annually in April and July (part of the dry season), and as a hunting ground and bush medicine place throughout the year: at paragraph 24)
- ‘Pindan Dam’ – historical place, fresh water place, camping place. This is a fresh underground water source that is important to Traditional Owners (at paragraph 4.1.22)
- ‘Bluebush’ – historical place, camping place, hunting place. This is the largest billabong/wetland recording in the survey. There is ethnographic evidence of seasonal hunting that is currently practiced in the area for goanna, black duck and kangaroo. It is also an area used as a hunting teaching ground for Nyikina Mangala and Ngarinyin children, and there is a large concentration of paperbark

trees present, which is a common source of bush honey/ sugarbag (at paragraph 4.1.37).

GP Reply

80. The grantee party states that the native title party has not provided evidence to demonstrate that the exploration activities of the grantee party will affect their ability to exercise their native title rights, or how the fact that those exploration activities target uranium means they will have any additional impact on the exercise of native title rights over and above other exploration activities (GP Reply at paragraph 4).
81. The grantee party states that it has not been explained in Ms Charles' affidavit how access to the Mowanjum station will be interfered with (GP Reply at paragraph 9). In regard to Mr Russ' affidavit, the grantee party states that to the extent that it details plans to use the proposed licence area as a cattle depot at times of the year 'due to the weather in the Kimberley' (and to the extent that this refers to the wet season, being the most likely time of the year where transportation of cattle is difficult), the grantee party notes that its drilling and rehabilitation program is to be undertaken in the dry season so will not impact on these plans (GP Reply at paragraph 11). Furthermore, the grantee party states that exploration activities, due to their nature, will have a negligible effect on the ability to use the land for cattle or farming purposes. In particular, the grantee party notes that Mr Russ' affidavit does not indicate any form of physical impediment to the use of Mowanjum station, 'and nor should there be' (GP Reply at paragraph 11).
82. The grantee party states that Mr Nulgit's affidavit deposes to taking children out on the Mowanjum pastoral lease most days, but does not specify whether this is in the area of the proposed licence. It furthermore submits that Mr Russ' affidavit indicates that the operational part of the station does not overlap with the proposed licence (GP Reply at paragraph 12). In regard to Mr Nulgit's reference to taking kids hunting and camping on the weekend and during school holiday time, the grantee party states that there is no evidence of exactly how the grantee party's activities would physically interfere with these activities. In particular, the grantee party notes that Mr Nulgit's affidavit simply alleges that the grantee party will 'get in the way' and that the area will not stay 'peaceful' if the grantee party is exploring for uranium (GP Reply at paragraph 12).

83. The grantee party submits that a number of sites referred to in the NTP Contentions are outside the proposed licence, in particular: the Fitzroy River, Nobby's Well, Yamarrirri, Kunmudj, Mowanjum Mission and other sites identified in the Heritage Report (NTP Reply at paragraph 20). It also states that, in any event, the particular significance of Nobby's Well and Kunmudj are not explained in the affidavits (NTP Reply at paragraph 28). In regard to Ringo Bore, it states that no evidence of the particular significance of this site has been provided in either the native title party's affidavit evidence or the Heritage Report (NTP Reply at paragraph 29).
84. The GP Reply notes various distinguishing features of the current matter from *Weld Range Metals v Simpson* and *Western Desert Lands Aboriginal Corporation v Western Australia*, cited in the NTP Contentions, which were Tribunal decisions that the future act could not be done. For example, in *Weld Range Metals v Simpson*:
- a) the grantee party was seeking the grant of four mining leases, in which it proposed to mine chromium and nickel ore in an open cut mine;
 - b) there was significant evidence before the Tribunal of the particular significance of the Weld Range, including that:
 - i. the native title party provided evidence referring to the area as the most important area in Wajarri country, including sacred sites, caves, Wilgie Mia and song lines, and that since 2005 it has had a different standard agreement for the area due to its significance;
 - ii. the DAA evidence was that 225 sites were listed and 18 survey reports exist in relation to the area;
 - iii. the National Heritage Listing report and the Napier Report traced Wilgie Mia history as a gazette Reserve since 1917 and as having protection under the AHA since 1974; and
 - c) the proposed mining operations could not take place in a way that would avoid the significant area or some of the specific sites within it.
85. In *Western Desert Lands Aboriginal Corporation v Western Australia*, the grantee party raises the following distinguishing features:

- a) the native title party was the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu), who was the registered native title body corporate of the Martu People and held exclusive possession of their determined area in the Gibson Desert;
 - b) the area of the proposed mining lease in that matter overlapped partly with the determination area, and 100 per cent with Lake Disappointment, which was a site registered under the AHA as a ceremonial site with closed access over 3,758 square kilometres (although I note this is incorrect – the overlap with Lake Disappointment between the proposed licence and determined area was 86.6 per cent);
 - c) the grantee party proposed to construct a brine collection trench in Lake Disappointment for the mining of potash. The project facilities would affect about 25 square kilometres and the project's lifespan was 40 to 50 years; and
 - d) there was no way that the grantee party could comply with the AHA by planning its operations in a way that avoids the site.
86. The other submissions made in the GP Reply largely restate matters raised in its original Contentions, which I have taken into account.

NTP Reply

87. The NTP Reply addresses specific aspects of the GP Contentions and GVP Contentions. Some of these are noted at [79] above. Other points are noted in the following summary, to the extent relevant to explain my assessment of the evidence.
88. The native title party notes that while the grant of an exploration licence is not an authorisation to undertake uranium mining, the Tribunal needs to take account of the extent of the activities that may be undertaken by the grantee of an exploration licence, including the right to 'excavate, extract or remove ... fluid or mineral bearing substances' under s 66 of the *Mining Act*, to the extent permitted by that Act, the Mining Regulations and any Ministerial authority (NTP Reply at paragraph 5).
89. The native title party takes issue with the grantee party's assertion that there is no evidence that their activities will affect the ability of the native title party to exercise

their native title rights. The native title party claim that this is incorrect, ‘given the evidence in the affidavit of Ms Rona Charles as to the psychological impact of the uranium exploration program that is intended by Areva over revered areas for the Nyikina and Mangala People’ (NTP Reply at paragraph 9).

90. The native title party states that the environmental risks associated with the targeting of uranium – ‘even if they are only perceived risks’ – means that the proposed mitigation measures are of no comfort to the native title party. They argue that the existence of the risk alone will have an impact on the ‘state of mind, well-being and activities’ of the native title party (NTP Reply at paragraphs 10 and 18).
91. In response to the grantee party’s assertion that the operational area of Mowanjum Station does not overlap with the proposed licence area, the NTP Reply states that this is incorrect, and this is further addressed by Mr Russ in his second affidavit (outlined below). The native title party also notes that Mr Nulgit’s affidavit ‘refers to the building of fences, cattle drafting in the yards and horses for mustering and teaching horse riding to at-risk youths – all of which is in the tenement area and the native title claim area’ (NTP Reply at paragraphs 15-16).
92. In response to the grantee party’s assertion that there will be no restriction of the use of the claim/licence overlap area for hunting and camping, the native title party states that this ignores the evidence of Ms Charles that the native title party will ‘want to avoid the places the mining company goes’ (NTP Reply at paragraph 17).

Russ Affidavit (2)

93. In Mr Russ’ affidavit of February 2014, he provides clarification of his evidence provided in his January affidavit, by affirming that ‘the current operational area of the Mowanjum pastoral station is overlapped by the southern half of the land the subject of the mining company’s tenement application E04/1940 and this is the area that we take the young kids out to learn skills on the station’ (at paragraph 5).

Statutory interpretation in relation to future act determinations

94. I rely on the principles enunciated in the following Tribunal future act determinations:

- *Waljen*;
- *WMC Resources v Evans*;
- *Western Desert Lands Aboriginal Corporation v Western Australia*; and
- *Cheedy v Western Australia*.

95. Section 38 of the Act sets out the types of determinations that can be made and which relevantly are:

38 Kinds of arbitral body determinations

- (1) Except where section 37 applies, the arbitral body must make one of the following determinations:
 - (a) a determination that the act must not be done;
 - (b) a determination that the act may be done;
 - (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

Determinations may cover other matters

...

Profitsharing conditions not to be determined

- (2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:
 - (a) the amount of profits made; or
 - (b) any income derived; or
 - (c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

96. Central to the scheme by which the Tribunal makes a determination about whether the future act may be done, with or without conditions, or must not be done, are the requirements of s 39 of the Act. Subsections (1) and (2) of that section provide:

39 Criteria for making arbitral body determinations

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

97. The Tribunal's task involves weighing the various criteria in s 39 by giving proper consideration to them on the basis of evidence. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue exploration and mining, and the interests of the Aboriginal and Torres Strait Islander people concerned. The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. The Tribunal is required to take into account diverse and sometimes conflicting interests in coming to its determination. The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence (see *Waljen* at 165–166; *Western Desert Lands Aboriginal Corporation v Western Australia* at 37). The Tribunal undertakes the task set by s 39 by considering 'each of the criteria ... individually' in light of the evidence and the submissions made by each party to the inquiry in relation to that criterion, and then engages in a 'weighing process' before making its determination: *Watson v Backreef Oil* at [27]–[28] per Siopis J.
98. The Tribunal is not bound by the rules of evidence (s 109(3) NTA) and adopts a commonsense approach to evidence.

Findings on the Section 39 criteria

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

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

100. Where there has been a determination that native title exists over an area the subject of a proposed future act, the Tribunal must assume that the native title rights and interests which potentially could be affected by the proposed future act are those set

out in the NNTR, and then consider evidence of the likely effects of the future act on those registered native title rights and interests.

101. The native title party's registered native title rights and interests according to the NNTR are:

Exclusive native title rights and interests

(...)

- (5) Subject to paragraphs 7, 8 and 9 the nature of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Three, being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded, are:
- (a) except in relation to flowing and underground waters, the right to possession, occupation, use and enjoyment of that part of the Determination Area to the exclusion of all others; and
 - (b) in relation to flowing and underground waters, the right to use and enjoy the flowing and underground waters, including:
 - (i) the right to hunt on, fish from, take, use, share and exchange the natural resources of the flowing and underground waters for personal, domestic, cultural or non-commercial purposes;
 - (ii) the right to take, use, share and exchange the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes.

Non-exclusive rights and interests

- (6) Subject to paragraphs 7, 8 and 9, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Four, being areas where there has been a partial extinguishment of native title and where any extinguishment is not required to be disregarded, are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:
- (a) the right to access and move freely through and within each part of the Determination Area referred to in Schedule Four;
 - (b) the right to live, being to enter and remain on, camp and erect shelters and other structures for those purposes on the Determination Area referred to in Schedule Four;
 - (c) the right to:
 - (i) hunt, gather and fish for personal, domestic, cultural and non-commercial communal purposes;

- (ii) take and use flora and fauna for personal, domestic, cultural and non-commercial communal purposes;
 - (iii) take, use, share and exchange the natural resources of each part of the Determination Area referred to in Schedule Four, including soil, sand, clay, gravel, ochre, timber, charcoal, resin and stone for personal, domestic, cultural and non-commercial communal purposes;
 - (iv) engage in cultural activities in the area, including the transmission of cultural heritage knowledge;
 - (v) conduct and participate in ceremonies;
 - (vi) hold meetings; and
 - (vii) visit, maintain and protect from physical harm, areas, places and sites of importance in each part of the Determination Area referred to in Schedule Four.
- (7) The native title rights and interests referred to in paragraph 5(b) and 6 do not confer:
- (a) possession, occupation, use and enjoyment of those parts of the Determination Area on the Native Title Holders to the exclusion of all others; nor
 - (b) a right to control the access of others to the land or waters of those parts of the Determination Area.
- (8) Notwithstanding anything in this Determination there are no native title rights and interests in the Determination Area or in relation to:
- (a) minerals as defined in the Mining Act 1904 (WA) (repealed) and the Mining Act 1978 (WA); or
 - (b) petroleum as defined in the Petroleum Act 1936 (WA) (repealed) and the *Petroleum and Geothermal Energy Resources Act 1967* (WA);
 - (c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA); or
 - (d) water lawfully captured by the holders of Other Interests,

Except the right to take and use ochre to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA).

- (9) Native title rights and interests are subject to and exercisable in accordance with:
- (a) the laws of the State and the Commonwealth, including the common law; and
 - (b) the traditional laws and customs of the Native Title Holders for personal, domestic, cultural and non-commercial communal purposes (including social, religious, spiritual and ceremonial purposes).

102. As noted above at [4], there has been a determination that non-exclusive native title exists in 41.53 per cent of the proposed licence, and exclusive native title exists in 3.32 per cent of the proposed licence.
103. The Tribunal must make an assessment of the effect of the act on present usage and future amenity, and not previous activities: *WMC Resources v Evans* at [30]; *White Mining (NSW) v Franks* at [41].
104. The native title party contentions state that the potential effects of the grant of the proposed licence on the criteria in s 39(1)(a)(i) of the Act can be gleaned from the affidavits of Ms Charles, Mr Nuglit and Mr Russ, as well as from the Heritage Survey Report (NTP contentions at paragraph 32). This information is summarised above at [74] to [76]. All the native title party's deponents indicate current use and enjoyment of the proposed licence area to varying extents. From this evidence, I accept that the following rights and interests are exercised on the proposed licence area:
- Ms Charles goes to the proposed licence area almost every week with her family to undertake activities including hunting and teaching Nyikina Mangala culture to the children from Pandanus and Mowanjum communities. She says that the NTP spends most of the school holidays out on the tenement area, hunting and collecting bush tucker;
 - Ms Charles, Mr Nulgit and others take about 15 children from Pandanus and 20 children from Mowanjum twice a year, every year, for about a week each time, to teach them about Nyikina Mangala culture. This involves use of local flora and fauna and passing down stories from the 'old people' (I also note evidence that an event occurred in September 2013 in Munkajarra when about 20 children from Pandanus and Mowanjum travelled to Munkajarra to learn how to use cameras and record the cultural traditions that the senior people were teaching.);
 - Ms Charles also deposes to various other activities carried out by the native title party related to use of local flora and fauna. For example, she notes kangaroo hunting activities in the east of the proposed licence area, fishing activities during the wet season, and goanna. She also notes the use of clay from ant pits

made into a paste and applied on to people grieving every day from the death of a person until the funeral;

- Mr Nulgit works on the Mowanjum station and is involved in taking children from the Mowanjum community hunting and camping on the proposed licence area as often as he can, usually on the weekend and during the week in school holiday time ; and
- There are currently five full time station hands working on the Mowanjum station, and 'at-risk' youth are taken there to help out with various tasks. In the Russ Affidavit (2), Mr Russ clarifies that there is an overlap between the operational part of the Mowanjum pastoral lease and the claim/licence overlap area (see [93] above).

105. I note that the grantee party has raised concerns about the appositeness of the NTP deponents. In particular, the GP Reply states that Mr Russ does not provide evidence as to the nature of his relationship to the native title party's claim, does not purport to have any specialist training in regard to cultural heritage, nor purport to be a member of the claim group (NTP Reply at paragraph 55). In regard to Mr Nulgit, the GP Reply notes that he is a Ngarinyin man, and submits that it is not clear whether he is a member of the claim group, nor does he indicate whether he has any specialist training with regard to cultural heritage (GP Reply at paragraph 55). I note these concerns but also note that Mr Nulgit is a leader in the Mowanjum community and that there is evidence of the shared traditions of the Pandanus and Mowanjum communities in his affidavit. Ms Charles also provides evidence of the Ngarinyin and Nyikina Mangala peoples' shared ceremonial dance and song culture and activities (NTP Reply at 23). Furthermore, it appears from the fact that the native title party has submitted these affidavits in this inquiry that the deponents are authorised to speak for the native title party.

106. In regard to the substance of the deponents' evidence, I accept that this establishes the native title party uses and enjoys resources of the proposed licence area on a regular basis, and that it forms an important part of the native title party's community activities, particularly the Mowanjum festival and work opportunities on the Mowanjum station.

107. To the extent that there are non-specific references in the affidavits such as 'local kids' (Charles Affidavit at paragraph 16), 'kids from Pandanus' (Charles Affidavit at paragraph 17) and 'children' generally involved in activities on the proposed licence, I will assume from the context in each case that these include Nyikina Mangala youth. Similarly, I will assume that the '3 old ladies and 3 senior men' involved in the trips to Munkajarra (Charles Affidavit at paragraph 19) are likely to be Nyikina Mangala elders, or perhaps Ngarinyin elders, based on the context in the affidavit.
108. Ms Charles in particular provides detailed evidence regarding the native title party's enjoyment of use and access of the proposed licence area. Furthermore, I accept the evidence of the deponents regarding the positive impact that these activities are believed to have on 'at-risk' youth (see for example, Charles Affidavit at paragraphs 39-45, Nulgit Affidavit at paragraphs 22-23 and Russ Affidavit at paragraphs 15-16).
109. However, I find no evidence from the native title party to demonstrate precisely how the grantee party's activities will be likely to effect the continuation of the native title party's activities in any physical sense. The native title party's evidence concerning s 39(1)(a)(i) entirely concerns a likely loss of enjoyment based on the native title party's objection to the grantee party's exploration programme for uranium. For example, Ms Charles deposes that the grant of the proposed licence will 'stop people from feeling the peace and the calm the area provides' and the native title party will 'want to avoid the places that the mining company goes - we will be restricted in where we go and hunt and camp and practice ceremony in a place where we have never been restricted before' (Charles Affidavit at paragraph 55). Apart from the restrictions referred to at [46(d)(vii)] above, there is no evidence of any physical impediment to the native title party's ability to exercise its (predominantly non-exclusive) rights to access or live in the area, to hunt, gather and fish, to take flora and fauna, and engage in cultural activities etcetera, in the proposed licence area.
110. The grantee party's contentions in relation to s 39(1)(a)(i) are outlined at [46] above. I note in particular that: exploration activities will be temporary and only a small amount of the proposed licence will be disturbed at any one time; the grantee party is able to relocate drill locations so as to avoid sensitive environmental and cultural heritage sites; the grantee party only needs to restrict entry to the area in the immediate vicinity of a drill hole while drilling (limited to 25m x 25m square for

drilling, plus a 50m buffer zone, for two to three days at a time) (Potter Affidavit at paragraph 25); clearing will only be necessary for some drill holes for the 25m x 25m drill rig space, not the 50m buffer zone (Potter Affidavit at paragraphs 20-21), the grantee party will rehabilitate each drill site as soon as the works are completed for that drill site (Potter Affidavit at 26); and no lasting effects of exploration will result due to the nature of the low-impact exploration methodologies employed and rehabilitation practices and standards adopted (Potter Affidavit at paragraphs 26-33).

111. The GVP Contentions state that any interference could potentially be mitigated by the imposition of appropriate conditions such as those contained in the Draft Conditions and Endorsements extract. The Government party also submits that any interference with the physical enjoyment of native title would be slight when regard is had to the small size of the areas of the proposed licence relative to the area of the native title party's claim. The Government party further submits that such slight interference would be outweighed by the economic significance of, and public interest in, the doing of the act (GP Contentions at paragraphs 42 and 43).
112. The GVP Further Reply asserts that the NTP Reply appears to argue that the main relevant effect for the purposes of s 39(1)(a)(i) is a 'psychological impact', and that the native title party had not characterised its argument this way previously (GVP Further Reply at paragraph 2). I disagree that the native title party has altered its argument in the course of the inquiry, as I believe the native title party's opposition to uranium mining based on non-physical impact on enjoyment is also central to their original NTP Contentions. It is not a new concept that was introduced in the NTP Reply.
113. I acknowledge that there can be situations where the unaccompanied presence of persons on an area of particular significance to the native title party could amount to physical interference with that area, on the basis of a spiritual belief that there would be negative repercussions of a spiritual or cultural nature as a result. In the present case, however, the native title party has not characterised their concerns regarding the grantee party's activities in that way. Rather, it is expressed as an attitude that has been adopted in relation to uranium mining which is based upon perceived environmental risk. I also note that the NTP Contentions refer to the native title party's 'strength of opposition to uranium exploration and mining in Australia' (at

paragraph 66) with reference to various entities whose positions they support on this issue (including links to articles by the WA Greens, the Australian Conservation Foundation, Friends of the Earth and Greenpeace). General perusal of these linked articles does not appear to reveal information regarding Indigenous concerns over uranium exploration or mining based on spiritual rather than environmental grounds, and nor has any information of this type been highlighted by the native title party if it exists.

114. The overlap between the proposed licence (approximately 326 square kilometres) and the native title party's claim is about 48.5 per cent. However, the percentage overlap of the proposed licence/claim overlap area with the entire Nyikina Mangala determined area (26 216.6 square kilometres pre-determination/26 121.1 post-determination) represents less than one per cent of the claim area. I note Member Shurven's finding in *Lungunan v AFMECO* that, consistent with previous Tribunal decisions such as *Cooke v Dioro Exploration*, the size of the proposed licence area in the context of a much larger native title claim makes it less likely that the proposed exploration activity would interfere with the native title party's community or social activities (in the context of s 237(a) of the Act): *Lungunan v AFMECO* at [26].
115. On the other hand, I observe that this may be an area that has not been explored extensively, and consequently, the risk is that the native title party's enjoyment of its registered native title rights and interests would be more greatly affected by the grantee party's exploration activities. I also observe that while the overlap might only be a small percentage of the claim area, it is a significant portion of the Indigenous-owned Mowanjum pastoral lease. The native title party's evidence indicates that the pastoral lease is used and accessed for various cultural purposes, and due to the concentration of activity in that area, the impact on s 39(1)(a)(i) and other subdivisions of s 39 is arguably greater.
116. Subject to circumstances of the kind I described at [113] above, I agree with the Government party that s 39(1)(a)(i) is not enlivened when there is no physical or tangible interference with the enjoyment of rights on the evidence (GVP further Reply at paragraph 12). I accept the native title party's evidence that their enjoyment of the proposed licence area will likely be affected by the grantee party's exploration for uranium on the basis that they have a fundamental opposition to uranium mining on

environmental grounds, and believe this will affect their amenity in the area. However, the Tribunal cannot make a determination that a future act cannot be done solely because there is no agreement or a native title party is opposed to mining: *Weld Range Metals v Simpson* at [310]; *Western Desert Lands Aboriginal Corporation v Western Australia* at [161]-[162]; and *Australian Manganese v Stock* at [55]-[57] and [71]-[72].

117. That is not to say that I cannot give weight to the native title party's wishes as required by s 39(1)(b), but I weigh this against the other criteria in s 39 of the Act. There is no evidence to indicate that the grantee party may deviate from its proposed activities and mode of operation outlined in its contentions. To the contrary, there is evidence that the risks of uranium exploration will be appropriately monitored and managed by the grantee party according to the State's regulatory regime, including a comprehensive RMP. I discuss this further at [164] to [166] below.
118. I also note and take into consideration the concern that all deponents express regarding Aboriginal youth in the local community, and the view of the activities that the deponents are involved in as being critical to helping 'at-risk' youth.
119. Having taken the above into consideration, I agree with the Government party that any impact of the proposed licence on the native title party's registered rights and interests can be minimised by appropriate conditions, comprising both the Government party's proposed conditions and endorsements (see [37]-[39] above) and the ToR or a Heritage Agreement (see [48] and [62] above), and does not support the conclusion that the act must not be done.

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

120. The native title party contentions state that the potential effects of the grant of the proposed licence on s 39(1)(a)(ii) of the Act can be gleaned from the affidavits of Ms Charles, Mr Nuglit and Mr Russ, as well as from the Heritage Survey Report (NTP contentions at paragraph 32).
121. The grantee party's contentions in relation to this criterion are outlined at [47]-[49] above. In summary, the grantee party notes that it is required to develop and adhere to an RMP, which has strict processes to be followed that will result in no ongoing effect

to the native title party's way of life, culture and traditions. It states that it will follow the ToR to notify the native title party of planned activities and to work around cultural or social events planned to mitigate any potential impact on the native title party. The grantee party notes that it will only restrict access to small areas for two to three days at a time in order to conduct drilling activities. It states that in *Backreef Oil v JW (name withheld)*, disturbance of 30 days to two months for each act (i.e. seismic surveys and drilling holes) over a large area of the claim was considered to only have a marginal impact on the native title party. Further comments regarding the RMP are noted under s 39(1)(f) at [163] to [166] below.

122. The GVP Contentions state that any effects on the way of life, culture and traditions of the native title party will be regulated and minimised by the State and Federal regulatory regime (GVP Contentions at paragraph 45). I note this includes State laws which will regulate the exercise of the rights conferred by the proposed licence, which in addition to the *Mining Act* and Mining Regulations, are the *Environmental Protection Act 1986* (WA), the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), the AHA, the *Wildlife Conservation Act 1950* (WA) and the *Rights in Water and Irrigation Act 1914* (WA) (GVP Contentions at paragraph 36). The Government party also notes that Federal statutes which will provide further protection are the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth) (GVP Contentions at paragraph 37).
123. I accept that the extensive State and Federal regulatory regime applicable to the proposed licence means that any impact of the grantee party's activities on the native title party's way of life, culture and traditions would be minimised. I note that the rights afforded by s 66 of the *Mining Act* would allow the right to 'excavate, extract or remove ... fluid or mineral bearing substances', as highlighted by the NTP Reply at paragraph 5. However, the grantee party has provided extensive evidence about its proposed exploration programme (see [46] above), and I am satisfied that any physical interference with the native title party's way of life, culture and traditions will not be significant. I have dealt with the native title party's evidence concerning psychological impact at [112]-[113] above.

124. I note that the *Backreef Oil v JW (name withheld)* decision, providing that the grant of a petroleum exploration permit under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) could be done, was upheld on appeal to the Federal Court: *Watson v Backreef Oil*. Notable commonalities between that case and the present one are the Nyikina Mangala claim group being the relevant native title party, and the proposed licence having been an area that includes the present proposed licence area. Having reviewed the grantee party's proposed activities in *Backreef Oil v JW (name withheld)*, and the rights conferred by the *Petroleum and Geothermal Energy Act 1967* (WA) for petroleum exploration, I agree with the grantee party that the exploration program proposed in the present matter will be less physically invasive, require shorter drilling times, affect smaller areas, involve less personnel and therefore have a lesser overall impact on the area (GP Reply at paragraph 15).
125. Based on the evidence before me, I find that the grant of the proposed licence may have a minor effect on the native title party's way of life, culture and traditions. However, the evidence does not support the conclusion that the act must not be done where conditions, comprising both the Government party's proposed conditions and endorsements (see [37]-[39] above) and the ToR or a Heritage Agreement (see [48] and [62] above), are likely to minimise such impact.

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

126. The native title party contentions state that the potential effects of the grant of the proposed licence on the criteria in s 39(1)(a)(iii) of the Act can be gleaned from the affidavits of Ms Charles, Mr Nuglit and Mr Russ, as well as from the Heritage Survey Report (NTP contentions at paragraph 32).
127. As outlined above at [50], the grantee party submits that the benefit to the local area, along with the opportunities in the ToR for participation in cultural surveys and other activities, means that the grant of the proposed licence will have some positive impact on the development of the native title party's social, cultural and economic structures.
128. I acknowledge that the activities which the native title party's deponents attest to conducting on the proposed licence appear to have led to positive social impact for

the youth from the Mowanjum community. However, I agree with the GVP Reply (at paragraph 27) that it appears unlikely that the grant of the proposed licence will physically interfere with any pastoral activities on the Mowanjum pastoral lease, even though I accept the evidence that there is an overlap with the operational southern portion of the lease. As the GVP Further Reply points out (at paragraph 28), the infrastructure associated with the operational part of the station is confined to a relatively small area, comprising a single cattle yard (noting also satellite maps and markings depicted in annexures to the Russ Affidavit (2)). I am satisfied that the grantee party's proposed drilling practices (see [46(d)] above) are sufficiently flexible to avoid interference with the station's operation in any substantial way. My findings in relation to the asserted non-physical effects on enjoyment are outlined at [112]-[113] above.

129. The status of the ToR is not completely clear in terms of contractual enforceability, however, there is a dispute resolution process provided (if a dispute is not resolved by way of mediation, either party may seek to have the dispute determined by a court or tribunal of competent jurisdiction). I note that there is a schedule of fees and payments attached to the ToR, however, I do not find that the direct economic benefits of the grantee party's activities would be substantial.
130. On the basis of the evidence before me, I find that the grant of the proposed licence, on balance, may be likely to have a slightly beneficial effect on the development of the social, cultural and economic structures of the native title party.

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

131. The native title party contentions state that the potential effects of the grant of the proposed licence on each of the criteria in s 39(1)(a)(iv) of the Act can be gleaned from the affidavits of Ms Charles, Mr Nuglit and Mr Russ, as well as from the Heritage Survey Report (NTP contentions at paragraph 32).
132. As outlined above at [51]-[52], the grantee party states that to the extent that the native title party carries out activities of cultural significance on the proposed licence, the grantee party will not directly interfere or deny access to the proposed licence

overlap area with the claim (GP contentions at paragraph 8.3). It also repeats its submissions above regarding proposed drilling practices (see above at [46(d)]).

133. The Government party accepts that, due to exploration activities, some of the land in the area of the proposed licence may become less freely accessible by the native title party. However, given the area of the proposed licence relative to the Nyikina Mangala native title claim as a whole, ‘this is of little moment when weighed against the economic significance of, and public interest in, the doing of the act’ (GVP Contentions at paragraph 49).
134. Having regard to my findings concerning s 39(1)(a)(i) above, I accept the grantee party’s contentions on the basis that conditions, comprising both the Government party’s proposed conditions and endorsements (see [37]-[39] above) and the ToR or a Heritage Agreement (see [48] and [62] above), are likely to minimise any effect.

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

135. The issue to be determined in relation to s 39(1)(a)(v) is whether the grant of the proposed licence will affect sites or areas of particular (that is, of special or more than ordinary) significance to the native title party in accordance with their traditions: *Cheinmora v Striker Resources NL* at [34]-[35]. The focus of the inquiry is on the effect of the future act on relevant sites or areas within the land or waters concerned. However, in some circumstances, the effect of the future act on sites or areas of particular significance located elsewhere may be relevant if they are linked in some way to sites or areas on the land or waters concerned: *Xstrata Coal Queensland v Albury* at [103].
136. As noted above at [31]-[32], a search of the Aboriginal Sites Database establishes that there is one registered site and two ‘Other Heritage Places’ within the proposed licence area. This does not mean there are not other sites or areas of significance to the native title party in the proposed permit or the surrounding areas. The Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. Nor does it mean that the sites registered under the AHA are necessarily sites of particular significance within the meaning of the Act. Rather, the question of whether there are sites or areas of particular significance on the

proposed permit is a matter to be established on the evidence, particularly from those members of the native title party with the authority to speak for the area in question.

137. The native title party contentions state that the potential effects of the grant of the proposed licence on each of the criteria in s 39(1)(a)(v) of the Act can be gleaned from the affidavits of Ms Charles, Mr Nuglit and Mr Russ, as well as from the Heritage Survey Report (NTP contentions at 32). The affidavits do not provide significant detail regarding any sites on the proposed licence area. Ms Charles refers to *Larrkarrdiy* (Boab), which contains engravings of kangaroo paw and snakes (at paragraph 30 Charles Affidavit). She also refers to underground springs on the proposed licence area, but does not describe any particular significance attached to them (at paragraph 37 Charles Affidavit).
138. The Heritage Report is summarised above at [77]-[79]. This provides some evidence regarding places such as Ringo Bore, Pindan Dam and Bluebush. The evidence that I place the greatest weight on concerns Munkayarra, because it is directly corroborated by Ms Charles' evidence. I accept that this area is used annually in April and July as a ceremonial teaching ground, and as a hunting ground and bush medicine place throughout the year. I do not find that the Heritage Report provides sufficient information regarding any of the other sites to identify their particular significance for the purposes of s 39(1)(a)(v) of the Act.
139. The grantee party disputes that the Kunumudj registered site is in the proposed licence area. It also disputes that one of the 'Other Heritage Places', Mowanjum Mission, is in the proposed licence area (GP Reply at paragraphs 9.1-9.2). The grantee party states that the Tribunal considered evidence of various sites of significance near the proposed licence area in *Backreef Oil v JW (name withheld)* and whilst prepared to find that there are sites of significance within the claim area, they are unlikely to be within the area of the proposed licence: at [86]-[89]. The grantee party argues that, as the proposed licence in this matter is wholly within the Backreef Oil tenement, the 'logical conclusion' is that none of the sites of particular significance proposed by the native title party in that determination are located within the overlap area of the claim and the proposed licence in this matter' (GP Contentions at paragraph 9.4).

140. The grantee party also disputes that any of the following sites are located in the proposed licence area: the Fitzroy River, Nobby's Well, Yamarrirri or waypoints 88, 89, 118, 119, 121 and 123 (the waypoints are referred to in the Heritage Report at Ms Charles' affidavit at paragraph 30). I note evidence in the NTP Reply that the waypoints 88, 89, 118 and 119 are less than one kilometre from the proposed licence boundary, and way points 121 and 123 are less than 200 kilometres from the proposed licence boundary (NTP Reply at paragraph 21). It appears, however, that way points 121 and 123 are approximately less than two kilometres (not 200) from the proposed licence, with reference to figure 7 of the Heritage Survey Report.
141. The native title party do not refute the assertion that Nobby's Well and Yamarrirri are not located on the proposed licence area. However, the native title party provides further evidence in regard to the location of the Fitzroy River in its Reply, stating that the boundary of the Nyikina Mangala claim that overlaps with the south western boundary of the proposed licence follows the high water mark of the coast, which adjoins the Fitzroy River to the south, and at certain times the western boundary of the proposed licence encroaches into the high-water coastal area (NTP Reply at paragraph 20).
142. The Government party states that the NTP Contentions appear to note four particular areas or sites falling within s 39(1)(a)(v) - Ringo Bore, Munkayarra Pool, Nobby's Well and Kunumudj (GVP Reply at paragraph 20). The GVP Reply further states that, of these sites, it appears from the evidence and from the NTP Contentions that neither Nobby's Well nor Kunumudj are within the area of the proposed licence (GVP Reply at paragraph 20). The GVP Reply also states that, of the remaining two sites, none of the affidavit evidence appears to address Ringo Bore, and nor does the Heritage Survey Report explain the particular significance of this site (GVP Reply at paragraph 20).
143. I agree that mapping establishes only one DAA registered site – an 'Other Heritage Place', Munkayarra Pool – is located in the proposed licence/claim overlap area.
144. The GVP Contentions state that should there be a prospect of interference with any sites of particular significance to the native title party, whether registered or not, the AHA regime will apply, as explained in *Waljen*. The Government party notes that the

grantee party's attention has been drawn to this requirement by proposed Endorsement 1 on the Draft Tenement Endorsement and Conditions (GVP Contentions at paragraph 54).

145. I further note that the grantee party has indicated its willingness to enter into a Heritage Agreement with the native title party 'on reasonable terms', but in lieu of such as an agreement has proposed the ToR to ensure any effects on cultural heritage are minimised (GP Contentions at paragraph 10.8).
146. I find that there are a number of sites identified by the native title party in the proposed licence area, but do not find that their particular significance to the native title party has been established on the evidence. I agree with the Government party that broad statements expressed in a report from an anthropologist, without direct linkage to claimants' evidence, cannot enliven s 39(1)(a)(v) (GVP Reply at paragraph 22). I agree with the Government party that the fact that the Heritage Survey has delineated various areas and sites in the proposed licence means that the grantee party is on notice about these areas and sites (GVP Reply at paragraph 23). Given that there is no evidence of non-compliance with cultural heritage legislation by the grantee party, I assume that it will arrange its proposed exploration activities so as to avoid interference with any of these areas and sites.
147. The exception to this conclusion concerns Munkayarra, in relation to which the native title party has provided quite extensive evidence of current and continuing use and which I am prepared to find is an area of particular significance to the native title party. I also note, however, that further Tribunal mapping post-determination establishes that most of this site is in an area of non-exclusive native title, with part of the site (the south-west corner), being in an area where native title has been determined to not exist. I also note that the Munkayarra area is referred to in the Heritage Survey Report (in figure 7 and table 3) as GPS waypoint number 91, and in Annexure A of Ms Charles' Affidavit, in a way which is denoted as being located is slightly to the left of the Munkayarra Pool site. Based on visual inspection (but without co-ordinates for the site), it appears that majority of the Munkayarra site as identified in the Heritage Survey Report and in Annexure A of Ms Charles Affidavit is in an area where native title does not exist. Regardless of this, however, I accept the particular significance of the area as established on the evidence submitted in this

inquiry. Nevertheless, I am confident that the conditions and endorsements to be imposed on the grant by the Government party, and the grantee party's proposed mode of exploration outlined at [76(d)] above, will minimise any effects of the proposed licence on this site/area.

148. The Government party's *Aboriginal Heritage Due Diligence Guidelines* published on 30 April 2013 state, under the heading 'Site Avoidance Strategies', that where an Aboriginal site 'is on or close to an area where a land user proposes an activity which may damage, destroy or alter an Aboriginal site the land user should investigate strategies for avoiding the site or limiting disturbance to the site' (paragraph 2.28). The guidelines also state that the land user should consult with the relevant Aboriginal people to seek advice about managing the activity in a way that will avoid damage to the site and, where necessary, conduct a heritage survey. The parties did not make reference to the guidelines in their contentions, and the grantee party's attitude to the guidelines is unknown. The guidelines might carry more weight were they included in the endorsements on the proposed licence, as this would ensure that the grantee party's attention is drawn to its responsibilities and reasonable steps that could be taken to discharge them.

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

149. The native title party states that they do not want the act to be done (NTP Contentions at paragraph 71). I note that the native title party indicates a strong opposition to uranium mining on environmental grounds, referred to particularly in Ms Charles' and Mr Nulgit's affidavits (see [74] – [76] above).
150. The Government party argues that, due to the effect of the Government's regulatory regime, it is likely that the native title party will continue to be able to access and use the area of the proposed licence in the event the proposed licence is granted (GVP Contentions at paragraph 57).
151. My findings in relation to the wishes and proposals of the native title party are at [112]-[113] above in my consideration of s 39(1)(a)(i). My conclusions in relation to this criterion can be contrasted with circumstances where significant weight might be given to the interests, proposals, opinions or wishes of the native title party where the future act would affect an area or site of particular significance, and protections

through the regulatory regime or otherwise are not sufficient: *Western Desert Lands Aboriginal Corporation v Western Australia* at [200] and [216].

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

152. The grantee party's contentions and evidence in relation to this criterion are outlined at [63]-[65] above. By way of brief summary, the grantee party generally states that successful exploration is a precursor to mining and as such, a significant State and local benefit can result from the extraction and treatment of mineral deposits (GP Contentions at paragraph 11.1). Furthermore, the grantee party submits that the grant of the proposed licence will improve the State's knowledge of the nature and extent of mineral deposits in Western Australia (GP Contentions at paragraph 11.2). It notes that it has committed to spending two to five million dollars over the next three years, as part of its exploration program across the various Project tenements.
153. The native title party states that it does not accept the grantee party's contentions in relation to this criterion, and argues that the statements are too broad to be of assistance to the Tribunal (NTP Contentions at paragraphs 68 and 69).
154. The Government party contends that the grant of the proposed licence will be of significance to the nation, the State and the Shire. Benefits to the State include investments in mineral exploration which may lead, or contribute to, a viable mining project. The grant of the proposed licence will also improve the State's knowledge of the nature and extent of mineral fields (GVP Contentions at paragraph 60).
155. In general, I accept the Government and grantee party's submissions regarding the economic significance of the proposed permit to Australia and the State.
156. Insofar as s 39(1)(c) requires consideration of the economic or other significance of the proposed permit to the area in which the land or waters concerned are located and to Aboriginal peoples and Torres Strait Islanders who live in that area, I accept that the grant of the proposed licence is likely to be of some economic benefit to Derby and the Fitzroy Region. I accept that the exploration program is likely to create some opportunities for employment in the region and it is likely that the grantee party will need to utilise the services of local businesses for various purposes. However, given the evidence that only one Indigenous person has been employed so far (GP

Contentions at paragraph 11.6), I do not find evidence of significant direct benefit likely to flow to the native title party.

157. I find on balance that exploration activity as a result of grant of the proposed licence is likely to be of discernible economic significance for the local and national economy.

Section 39(1)(e) – public interest

158. The Tribunal accepts there is a public interest in the ongoing exploration for minerals, and that the grant of the proposed licence is likely to serve to the public interest due to the economic benefits that will accrue at a local, State and national level if production occurs: *Evans v Western* at [215]; *Australian Manganese v Western Australia* at [59].
159. The grantee party's contentions in relation to this criteria are outlined at [66] above. It states that in the long term, the grant of the proposed licence will contribute to the development and maintenance of a vibrant mining industry and will assist in expanding the knowledge of the mineral deposits in the area, and attracting investment in infrastructure to the area. In the short term, there is also potential for the proposed licence to serve the public interest through upgrades to tracks and roads by the grantee party and direct support and assistance to the town of Derby and nearby areas.
160. The native title party again states that it does not accept the grantee party's contentions in relation to this criterion, and argues that the statements are too broad to be of assistance to the Tribunal (NTP Contentions at paragraphs 68 and 69). It also states that the grantee party's statements are 'sloganistic' (NTP Contentions at paragraphs 69). The NTP Reply notes that the grantee party employed only one local Aboriginal person in 2013. It also argues that its evidence as to the likely disruption of the local community suicide prevention program undertaken on the proposed licence area by the grant of the proposed licence needs to be taken into account, and it is not in the local public interest that this occurs (NTP Reply at paragraph 26).
161. Taking all of the above into consideration, I accept that, on balance, there is a public interest in the grant of the proposed licence.

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

162. Under this criterion, the Tribunal may have regard to the environmental impact of the future act: *WMC Resources v Evans* at [81]. The Tribunal may also have regard to the Government party's environmental protection regime as described in *Waljen* at 212-214 and *Koara 2* at [53]-[62], the findings of which are adopted here.
163. I note that the native title party, through the affidavit evidence of Ms Charles for example, has set out its perception of the environmental risks associated with the targeting of uranium mining – 'even if they are only perceived environmental risks' (NTP Reply at paragraph 10).
164. In regard to radiation safety issues, I note that the grantee party has provided a copy of a letter from DMP Resources' Safety Division, dated 8 October 2013, granting approval for the grantee party's 'North Canning Project' (the tenements adjacent to the proposed licence) under reg 16.7(7)(a) of the *Mines Safety and Inspection Regulations 1995* (WA). This letter advises that the grantee party's RMP had been compared with the requirements as outlined in DMP's 'Managing naturally occurring radioactive material (NORM) in mining and processing – guideline NORM 2.1' in granting the approval. The GP Contentions state that the RMP submitted to the State for the proposed licence would be substantially similar to the one approved for the North Canning Project (GP Contentions at paragraph 37).
165. I also note the comments in the Potter Affidavit at paragraph 35, that an independent radiation expert from Radiation Advice & Solutions Pty Ltd had advised Mr Potter that uranium exploration would not expose people to harmful levels of radiation, nor would it 'contaminate' the ground particularly compared to the natural exposure people experience in day to day life. I also note the information provided by the grantee party that its uranium operations are independently annually audited under its International Organisation for Standardisation (ISO) certifications and internal standards to ensure world's best practice (GP Contentions at paragraph 10.4).
166. I am satisfied that there is no basis to rebut the presumption of regularity in the grantee party's adherence to relevant legislation and guidelines regarding radioactive substances (for a similar finding, see also *Freddie v Globe Uranium*, in the context of an expedited procedure determination). However, I also find that uranium safety

issues are essentially a matter for the State Government in terms of its environmental approvals for the grantee party's project. The native title party's wishes and proposals in relation to its perception of uranium mining have been discussed in relation to s 39(1)(b) above.

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

167. As noted earlier in this determination, I have had regard to the existing non-native title rights and interests and the existing use of the land or waters concerned by persons other than the native title party which may have already had an adverse impact on the enjoyment of native title rights and interests, and the other matters considered in relation to s 39(1)(a).

Determination

168. The determination of the Tribunal is that the act, being the grant of exploration licence E04/1940 to Areva Resources Australia Pty Ltd, may be done.

James McNamara

Member

25 July 2014