NATIONAL NATIVE TITLE TRIBUNAL

William Robert Richmond and Another v Walalakoo Aboriginal Corporation RNTBC **[2015] NNTTA 20 (21 May 2015)**

Application No: WF2014/0009

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

- and -

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

William Robert Richmond (grantee party)

- and -

Walalakoo Aboriginal Corporation RNTBC (WCD2014/003) (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION

Tribunal:	Mr J R McNamara
Place:	Perth
Date of decision:	21 May 2015
Hearing date:	19 September 2014
Grantee party representative:	Mr William Robert Richmond (self-represented)
Native title party representative:	Ms Hayley Haas, KRED Enterprises Pty Ltd
Government party representatives:	Mr John Carroll, State Solicitor's Office Mr Dennis Jacobs, Department of Mines and Petroleum

Catchwords: Native title – future acts – no agreement with native title party – application for determination for the grant of an exploration permit – s 39 criteria considered – on country hearing request not granted – on the papers – environment – audio and video evidence – sole operator – small operations – sites of particular significance – potential economic benefit – joint venture – assignment – uranium exploration – protection of sites – determination that the act may be done subject to conditions

Legislation:

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

Acts Interpretation Act 1901 (Cth), s 36

Environmental Protection Act 1986 (WA)

Mines Safety and Inspection Act 1994 (WA)

Mines Safety and Inspection Regulations 1995 (WA)

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

Mining Regulations 1981 (WA)

Native Title Act 1993 (Cth), ss 29, 30, 30A, 31, 32, 35, 36, 37, 38, 39, 76, 77, 109, 150, 151, 237

Cases:

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

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

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

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 & Ors on behalf of the Nyikina & Mangala Native Title Claimants/Western Australia/William Robert Richmond [2013] NNTTA 112 *(‘Lungunan v Richmond’)*

Daisy Lungunan and Others on behalf of the Nyikina and Mangala People/Western Australia/Areva Resources Australia Pty Ltd (formerly AFMECO Mining and Exploration Pty Ltd) [2013] NNTTA 74 (‘*Lungunan v Areva Resources*’)

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland, [2012] NNTTA 31 (‘*Drake Coal v Smallwood*’)

Evans v Western Australia [1997] FCA 741; (1997) 77 FCR 193 (‘*Evans v Western Australia*’)

FMG Pilbara Pty Ltd and Another v Yindjibarndi #1 [2014] NNTTA 79 (‘*FMG Pilbara v Yindjibarndi #1’*)

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

Gregory Mark Jensen/Scott Gorringe & Ors (Mithaka People)/Queensland, [2011] NNTTA 41 (‘*Jensen v Mithaka People*’)

Ives Gold Mining Company Pty Ltd and Another v Ngadju [2014] NNTTA 73 (‘*Ives Gold Mining v Ngadju*’)

Keith Narrier and Others on behalf of Tjiwarl v WA Mining Resources Pty Ltd and Another [2014] NNTTA 112 (‘*Tjiwarl v WA Mining Resources*’)

Mark Lockyer and Others on behalf of Kuruma Marthudunera (Combined)/Western Australia/Iron Duyfken Pty Ltd [2012] NNTTA 1 (‘*Lockyer v Iron Duyfken*’)

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

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

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

Page v Teelow (2002) 169 FLR 62; [2002] NNTTA 17 (‘*Page v Teelow*’)

Peregrine Resources Pty Ltd and Another v Raymond Ashwin and Others on behalf of the Wutha and Another [2014] NNTTA 59 (‘*Peregrine Resources v Ashwin*’)

Raymond Ashwin and Others on behalf of the Wutha People & Others v Dourado Resources Ltd & Another [2014] NNTTA 78 (‘*Wutha v Dourado Resources*’)

Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna, [2011] NNTTA 53; (2011) 257 FLR 175 (‘*Seven Star v Wiluna*’)

Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6) [2014] FCA 545 (‘*Watson v Western Australia*’)

Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172*;* (2011) NNTTA 172 (‘*Weld Range v Wajarri Yamatji*’)

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

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

Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/ Globe Uranium Ltd, [2007] NNTTA 37 (‘*Freddie v Globe Uranium*’)

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

Young v Western Australia (2001) 164 FLR 1; [2001] NNTTA 42 (‘*Young v Western Australia*’)

REASONS FOR DECISION

Background

[1] The Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licence E04/2141 ('the proposed licence') to William Robert Richmond ('the grantee party') under the *Mining Act 1978* (WA) ('*Mining Act'*). The notice specified the notification day as 14 December 2011.

[2] The notice provides that:

(a) The proposed licence covers an area of approximately 19 graticular blocks (approximately 61.91 square kilometres);
(b) The proposed licence is located approximately 116 kilometres south easterly of Derby, within Derby-West Kimberley Shire, Western Australia; and
(c) Grant of the proposed licence would authorise the grantee party to explore for a term of five years from the date of grant. The notice does not provide an option for renewal.

[3] The notice also specifies that any person who is or becomes a native title party (with reference to a three month period from the notification day to take steps to do so: see s 30 of the Act) is entitled to procedural rights provided in Part 2 Division 3 Subdivision P of the Act. The notice also specifies that the Government party considered the act attracted the expedited procedure (see s 237 of the Act) and that the proposed licence could be granted unless, within four months from the notification day, a native title party lodged an objection with the National Native Title Tribunal ('the Tribunal') against the Government party's statement that the expedited procedure applies. The four month notification period ended on 16 April 2012 (the four month date was moved from 14 April 2012 to the next working day of 16 April 2012 due to s 36(2) of the *Acts Interpretation Act 1901* (Cth)). At the end of this period, the Nyikina and Mangala claim (Tribunal file number WC1999/025; Federal Court file number WAD6099/1998) wholly overlapped the proposed licence. There were no other claims or any other determined native title holders overlapping the proposed licence.

[4] On 16 April 2012, Daisy Lungunan and others on behalf of the Nyikina and Mangala native title claimants lodged an objection application (see s 32(3) of the Act), objecting to the State's

assertion that the expedited procedure applied in respect of the proposed licence (Tribunal file number WO2012/0336). Member O'Dea conducted an inquiry in relation to the criteria in s 237 of the Act and handed down his determination on 13 August 2013 that the act, being the proposed grant of the proposed licence, is not an act attracting the expedited procedure (see *Lungunan v Richmond*). Accordingly, grant of the proposed licence became subject to the right to negotiate provisions within Part 2 Division 3 Subdivision P of the Act.

The section 35 future act determination application and subsequent inquiry

[5] Following the expedited procedure determination, the negotiation parties (see s 30A of the Act) were required to negotiate in good faith with a view to obtaining the agreement of the native title party to the granting of the proposed licence, whether that be with or without conditions to be complied with by any of the parties (see s 31(1)(b) of the Act).

[6] On 17 April 2014, the grantee party applied under s 35 of the Act for the Tribunal to make a determination. Under s 38 of the Act the determination can be one of the following: that the act must not be done, that the act may be done or that the act may be done subject to conditions. An application can be made under s 35 if at least six months have passed since the notification day (the six month date being 14 June 2012) and no agreement of the kind mentioned in s 31(1)(b) has been made. The grantee party's application fulfilled the requirements set out in s 35 of the Act.

[7] On 24 April 2014, President Webb QC appointed me for the purpose of making the determination in respect of the proposed licence. I considered the conditions outlined in s 76 of the Act and subsequently accepted the determination application, pursuant to s 77 of the Act, on 5 May 2014. Parties were notified on 6 May 2014 that the inquiry had commenced.

[8] On 13 May 2014, I convened a preliminary conference with the parties. One of the issues raised was whether the native title party intended to allege that either or both of the Government party or grantee party had not negotiated in good faith for the purposes of s 31(1)(b) of the Act. If the native title party alleged that either the Government or grantee party's conduct had not been in good faith, the Tribunal would have to make a finding on that issue and would only have power to determine the substantive issue under s 39 of the Act if satisfied that the relevant party had negotiated in good faith (see s 36(2) of the Act). The native title party indicated that it would advise the Tribunal and parties at a later time as to

whether good faith would be challenged. I also asked parties whether they saw benefit in participating in a s 150 conference to try and resolve any matter relevant to the inquiry. No party asked for this assistance.

[9] Later that day, I made directions requiring parties to submit contentions and evidence in relation to the good faith issue, if challenged by the native title party, and also the criteria outlined in s 39 of the Act.

[10] On 22 May 2014, the parties were provided with a map prepared by the Tribunal's Geospatial Services showing the proposed licence, the claim boundary, topography, Aboriginal communities and Aboriginal sites recorded with the Department of Indigenous Affairs ('DIA', now Department of Aboriginal Affairs, 'DAA'). This map was later replaced, as described below.

[11] On 17 June 2014, Ms Haas, representative for the native title party, emailed the Tribunal and parties advising that the native title party 'does not intend to submit contentions or evidence in relation to the good faith obligation'. Following this advice, the Tribunal informed parties on 23 June 2014 that directions 1-5 (on the good faith issue) made on 13 May 2014 are vacated, though the aspect of direction 4 providing that the Tribunal can provide mediation or s 150 conference assistance is still open and remains open at any time prior to a determination being handed down.

Federal Court determination

[12] Part way through this inquiry, the Federal Court made a determination in respect of the Nyikina and Mangala native title claim; this determination took effect on 29 May 2014 (see *Watson v Western Australia*). An entry for the Nyikina and Mangala People was made the same day on the National Native Title Register (Tribunal file number WCD2014/003); it recorded that native title exists in parts of the determination area and that the registered native title body corporate is the Walalakoo Aboriginal Corporation RNTBC.

[13] Subsequent searches carried out by the Tribunal's Geospatial Services confirmed that the whole of the proposed licence falls within the determination area, specifically within the area for which native title had been determined to exist. An updated Tribunal map was generated and provided to parties on 20 August 2014, with all features as above, but showing the

proposed licence in relation to the determined area. Parties were informed that the Tribunal intended to use this map as part of the decision-making process and allowed a seven day period for comments. No comments were received.

[14] Where a claim is determined successfully, the note at s 30(2) of the Act provides that the registered native title claimant will be succeeded as a native title party by the registered native title body corporate ('RNTBC'; see also s 30(1)(c)). Noting this, in addition to the absence of any other native title parties overlapping the proposed licence, the 'native title party' for the purposes of this inquiry is Walalakoo Aboriginal Corporation RNTBC, though my references to the 'native title party' shall be inclusive of the preceding Nyikina and Mangala registered claim, as appropriate.

Material received (directions made 13 May and amended 30 July and 21 August 2014)

[15] Accompanying the grantee party's Form 5 were the following:

(a) Tenement Register Search;
(b) DAA Aboriginal Sites Database Search results and map for the subject tenement
(c) Tengraph Quick Appraisal for the subject tenement;
(d) Section 29 notice;
(e) An email from DMP to Mr Richmond dated 19 March 2014;
(f) An email from DMP to Hayley Haas dated 20 March 2014 with subject heading WM2014/0007; and
(g) A letter from DMP to Bill Richmond dated 26 March 2014 with subject 'Application for tenement E04/2141 by William Robert Richmond', enclosing withdrawal Form 22.

[16] In compliance with the directions made on 13 May 2014, the Government party submitted a statement of contentions ('GVP Contentions') on 7 July 2014 regarding the s 39 criteria, together with the following:

(a) GVP Doc 1 – Mining tenement register search extract for the proposed licence, created on 6 May 2014;
(b) GVP Doc 2 – s 29 notice for the proposed licence;

(c) GVP Doc 3 – Tengraph quick appraisal for the proposed licence, including information on the area covered, the land affected, any present or past tenements affected and services affected;

(d) GVP Doc 4 – Tribunal map of the proposed licence, prepared for this inquiry showing the claim area and other features (the earlier map circulated to parties, see [10] above);

(e) GVP Doc 5 – Map of the proposed licence and other features prepared by DMP, dated 6 May 2014;

(f) GVP Doc 6 – Draft tenement and endorsement and conditions extract for the proposed licence, prepared by DMP and dated 6 May 2014; and

(g) GVP Doc 7 – Search results extract from DAA's Aboriginal Heritage Inquiry System (Aboriginal Sites Database) dated 6 May 2014 in respect of registered sites, showing no registered Aboriginal sites.

[17] The grantee party was due to submit contentions and evidence regarding the s 39 criteria on 11 July 2014. No material was received. On 18 July 2014, the Tribunal emailed the grantee party asking for an explanation and mentioned that an email with supporting reasons could be sent through if the grantee party wished to ask whether an extension could be granted. The grantee party responded on 21 July 2014: 'I rely on the states submission'.

[18] On 29 July 2014, Ms Haas emailed the Tribunal asking for an extension to the native title party's compliance date (then 8 August 2014) with reasoning relating to the timing of the grantee party's response affecting the timing of an upcoming meeting of the native title party. An extension was granted and the directions were amended on 30 July 2014, such that native title party compliance was due on 18 August 2014.

[19] On 16 August 2014, the grantee party emailed the Tribunal and parties indicating he 'may lodge contentions and needed further time to do so'. After considering viewpoints from the other parties (Ms Haas opposed this request and DMP provided a neutral response); the fact that five weeks had passed since the grantee party's compliance date; the reliance placed on the grantee party's advice that it was relying on the State's submission; and the approach the Tribunal had taken in other matters (see for example, *Tjiwarl v WA Mining Resources* at [12]-[14]), parties were advised on 18 August 2014 that I would not grant an extension nor accept any contentions submitted by the grantee party. In appropriate circumstances, the Tribunal

can proceed to make a determination where there is no material from one of the parties (see *Ives Gold Mining v Ngadju* at [22]-[26]).

[20] On 18 August 2014, the native title party provided the Tribunal and parties with a statement of contentions ('NTP Contentions'), together with:

(a) The affidavit of [name withheld for cultural reasons], affirmed on 16 August 2014 with the following annexures:
   (i) A – Map of the proposed licence prepared by DMP (dated 14 August 2014);
   (ii) B – An earlier affidavit of [name withheld for cultural reasons] ('[name withheld for cultural reasons]'s 2013 affidavit') submitted during the Tribunal's expedited procedure objection inquiry (*Lungunan v Richmond*; WO2012/0336) with (i) a map of the proposed licence (prepared by the Tribunal on 29 November 2012) and (ii) DAA search results extract showing four other heritage places within the proposed licence. I note that only pages 1 and 3 of this extract were provided, however, this information is publicly available and is also described in *Lungunan v Richmond* at [16]. The inquiry determination indicates that this affidavit was affirmed on 10 April 2013;
(b) The affidavit of Ms Annie Milgin (she notes her bush name is Nayina), affirmed on 14 August 2014, with a map prepared by DMP showing the proposed licence (dated 14 August 2014);
(c) The affidavit of Mr Anthony Watson (Aboriginal name Jilkindi), affirmed on 18 August 2014 with the following:
   (i) A – Map of the proposed licence, prepared by DMP and dated 14 August 2014;
   (ii) B – Synopsis and outcomes from Tribunal-assisted mediation;
   (iii) C – A copy of a handwritten letter from Mr Richmond to Mr Jason Diss at DMP dated 8 September 2013 regarding the proposed licence, with a copy of Mr Richmond's tenement application for the proposed licence as received by DMP on 8 July 2011;
   (iv) D – A Mining Warden decision (*MPF Exploration P/L v Ashburton Minerals Ltd & Anor* [2013] WAMW 9), to which Mr Richmond was a respondent, delivered on 3 April 2013 regarding exploration licences 80/3331, 80/3332, 80/4384 and 45/3731;

(v) E – A Mining Warden decision (*Legendre v Richmond & Anor* [2012] WAMW 21) delivered on 8 August 2012 regarding exploration licences 51/1280 and 51/1281;

(vi) F – Pages 120-124 of a journal extract with reference (1997) 16 AMPLJ describing a Warden's Court decision delivered on 10 March 1997 between David Jones Roberts and William Robert Richmond; and

(vii) G – Extracts from the Nyikina and Mangala Mardoowarra Wila Booroo Natural and Cultural Heritage Plan, by John Watson, Anthony Watson, Anne Poelina, Neville Poelina, William Watson & Jo Camilleri on behalf of Nyikina and Mangala custodians, dated December 2011 (cover pages and pages 73-79 provided);

(d) 'Submission in response to the Aboriginal Heritage Bill 2014 (WA) - Draft Bill for Public Comment' dated 4 August 2014 from KRED Pty Ltd (the native title party's representative company) to the Chief Executive Officer of DAA; and

(e) A map showing the proposed licence and surrounding area prepared by DMP and dated 14 August 2014.

[21] Due to the timing with receiving the native title party's material (there were some technical difficulties), the Government party requested a two-day extension for the reply opportunity in the directions made on 30 July 2014. I granted this request and amended directions on 21 August 2014, such that the Government party and grantee party were at liberty to submit a reply to the native title party's material on or before 27 August 2014.

[22] On 22 August 2014, the grantee party submitted to the Tribunal and parties its reply material ('GP Reply'), consisting of a six-page statement (which largely addressed specific paragraphs within [name withheld for cultural reasons]'s affidavit), together with various attachments (see Attachment A below).

[23] On 27 August 2014, the Government party submitted a statement in reply ('GVP Reply').

On country hearing request and further material received

[24] The native title party's contentions contained a request for an on-country hearing to take place, explained at paragraphs 55-63 of the NTP Contentions as follows:

55. The NTP submits that the evidence outlined in the abovementioned affidavits requires a hearing 'on Country' at a safe place within the proposed tenement (at or near Nine Mile Pool) in the presence of the NTP in order for the Tribunal to adequately determine the relevant issues in this matter.

56. The following evidence support the NTP's contention that the issues for determination cannot be adequately determined on the papers in the absence of the parties:

d. [Name withheld for cultural reasons] deposes as to his inability to adequately explain in English what is required to be done and said on Country when entering the proximity of Jilibobel. [Referring to Affidavit of [name withheld for cultural reasons], affirmed 14 August 2014 paragraph 28]

e. Ms Milgin confirms [name withheld for cultural reasons]'s limited ability to convey complex information in English. [Referring to Affidavit of Ms Milgin paragraph 10]

f. [Name withheld for cultural reasons] deposes as to the need to demonstrate to the Grantee and the Tribunal in the cultural way what must be done to "stop the bad things on Country". [Referring to Affidavit of [name withheld for cultural reasons], affirmed 14 August 2014 paragraph 29]

g. Ms Milgin confirms that it is "very very important" that [name withheld for cultural reasons] "speak the story in his way, in his language – the cultural way on the country" and that "the calling out to country can only be done in cultural way – in our language" in order to convey the significance of the sites in question and to protect both people entering the proposed tenement area and the sites.

h. Ms Milgin deposes that English "doesn't have the words that need to be used in Walmajarri or Mangala for the warning of those places. It doesn't show how you have to treat that place if you are going there".

i. Mr Watson deposes that [name withheld for cultural reasons] "is getting elderly and frail now ... He is stronger and his message is much much clearer and more powerful when he gives it cultural way-in Walmajarri or Mangala-in spoken way." [Referring to Affidavit of Anthony Watson, paragraph 9]

j. Ms Milgin and Mr Watson both depose as to the seniority of [name withheld for cultural reasons] and indicate that he is the correct person to speak for the Country the subject of the proposed tenement. [Referring to Affidavit of Ms Milgin, paragraphs 7 and 9; Affidavit of Anthony Watson, paragraphs 7-8]

57. In their affidavits [name withheld for cultural reasons] and Ms Milgin have each attempted to the best of their ability to explain in English the significance of the particular sites on the proposed tenement and what must be done in order to safely enter the correct parts of land. However, [name withheld for cultural reasons] has limited English skills. The evidence provided by the NTP indicates that describing in English:

a. the need to avoid certain places;

b. the mode of calling out and speaking to country the cultural way and calling out to the spirits;

c. the actions to be undertaken to protect people from the danger associated with the places to avoid on the tenement;

d. where actions are to be undertaken to protect people from the danger associated with the places to avoid on the tenement;

are, at best, crude and abbreviated translations of the full breadth of information the NTP contends is necessary to convey to the Tribunal for the Tribunal to have had sufficient regard to the s39 criteria under the NTA in making the determination whether the act may be done. The NTP also considers it necessary that the Grantee witness the evidence on country.

58. Although the NTP appreciates the Tribunal staff are unlikely to have a working knowledge of Mangala or Walmajarri languages, a hearing 'on Country' in which [name withheld for cultural

reasons] can give evidence in his language and in the correct cultural way will, through tone, expression and physical demonstration, significantly expand the understanding of the Tribunal and will also allow for [name withheld for cultural reasons] to fulfil the responsibilities he owes under his traditional Law and culture, as a senior law man for the NTP.

59. A hearing on country would provide the Grantee with an additional opportunity to make submissions in the matter (as at the time of writing, no submissions had been submitted by the Grantee) and would allow the NTP to hear from the Grantee on the matter, and demonstrate their concerns to the Grantee about the Grantee's proposed exploration activity on the tenement area.

60. Significantly, in the NTPs submission, an on country hearing would provide the Tribunal with the opportunity to adequately ascertain the capacity of the Grantee to lawfully exercise his rights under the grant of the tenement.

61. In *Page v Teelow* [(2002) 169 FLR 62 at [23]], the Tribunal found that if there is any doubt about the adequacy of the material before the Tribunal, and that inadequacy could be cured by oral testimony, then there is a statutory obligation under s 151(2) of the NTA on the Tribunal to convene a hearing. The NTP submits that in light of the concerns raised regarding the Grantee's capacity, the failure of the grantee to provide any contentions or evidence and this breadth of the evidence to be conveyed by the NTP that cannot be done without demonstration in specific locales, the Tribunal should convene an on country hearing in order to adequately assess whether the act may be done.

62. The NTP contends that the effects of the grant of the tenement to the Grantee on the NTP under the criteria set out in s 39(1)(a) of the NTA and the NTP evidence in relation to s 39(b)-(f) of the NTA, support a finding that the act may not be done.

63. The NTP therefore submits that:

a. If the Tribunal finds that this matter can be heard on the papers, the Tribunal should determine that the act may not be done – that is, grant of tenement E04/2141 to the Grantee, should not be made.

b. If the Tribunal determines this matter cannot be determined on the papers, an on-country hearing should be convened by the Tribunal at Nine Mile Pool, near Myroodah Station Homestead.

c. If the Tribunal does not make either of the findings listed at 63(a) or 63(b) above, the NTP respectfully requests leave to file and serve further evidence in support of its objection to the Grantee's s 35 application.

[25] In [name withheld for cultural reasons]'s affidavit he states that he can't explain in English what needs to be done and said on country for the 'danger places in this tenement' and he explains he needs to 'show the cultural way – what we do to stop the bad things on Country' (paragraph 29). Similar reasons are provided at paragraph 15 of Ms Milgin's affidavit. Ms Milgin notes that she has been asked to translate but confirms [name withheld for cultural reasons] 'needs to speak the story in his way, in his language – the cultural way on the country' (paragraph 19 Milgin affidavit). Similarly, Mr Watson deposes that [name withheld for cultural reasons] is 'stronger and his message is much clearer and more powerful when he gives it cultural way – in Walmajarri or Mangala – in spoken way' (paragraph 9).

[26] [Name withheld for cultural reasons] specifies that Nine Mile Pool is as close as 'we can go to the danger places from that side' (paragraph 30) and Ms Milgin explains that 'outside to the east of the tenement at a safe place nine mile pool' is a place where [name withheld for

cultural reasons] can 'show the cultural way' and 'explain the warning and the calling to country from that safe place' (paragraph 19 Milgin affidavit).

[27] The directions of 13 May 2014 provided that, if necessary, a listing hearing would be held in the week commencing 25 August 2014 and the amended directions of 30 July 2014 and 21 August 2014 moved this listing hearing opportunity to the week commencing 1 September 2014.

[28] After considering the material submitted by parties, the Tribunal informed parties on 28 August 2014 that a listing hearing would be held on 4 September 2014. The grantee responded on 29 August 2014 as follows:

> I will be in transit in the north & impossible to speculate where i may obtain communications. This will be the situation through to December.
> In the circumstances i rely on the response i lodged.

[29] Due to Mr Richmond's expression of unavailability, I vacated the conference on 3 September 2014 by email. This email also contained my views on the matters that required resolution, my decision to tentatively reschedule the listing hearing to 19 September 2014 and the making of further directions. After setting out the background to the matter, that email reads as follows:

> Given these circumstances, and the materials provided to date, these are the issues which require resolution before the Tribunal can determine the matter:
>
> • The native title party, in its contentions, request the consideration of an on country hearing. The Government party in Reply oppose an on country hearing. The grantee party makes no reference to the request in its submission.
>
> • The Government party challenge the admissibility of certain evidence from the native title party on the grounds of privilege, and on the basis that certain material does not meet evidentiary standards.
>
> • The native title party, as an alternative to the request for an on country hearing being granted or a determination on the papers that the act may not be done, requests the opportunity to file further evidence and contentions. That proposal is objected to by the Government party.
>
> Against this backdrop is the failure by the grantee party to comply with Direction 11 regarding making himself available for the listing hearing despite being aware of its likely scheduled date for some time, and advice from the grantee party representative that he will be generally out of communication for the rest of the year. The parties ought to be aware that the Tribunal is required to make a determination as quickly as is appropriate, and within six months after the making of a future act determination application, that is on or before 17 October 2014.
>
> **Future conduct of this matter**

The listing hearing scheduled for 4 September 2014 shall no longer be held and is replaced by the scheduling outlined below.

Mindful of the operation and effect of the following sections of the *Native Title Act 1993 (Cth)*: s 142 (opportunity to make submissions concerning evidence), s 146 (evidence and findings in other proceedings) and s 148(b) (power of the Tribunal to dismiss an application for applicant's failure to proceed or comply with a direction) the Tribunal asks the parties to provide further information to the Tribunal by **close of business 11 September 2014** as follows:

1. The parties' attention is drawn to the recent determination *Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation* [2014] NNTTA 70 and in particular [67], [122]-[123] and [164]-[165] (a copy of the paragraphs is attached and the full decision is accessible by the link above). Noting the Government party contentions in Reply (paragraph 64) and the grantee party contentions in Reply (page 6), can the Government party inform the Tribunal about how the regulatory regime would address the activities contemplated, that is, uranium exploration.
2. In relation to the stated lack of accessibility of the grantee party, the Government party argue that the native title party's concern is based on hearsay. Noting the advice from the grantee party regarding his ability to comply with Directions and the annexures to his contentions in Reply, which included a newspaper article seemingly confirming the difficulty people have with 'finding him', can the grantee party provide further and more detailed information about how he intends to progress his future act determination application and how the other parties can ensure that contact is effected.
3. In relation to the possible drilling program, the grantee party advised the Government party by letter in September 2013 of its intended work program (repeated at para 42 of the Government party reply). It is stated that the drilling program would be on a 50 metre grid with 50 metre spacing. In the *Areva Resources* matter the Tribunal noted that the drill holes would be 25cm diameter spaced 5 km apart with the ability to relocate them to avoid sensitive environmental and cultural heritage issues. Can the grantee party confirm that the proposal contained in the September 2013 letter is correct. The Government party may also wish to comment on this if it thinks it appropriate.
4. The grantee party also states in the September 2013 letter (referred to in para 42 of the Government party reply) that "any drilling would be on a joint venture basis". In the grantee party reply at p 6, it states "one couldn't find a better company than Areva with world wide experience and good safety record to do business with. If. I managed to secure a joint venture with Areva." Could the grantee party clarify this statement. In particular, whether there is or is not currently a joint venture with Areva Resources Pty Ltd. The Tribunal notes that following its determination in *Areva Resources*, it was reported that that company had abandoned its Kimberley uranium project because it was "not technically feasible".
5. The grantee party has not provided its view on the native title party's request for an on country hearing. If it wishes to do so that response ought to be provided at the same time.

The Tribunal will consider the material provided as a result of the requests at items 1-5 above, and, should it be deemed necessary, a listing hearing will be conducted on **19 September 2014 at 11am WST**. Parties will be advised earlier that week as to whether it will be held.

At the listing hearing, or beforehand if a listing hearing is not deemed necessary, the Tribunal will advise the parties of the steps the Tribunal will take to finalise the matter on or before 17 October 2014, including the possible time and location of a hearing, should that be deemed appropriate. In relation to the matters concerning the admissibility and relevance of evidence as raised by the Government party, the Tribunal will address the issues in its written determination.

[30] On 3 September 2014, the native title party requested the opportunity to reply to the anticipated additional material of the grantee party and Government party. On 5 September

2014, I informed parties that leave is not granted to do so and indicated there would be the opportunity to comment at the listing hearing, if held.

[31] In accordance with the 3 September 2014 directions contained within the above email, the grantee party sent a document ('GP Additional material') on 9 September 2014 clarifying those points. The Government party provided a document clarifying relevant points above ('GVP additional material') on 11 September 2014. There were some aspects of both sets of material that went beyond what I asked for, as explained below. After considering the additional material, the Tribunal decided to hold a listing hearing by teleconference on 19 September 2014.

[32] During the listing hearing, I asked Ms Haas to clarify the meaning of paragraph 63 of the NTP Contentions (see [24] above) and she explained the intended interpretation of that paragraph is as follows:

(a) Option 1: on the papers. If the Tribunal determined that the matter could be determined on the papers then the native title party submits that the act must not be done;

(b) Option 2: on-country hearing. If the Tribunal determined the matter could not be determined only on the papers, the strong preference of the native title party is for further submissions and evidence to be made by way of an oral hearing on country;

(c) Option 3: Non-written evidence by means other than on-country hearing. If the Tribunal does not hold an on-country hearing, the native title party wishes to submit evidence they can't provide in a written form via other means such as video recording or another form of demonstration.

[33] Ms Haas explained the native title party wished for the proposed hearing to take place at Nine Mile Pool, approximately four kilometres to the east of the proposed licence (I note that Mr Richmond estimated it as seven kilometres to the east), as it is the best place to demonstrate cultural concerns, being in proximity to but at a safe distance from the areas [name withheld for cultural reasons] described as significant in his affidavit, and also suits for logistical purposes. There was discussion about whether the provision of evidence would involve moving from Nine Mile Pool; Ms Haas explained that travelling to the proposed licence area, after meeting at Nine Mile Pool, could only occur 'to the extent that it's possible'; it was

apparent that travelling within the proposed licence was only a possibility and not the preference of the native title party. Ms Haas mentioned there could be scope to travel two kilometres to the west of Nine Mile Pool, which would still be outside of the proposed licence, or, if the weight of evidence would be diminished by not standing within the proposed licence area, the native title party could consider adjusting their demonstration so they are placed within the proposed licence area, though the latter would not enable the same type of demonstration that could be done from outside the proposed licence area. Ms Haas concluded that the native title party would use Nine Mile Pool as a starting point and move from there, though she could not be certain whether that movement would bring persons inside the proposed licence area. Ms Haas indicated she could request further consideration from the deponents about the location of the hearing but emphasised significant regard was had to Nine Mile Pool being best for demonstration purposes. Ms Haas estimated that half a day would be needed to provide the evidence.

[34] Mr Carroll stated that the Government party's reasons for opposing the request are set out in its submissions. He reiterated the view that certain components of the native title party's request (namely wanting to demonstrate the native title party's concerns to the grantee party and the opportunity for the native title party to hear from the grantee party on their ability to comply with their obligations) are regarded as improper bases for an on-country hearing. Mr Carroll stated that it would be inefficient and resource-heavy for the Government party to attend an on-country hearing.

[35] Mr Richmond noted that the bulk of the proposed licence doesn't have registered heritage sites within it, noting that four sites are located 'marginally' within the proposed licence (i.e. four other heritage places as described below) and briefly mentioning his view that those sites are to be excluded and that they wouldn't be disturbed. Mr Richmond also opined that the cost for the on-country meeting would be 'enormous' and he referred to his commitments with four other Tribunal matters.

[36] The latter part of the listing hearing involved discussion of option (c) at [32] above. Ms Haas explained that video evidence would be the secondary preference. I noted that the elements of interactive discussion and onsite physical demonstration would not be available through video evidence. Mr Carroll commented that Nine Mile Pool is not within the proposed licence area and suggested that the location issue could be addressed by video and the native title party's

objectives of giving a demonstration and conveying language and tone could be addressed through the video option.

[37] The remainder of the listing hearing largely focussed on whether the native title party should respond to those aspects of the grantee party and Government party's additional material which went beyond scope. The other parties did not oppose the native title party's request to submit such a response. Later on 19 September, the Tribunal informed parties that leave was granted for the native title party to provide a reply by 30 September 2014 in relation to: (a) the aspects of the GP Additional material concerning water flow and environmental issues and (b) the aspects of the GVP Additional material regarding the regulatory regime and associated attachment. This statement of reply ('NTP Reply') was received on 30 September 2014 together with:

(a) Annexure A – extract from a Commonwealth Scientific and Industrial Research Organisation ('CSIRO') report entitled 'Surface Water – Groundwater Interactions in the Lower Fitzroy River, Western Australia' dated August 2011;

(b) Annexure B – Report of the Secretary General of the United Nations entitled 'United Nations system-wide study on the implications of the accident at the Fukushima Daiichi nuclear power plant'; and

(c) Annexure C – Newspaper article entitled 'Another million reasons to probe uranium mining' by Dave Sweeney, published by The Age on 9 December 2013.

[38] Section 151(2) of the Act provides that the Tribunal may make a determination in relation to a right to negotiate application 'by considering, without holding a hearing, the documents or other material lodged with or provided to the Tribunal. However, the Tribunal must hold a hearing if it appears to the Tribunal that the issues for determination cannot be adequately determined in the absence of the parties.' As Member Sosso described it in *Page v Teelow* (at [23]):

> ... only if the Tribunal is of the view that documents and other material lodged by the parties sufficiently address the matters in contention, is it permissible for an inquiry to be conducted on the papers. The wording of section 151(2) is mandatory. If there is any doubt in the mind of a Member conducting an inquiry about the adequacy of material before the Tribunal, and assuming that this inadequacy could be cured by the giving of oral testimony, then there is a statutory obligation placed on that Member to convene a hearing.

[39] On 22 September 2014, the Tribunal emailed parties notifying them that I decided the matter can adequately be determined in the absence of the parties. I came to my conclusion after having:

(a) considered parties' written submissions on this issue;
(b) provided the opportunity to hear from parties and discuss their viewpoints in full during the listing hearing; and
(c) considered the adequacy of the material before me in view of the issues for determination under s 39 of the Act.

[40] In considering the necessity of the presence of parties, whether on country or not, for the purposes of s 151(2), additional factors were related. They were, in my view, the parties' viewpoints on the cultural and customary concerns of the Aboriginal people involved, particularly in view of the communication reasons and the concerns of parties about the resources required to attend a hearing and the time taken (see s 109(1)-(2) of the Act). I note Member Sosso's comment in *Page v Teelow* that the cost, delay and inconvenience for the parties by way of the holding of a full hearing is a further factor but not the decisive factor (at [34]). Ultimately, my decision was based upon the clear wording of s 151(2): the Tribunal must hold a hearing if it appears to the Tribunal that the issues for determination cannot be adequately determined in the absence of the parties. I am satisfied that the relevant issues can be determined without an oral hearing.

[41] Within the Tribunal's email to parties of 22 September 2014, I also informed parties of my view that an opportunity for the native title party to produce further evidence (by video, audio, written or other means accompanied by an adequate translation) ought to be provided. To assist in considering whether to allow further evidence, I issued further directions that day as follows:

> By COB 26 September 2014, the native title party is to:
>
> (a) advise whether they wish to take up the opportunity to file further evidence by video, audio, written or other means accompanied by an adequate translation;
> (b) advise how much time would be required for submitting that further evidence;
> (c) advise whether any prejudice might be suffered if a determination cannot be completed by 17 October 2014 (i.e. the six month time frame in s 36(3) of the Act)); and
> (d) acknowledge that, if a determination is not made by 17 October 2014, the Tribunal will need to write to the Attorney-General to provide the reason/s for not making the determination within six months of the future act determination application's lodgement.

By COB 26 September 2014, the Government party and grantee party are each to:

(a) advise whether they agree to the intended opportunity for further native title party evidence to be provided (and if not, to provide reasons);
(b) advise whether any prejudice might be suffered if a determination cannot be completed by 17 October 2014 (i.e. the six month time frame in s 36(3) of the Act); and
(c) acknowledge that, if a determination is not made by 17 October 2014, the Tribunal will need to write to the Attorney-General to provide the reason for not making the determination within six months of the future act determination application's lodgement.

[42] On 23 September 2014, the Government party complied with the 22 September 2014 directions. In addition to noting that no prejudice would be suffered if the determination was made after six months from the lodgement of the future act determination application (s 36(3) of the Act) and acknowledging the actions required in 36(3), the Government party wrote:

> The government party does not oppose the NTP providing further evidence, however the government party presumes that any further evidence will be within the scope of the request in the NTP contentions. The government party seeks an opportunity to make submissions as to whether the NTP has fallen outside of that scope at the same time that the government party files its reply to any further evidence of the NTP.

[43] Later on 23 September 2014, the grantee party provided its response to the 22 September 2014 directions, simply stating:

> The Grantee Party is in agreement with the response of the Government Party items A , B &C. May I add an early determination will help to be able to me [sic] spend more exploration time away from communication facilities.

[44] On 26 September 2014, the native title party provided its response as follows:

> (a) It wishes to take the opportunity extended by the Tribunal to file further video or audio evidence of [name withheld for cultural reasons], accompanied by a translation;
> (b) it anticipates being in a position to provide the abovementioned evidence by mid-November at the earliest, subject to the availability of [name withheld for cultural reasons] (who is currently in hospital) and taking into consideration resource constraints and logistical arrangements including sourcing equipment and meeting on-Country;
> (c) it will not suffer prejudice if a determination cannot be completed by 17 October 2014. The Native Title Party relies on paragraphs 54 – 63 of its Statement of Contentions filed 19 August 2014 outlining the circumstances in which it would suffer prejudice;
> (d) the Native Title Party acknowledges this requirement.

[45] On 1 October 2014, I issued directions allowing the native title party to submit by 28 November 2014 further evidence from [name withheld for cultural reasons], in the form of DVD/video or audio recording accompanied by a translation and allowing a reply opportunity by 12 December 2014 for the grantee party and Government party. These compliance dates were extended on 27 November 2014 to accommodate a request of the native title party due to [name withheld for cultural reasons]'s health. On 17 December 2014, the native title party

notified the Tribunal that due to [name withheld for cultural reasons]'s health, the native title party would not be submitting that further evidence and wished to rely on material submitted to date. The Tribunal informed parties that no further material would be received and a determination would be forthcoming.

Information about the proposed licence and intended activities

[46] Within the future act determination application is a statement from Mr Richmond 'that the native title party did not support uranium mining and did not wish to negotiate about this matter'. The subsequent material from parties and the related expedited procedure decision contain information about the proposed activities of the grantee party.

[47] The grantee party states that the tenement is in a syncline 'running east west and unlikely water would run north to the Fitzroy Flood Plain' (page 2 GP Reply).

[48] In a letter from the grantee party to DMP dated 8 September 2013 (Annexure C to Mr Watson's affidavit, also referred to as the work program), the following information about the grantee party's intended work is provided:

> A work programm [sic] will consist of an on going survey on a grid of 100m spacing using a Geiger counter in the search for uranium. This will be conducted on foot to minimise damage to fauna.
>
> Pending results a drilling program could follow to 200m depth using an RC rig the drilling would be on a 50m grid with 50m hole spacing.
>
> Care will be taken and consultations and heritage with traditional owners prior to a drilling program.
>
> This is a private operation at this stage. Drilling would need to be on a joint venture basis.
>
> No heritage on ground surveys have been undertaken.
>
> At this stage there is not a company policy but any joint venture would be required to liase [sic] with all parties for the benefit of Aboriginals on a successful project that goes into production.

[49] In terms of the joint venture issue, Mr Richmond states 'one must engage an experienced mining company in a joint venture capable of putting a project into production' (page 2 GP Reply) and later refers to Areva (assumed to be Areva Resources Australia Pty Ltd, 'Areva Resources') as a company with 'world wide experience and good safe record to do business with' (page 6 GP Reply). However, within the grantee party's additional material, it was clarified that the grantee party does not have a joint venture arrangement with another

company, though he intends to commence discussions with other companies inclusive of Areva Resources.

Underlying tenure and usage

[50] For the proposed licence, the Tengraph Quick Appraisal provided by the Government party indicates:

(a) the underlying tenure comprises:
    (i) Indigenous-held pastoral lease (Myroodah; I 3114/1165), wholly overlapping the proposed licence;
    (ii) Historical lease (H396/444) wholly overlapping the proposed licence;
    (iii) Exploration permit 457, overlapping by 43.3 per cent;
    (iv) Exploration permit 458, overlapping by 56.7 per cent;

(b) the proposed licence area was previously the subject of the following various dead/expired tenements:
    (i) Four exploration licences: E 04/1078 (never granted and withdrawn in March 1999, which overlapped by 99.9 per cent); E 04/1552 (granted July 2006 and surrendered in July 2009, which wholly overlapped); E04/1927 (granted May 2010 and surrendered in June 2011, which wholly overlapped); E04/2030 (never granted and withdrawn May 2010, which wholly overlapped);
    (ii) 38 mineral claims (all granted in 1979, the last cessation date of surrender was April 1982 and the overlap ranged between 0.3 and 1.9 per cent);
    (iii) Four temporary reserves: TR 70/212 (granted in February 1920, cancelled in June 1921, wholly overlapping); TR 70/3518 (granted in September 1965 and cancelled in April 1969, wholly overlapping); TR 70/6692 (granted in May 1978, cancelled in March 1979 and overlapping by 80.9 per cent); and TR 70/6693 (granted in May 1978, cancelled in March 1979 and overlapping by 14 per cent;

(c) the services affected comprise: one ‘Myroodah Uranium’, one ‘SSM-MYROODAH’, four minor roads, six tracks, one fence line, one Yard Symbolised and one well/bore with windmill.

Overview of Aboriginal heritage material

[51] The Government party and grantee party submitted search results from the DAA's Aboriginal Heritage Inquiry Database, indicating there are no registered sites. The native title party submitted the DAA Search results extract indicating there are four 'other heritage places' within the proposed licence. They are as follows, with reference to their location as per Tribunal mapping:

(a) Site 13614 (Myroodah Station: Swamp; status as lodged) overlaps a north eastern portion of the proposed licence;
(b) Site 13613 (Myroodah Station: Sandhill; status as lodged) overlaps the most northern right hand corner of the proposed licence;
(c) Site 13609 (Myroodah Station: Hills; status as lodged) overlaps the most eastern bottom corner of the proposed licence;
(d) Site 13608 (Myroodah Station; status as lodged) overlaps a south eastern portion of the proposed licence.

[52] In [name withheld for cultural reasons]'s 2013 affidavit he lists the four other heritage places above. He also attests that there are other special sites he knows of that are not recorded with DAA (at paragraphs 23-24).

[53] Tribunal mapping also indicates there is a cluster of various registered and other heritage places located approximately 12 kilometres north east of the eastern boundary to the proposed licence.

[54] Information recorded with the DAA, whether registered or an 'other heritage place', is one source of information the Tribunal can take into account, though it is not a conclusive record of all cultural heritage within the relevant area. For the purposes of s 39, the Tribunal is to consider the evidence submitted by the parties to the inquiry and as is seen in the discussion of s 39(1)(a)(v) below, the native title party has submitted evidence about sites regarded as being culturally important.

Regulatory regime and proposed conditions of grant

[55] Upon grant, the holder of an exploration licence has rights as conferred by s 66 of the *Mining Act*, the exercise of which are subject to conditions set out in s 63 of the *Mining Act*. There is

potential, under s 63AA of the *Mining Act*, for the Minister to impose additional conditions for the purpose of preventing or reducing, or making good, injury to the land or to anything below the natural surface of the land, or consequential damage to any other land following the grant of the proposed licence.

[56] Also, the Government party has indicated it intends to impose the conditions set out in the draft tenement endorsement and conditions extract, as follows:

> **ENDORSEMENTS**
> 1. The licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
>
> 2. The licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.
>
> **In respect to Water Resource Management Area (WRMA) the following endorsements apply:**
> 3. The licensee attention is drawn to the provisions of the:
> - Waterways Conservation Act, 1976
> - Rights in Water and Irrigation Act, 1914
> - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
> - Country Areas Water Supply Act, 1947
> - Water Agencies (Powers) Act 1984
> - Water Resources Legislation Amendment Act 2007
>
> 4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
>
> 5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.
>
> **In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:**
> 6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for these activities has been issued by the DoW.
>
> **In respect to Waterways the following endorsement applies:**
> 7. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:
> - 50 metres from the out-most water dependent vegetation of any perennial waterway, and
> - 30 metres from the out-most water dependent vegetation of any seasonal waterway.
>
> **CONDITIONS**
> 1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
>
> 2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.

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

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

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

6. The licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-

- the grant of the licence; or
- registration of a transfer introducing a new licensee;

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

7. No interference with Geodetic Survey Station Myroodah and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

[57] As noted in endorsements 1 and 2 above respectively, the proposed licence will also be subject to the provisions of the *Aboriginal Heritage Act 1972* (WA) ('AHA') and the *Environmental Protection Act 1986* (WA). An overview of the latter legislation was provided in *Minister for Mines v Evans* at [53]-[58] though I note amendments were made in 2003. As was stated in *Peregrine Resources v Ashwin* at [45]- [46] (with reference to *Minister for Mines v Evans*):

> [45] The procedures under this legislation were outlined by the Tribunal in *Minister for Mines v Evans* at [53]-[58] and I adopt the findings outlined in those passages. Briefly, a proposal must be referred to the Environmental Protection Authority for assessment where the proposal is likely, if implemented, to have a significant effect on the environment. The referral of *Mining Act* tenements is administered under a memorandum of understanding entered into between the Environmental Protection Authority and DMP.
>
> [46] The EP Act was amended in 2003 to incorporate provisions requiring approval before clearing native vegetation (Part V, Division 2). According to the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), mineral activities are exempt from this requirement if carried out pursuant to an authority granted under the *Mining Act* and not carried out in designated areas (reg 5, item 20 and schedule 1).

[58] The grantee party states that exploration or development must 'meet stringent environmental and safety laws' (page 6 GP Reply) but has not described them further.

[59] The Government party outlined the regulatory regime specifically within its contentions, reply and additional material, explaining as follows:

(a) The proposed licence will be subject to Division 2 of Part 16 (Radiation Safety) of the *Mines Safety and Inspection Regulations 1995* (WA) ('MSI Regulations') which is inclusive of regulation 16.7 (Preparation of Radiation Management Plan).

(b) The grantee party will be required to produce a radiation management plan where uranium exploration is to occur; the Government party states that the grantee party will have to comply with regulation 16.7 (which sets out the requirements of a radiation management plan) prior to commencing any drilling for uranium and notes regulation 16.2 and s 4(1) definitions within the *Mines Safety and Inspection Act 1994* (WA) to support the assertion that it applies to exploration. This assertion appears to be supported by regulation 16.7(1)(b) which requires preparation of a plan for the safe management of radiation before mining operations commence.

(c) DMP's 'Guide to Uranium in Western Australia' states that the radiation management plan must be produced and then be assessed and approved by the Radiological Council. The Government party notes that the plan must 'consider the measures that can be taken to control the exposure of the employees and members of the public to radiation at or from the mine' and 'include a waste management system for the mine, details of which must include facilities and procedures involved in the handling, treatment, storage and disposal of radioactive waste' (paragraph 19 GVP Additional material based upon regulation 16.7(2)).

(d) The grantee party will have to comply with other relevant regulations within Part 16 of the MSI Regulations. For example, breach of any of regulation 16.7-16.9 is an offence and the penalty in 17.1 applies to such offences.

[60] The section of the Guide entitled 'Uranium mining and the environment' provides the following information in relation to exploration:

(a) The company has to apply for a Programme of Work which details the proposed exploration activities and covers environmental factors inclusive of: details of the environmental impact including the area of disturbed ground and tonnage to be disturbed; whether or not the proposed activity will impact on an 'environmentally sensitive area' (defined under the *Environmental Protection (Clearing of Native Vegetation) Regulations*

2005 (Cth)) or a registered heritage site under the AHA (with extra approval required if so); details of environmental management and rehabilitation practices; and the possibility of detailed environmental surveys dependent on the level of disturbance;

(b) The Radiation Management Plan required by DMP must address: the procedures for identifying and monitoring radioactive material; strategies to minimise potential radioactive contamination; and processes to minimise human exposure to radioactive material. I note that regulation 16.7(2) provides more detail about the requirements for a radiation management plan.

[61] The Government party contends that it is relevant to s 39(1)(a) that the Government's environmental assessment process will be activated if productive mining is proposed, referring to *WMC Resources v Evans* at [82]. Various components of the Guide provide information about State and Federal processes for uranium mining (e.g. page 23 detailing that a uranium project will be referred to the State's Environmental Protection Authority and uranium mining is classified as a nuclear action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requiring environmental assessment and approval if it is likely to have a significant environmental impact).

Legal Principles

[62] As prescribed by s 38 of the Act, the Tribunal must make one of the following determinations: that the act must not be done, that the act may be done, or that the act may be done subject to conditions to be complied with by any of the parties. As for the last option, s 38(2) prohibits the Tribunal from imposing a condition which would have the effect of entitling the native title party to payments worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party.

[63] The Tribunal must assess the evidence provided by each party in terms of the criteria in s 39 of the Act, which reads as follows:

> **39 Criteria for making arbitral body determinations**
>
> (1) In making its determination, the arbitral body must take into account the following:
>
> (a) the effect of the act on:
>
> (i) the enjoyment by the native title parties of their registered native title rights and interests; and
>
> (ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

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

(f) any other matter that the arbitral body considers relevant.

Existing non-native title interests etc.

(2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:

(a) existing non-native title rights and interests in relation to the land or waters concerned; and

(b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

Agreements to be given effect

(4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:

(a) must take that agreement into account; and

(b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[64] The Tribunal must weigh the various s 39 criteria, and the Act does not require greater weight to be given to some criteria over others. It is a discretionary exercise in assessing the criteria, and the outcome of the assessment will depend on the evidence provided in relation to each criterion (see *Western Desert Lands v Holocene* at [37]).

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

[66] Section 109(1) provides that the Tribunal must pursue the objective of carrying out its functions 'in a fair, just, economical, informal and prompt way' and in carrying out these functions may take account of the 'cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved' (see s 109(2) of the Act).

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

Summary of contentions and supporting documents

[68] As explained above, the grantee party did not submit contentions or evidence by the compliance date. Subsequently, it provided a reply with various attachments, mainly consisting of newspaper clippings, and additional material as requested. By way of the grantee party's statement that it relies on the State's submission, it can be inferred that the grantee party seeks for a determination to be made that the act may be done without conditions. In the grantee party's additional material, he clarifies that he looks forward to the matter being concluded on the papers. At various points within the inquiry, the grantee party relied on or supported the State's position or material. While it is open to the grantee party to decide upon its expression in addressing the s 39 criteria, this approach resulted in there being less breadth in the material before me.

[69] The Government party provided contentions, a reply, additional material and verbal viewpoints during the listing hearing, to support its contention that the Tribunal should determine that the act may be done without conditions. It submitted that this determination should be made without an oral hearing, as explained above.

[70] The native title party took issue with specific aspects of the GVP additional material for the following reasons (paragraphs 8-11 NTP Reply):

(a) All paragraphs (especially paragraphs 22-23) other than 3-10 and 16 of the GVP additional material statement on the basis that they go beyond what the Tribunal sought (i.e. 'for the Government party to inform the Tribunal about how the regulatory regime would address the activities contemplated, that is, uranium exploration'); and

(b) DMP's Guide to Uranium in Western Australia - the native title party contends that the Tribunal should have regard to page 22 only and disregard the remainder on the basis that it goes beyond what the Tribunal asked for. The native title party states that the Guide 'puts forward a policy position about the safety of the nuclear industry as a whole which would be disputed by certain sections of the community, including the NTP' (paragraph 10 NTP Reply). As noted at [37] above, the native title party has submitted Annexure B and C of its reply regarding 'the controversial nature of uranium mining and nuclear facilities, particularly in relation to safety and the environment' (paragraph 11 NTP Reply).

[71] The native title party submitted that the Tribunal should determine that the act may not be done. However, it did so within a three-tiered summary of its submission: (a) if the Tribunal finds the matter can be heard on the papers, then the Tribunal should find that the act may not be done; (b) if the Tribunal determines the matter cannot be determined on the papers, then an on country hearing should be held; and (c) if neither (a) or (b) occur, the native title party requests leave to submit further evidence 'in support of its objection to the Grantee's s 35 application' (at paragraph 63 NTP Contentions). The Government party objected to the proposition in (c). I reiterate that, during the listing hearing, the native title party's representative Ms Haas clarified that the intention of (c) above was to request, in the event an on country hearing is not held, that the native title party be allowed to submit further evidence that couldn't be provided in written form via another means (such as video recording or some other form of demonstration). As has been explained above, directions were made on 1 October 2014 (amended on 27 November 2014) allowing the native title party the opportunity to submit further evidence by video/DVD or audio recording, however, that material could not be submitted.

[72] The native title party contentions rely on documentary evidence provided in the affidavits and accompanying attachments of [name withheld for cultural reasons], Ms Annie Milgin (also known as Nayina) and Mr Antony Watson (also known as Jilkindi).

[73] [Name withheld for cultural reasons] writes that he was born in 1922, is a senior man for the Nyikina Mangala people, his mother was Walmajarri and his father is Mangala. At paragraph 4 of his affidavit, he states 'under our Law, I can speak about this place in the map, attached at A' (being a map of the proposed licence prepared by DMP). [Name withheld for cultural reasons]'s seniority and his authority to speak for the area covered by the proposed licence is also attested to by Ms Milgin and Mr Watson. Ms Milgin states that he is 'a very senior cultural man for us' and 'he has been around those places on the map for years. He has been there from young fellow and worked there the longest time' (at paragraphs 6 to 9 Ms Milgin's affidavit). Mr Watson also deposes to [name withheld for cultural reasons] being the 'right cultural person' to give evidence about the area of the proposed licence because 'he carries out the law and culture program for the Nyikina Mangala people' and because he grew up with the old people who held the knowledge for country which [name withheld for cultural reasons] now passes on (at paragraphs 6 to 8 Mr Watson's affidavit).

[74] Ms Milgin is a senior Nyikina Mangala traditional owner, born at Paradise Station and the daughter of a Nyikina man and a Mangala woman. Ms Milgin has provided a map of the proposed licence with her affidavit and she states 'I know this country on the map for a long, long time' (paragraph 6).

[75] Mr Watson explains that he is a Nyikina Mangala man, being the son of a senior law man for Nyikina Mangala, and is one of the directors of the Nyikina Mangala People's registered native title body corporate Walalakoo Aboriginal Corporation. He was born in Derby and lives in Jarlmadangah community, around 20 kilometres from the north west of the proposed licence. Within his affidavit, he refers to a map of the proposed licence and states that he knows the area very well.

[76] I accept that [name withheld for cultural reasons], Ms Milgin and Mr Watson are familiar with the area of the proposed licence and are authorised to give evidence on behalf of the native title party.

[77] In relation to Mr Watson's affidavit, the Government party objects to the admissibility of Annexure B (i.e. the Tribunal's synopsis and outcomes document prepared during mediation under s 31(3) of the Act) as it contains information provided on a confidential and without prejudice basis. The native title party requested the opportunity to respond to this point, however, I indicated the Tribunal had sufficient information and it was not necessary to receive any further material from any party on that point.

[78] Section 31(4) of the Act prohibits the Tribunal from using or disclosing information obtained during s 31(3) mediation for any purpose other than for providing that mediation assistance or establishing the good faith issue unless the person who provided it to the Tribunal gave their prior consent. Even though the synopsis and outcomes document was not provided by a party as it is a Tribunal document, it contains information put forward by parties within a confidential process as far as ss 31(3) and (4) allow. I note that good faith was not challenged within this inquiry and the Tribunal did not receive the prior consent (of persons providing the information contained within the synopsis) to use that information beyond the purposes in s 31(4)(a) and (b). I also note that the document itself contains the words 'confidential and without prejudice' and I am satisfied that the circumstances and applicable law do not allow for a departure from that. Therefore, the document shall not be taken into consideration.

[79] The Government party also asserts that the paragraphs in Mr Watson's affidavit regarding Warden's Court decisions and the associated Annexure F should not be given any weight, claiming that they are irrelevant. I have commented on this material at [180] below.

Section 39 Criteria

[80] For ss 39(1)(a)(i)-(iv), the native title party has addressed them in a collective manner (see paragraph 18 NTP Contentions). The grantee party's contentions have not been directed specifically to each sub-section.

[81] The Government party has mostly addressed the criteria separately, apart from some contentions regarding s 39(1)(a) generally. The Government party makes the comment that, apart from two main concerns of the native title party (regarding sites of significance and water sources), the native title party's contentions do not draw a link between the evidence and the criteria (paragraphs 43-44 GVP Reply). As the Act requires the Tribunal to take

account of each sub-section, I will approach them separately and categorise relevant aspects from the parties' contentions and supporting material as far as possible.

Section 39(1)(a)(i) enjoyment of registered native title rights and interests and s 39(2) existing use of land or water by persons other than the native title parties

Enjoyment of registered native title rights and interests

[82] The native title party's registered native title rights and interests are those listed on the National Native Title Register, following the Federal Court's decision in *Watson v Western Australia* that native title exists in parts of the determination area. In the proposed licence area (as per Tribunal mapping), the native title party holds exclusive native title rights and interests as follows:

> Exclusive native title rights and interests
>
> 5. 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 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 communal purposes;
> (ii) the right to take, use, share and exchange the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes.
>
> [Clause 6 omitted as it sets out non-exclusive native title rights and interests]
>
> 7. The native title rights and interests referred to in paragraphs 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 in 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).

[83] As all the material from parties was submitted after this determination took place, it is not necessary to set out the preceding native title rights and interests from the Register of Native Title Claims.

[84] For s 39(1)(a)(i)-(iv) the native title party contends that the relevant information is contained in [name withheld for cultural reasons]'s affidavit (in summary, regarding hunting and teaching, the existence of a soak water place, the existence of large paperbark trees with various uses and concern about the soak water being impacted by the grantee party's activities which would then affect the native title party's ability to hunt, fish and camp following their traditional way of life) and also Mr Watson's affidavit at paragraphs 27-33 (which explains the Cultural Heritage Plan, positioning of the tenement in terms of water levels, his concerns about the detrimental effects if an accident occurs on the proposed licence during the taking of uranium samples, access to Myroodah Station and Jarlmadangah and Looma families hunting on the proposed licence).

[85] In terms of hunting activities, [name withheld for cultural reasons] states that the western side of the proposed licence is good for hunting due to the existence of a soak (a jila called *Mungaiyara*) in the middle of the proposed licence (supported by paragraph 17 of Ms Milgin's affidavit). After mentioning that 'we been going hunting there longest time' and that 'our old people hunt there' he goes on to say that 'five of us from Looma went hunting there last month we took three little kids with us. We caught some goanna and kangaroo and one black head python' (paragraphs 20-21). Within Annexure B (the 2013 affidavit submitted in *Lungunan v Richmond*) [name withheld for cultural reasons] deposes that 'every year during the dry season people from my community go out to exploration license area and go hunting for bush turke*y gramadgga*, goann*a barndi*, kangaroo *wandjeeri* and emu *canarnanja*' (paragraph 13).

[86] Mr Watson's evidence also addresses use, occupation and enjoyment through hunting, camping and fishing activities. He attests to his family as well as many families from Jarlmadangah and Looma hunting for kangaroo, emu and bush turkey within the proposed licence with his family or families from Looma going on or through the tenement to hunt on a

weekly basis (paragraph 31). He also describes families camping on or near the proposed licence and fishing 'a lot in the Fitzroy River near the tenement at Myroodah Crossing', specifically catching barramundi, catfish, crocodiles and long neck turtles (paragraph 33).

[87] [Name withheld for cultural reasons] in his affidavit deposes to occupation and use and enjoyment of the area as follows:

(a) he describes hunting activities, as already outlined;

(b) he describes himself and others taking kids to the proposed licence area and teaching them how to hunt and to prepare animals for eating 'the right cultural way' (at paragraph 21);

(c) he describes camping activity, noting the proposed licence is a good spot due to the drinking water (paragraph 18 of 2013 affidavit);

(d) he describes people from the community using the main road through the proposed licence in order to access their favourite fishing spots (paragraph 17 of 2013 affidavit);

(e) he describes people from his community going out to the proposed licence to clear areas (approximately one year prior to the 2013 affidavit) (paragraph 14).

[88] In terms of using the natural resources, within [name withheld for cultural reasons]'s 2013 affidavit he describes using paperbark as plates, for 'strong bow shed, shelter', for boat-making by children and for shoes (paragraphs 19-20 [name withheld for cultural reasons]'s 2013 affidavit).

Effect on enjoyment of native title rights and interests

[89] The native title party notes that, in the absence of evidence to the contrary, the Tribunal is entitled to assume that the grantee party will exercise the rights of grant to their fullest, referring to [50] of *Lungunan v Areva Resources*. The Tribunal has adopted that assumption on numerous occasions (see for example *Wutha v Dourado Resources* at [43] and *Monadee v Western Australia* at [17]).

[90] [Name withheld for cultural reasons] suggests a connection between the grantee party's possible activity and the viability of the soak water which enables hunting activities. He considers that hunting will be diminished due to birds and animals dying if the soak water is poisoned by the explorer and mentions that uranium 'might be bad for the water there' as it

might kill the animals and fish (see paragraphs 24 and 26). Ms Milgin echoes this concern, after explaining the importance of the soak providing fresh water for people and animals, and asserting 'it is very important that this water place does not get poisoned by people digging up the ground' (paragraph 18). Mr Watson provides greater context to this concern and how he thinks it would affect some of the native title rights and interests, stating at paragraph 28-29 of his affidavit:

> The tenement is where the higher country runs off into the Camballin flood plain – the tenement is less than 1.9 kilometers from the flood plain. Even the best environment protection standard is not enough of a guarantee for Nyikina Mangala that the Fitzroy river and the water places in the tenement won't be poisoned by the activities Mr Richmond does on the tenement. Especially in the wet season, the risk is higher because of the very high water levels and the big amounts of water running through that area in and around the tenement.
>
> I know that once an accident has happened on the tenement in taking uranium samples, there is no turning back to fix the accident. An accident with the samples of uranium would lock us – the Traditional Owners – out of contaminated zones and the wildlife would be killed. This would mean the end of us Traditional Owners using the area for hunting and fishing and camping, using our native title rights, teaching young kids cultural way, passing on traditions for that area.

[91] The Government party contends that this concern about poison is not substantiated with evidence. The Government party also contends that the risks to water sources are very low due to the nature of mineral exploration rather than mining and it notes the grant will be subject to conditions 'designed to avoid and minimise impacts on the environment, including water sources, as well as the State's full regulation regime' (paragraph 51 GVP Reply). Furthermore, the Government party contends that the production of a radiation management plan and the requirement for the grantee party to comply with it address the native title party's concerns about the potential for an accident to occur (regarding paragraph 29 of Mr Watson's affidavit) and the suspected detrimental effect on water (regarding paragraph 26 of [name withheld for cultural reasons]'s affidavit) (paragraphs 18-23 GVP Additional material).

[92] In relation to the native title party's concerns about the grantee party's capacity to lawfully exercise the rights permitted by grant, the native title party refers to paragraphs 10-26 and 34 of Mr Watson's affidavit. Broadly speaking, these paragraphs cover: problems with communicating with Mr Richmond; having no reasons to be satisfied that Mr Richmond or any joint venture company would liaise with all parties for the benefit of Aboriginal people (as indicated in the grantee party's work program (Annexure C to Mr Watson's affidavit)); adverse decisions of the Warden's Court involving Mr Richmond (related to expenditure requirements); the perceived possibility of on-selling the tenement; the lack of contentions or

evidence about how Mr Richmond would deal with cultural heritage concerns; perceived inability to comply with the draft endorsements and conditions (based upon the viewpoint that Mr Richmond doesn't have enough resources and experience to explore safely, noting there is no evidence suggesting otherwise); and perceived lack of financial resources required for safe uranium exploration.

[93] In response to Mr Watson's viewpoint that Mr Richmond won't be able to comply with the draft conditions and endorsements (due to a perceived lack of resources and experience: see paragraphs 24-26), the grantee party alluded to the benefits of a joint venture, speaking favourably of Areva Resources. After further clarification, it was established that there currently is no joint venture in place, though Mr Richmond has the intention to make a proposal to Areva and other companies specialising in uranium for a 'possible joint venture type deal' (see page 2 GP Additional).

[94] The Government party contends that it is unlikely that hunting, fishing and camping activities will be affected by the grantee party's proposed activities, due to the proposed work plan as set out in Mr Richmond's 8 September 2013 letter to DMP (Annexure C to Mr Watson's affidavit). In particular, the Government party notes that the grantee party plans to do 'no more than traversing the proposed tenement on foot on a grid of 100 metre spacing' which will not involve ground disturbance and is 'unlikely to have a significant, if any, effect on the hunting, fishing and camping activities' of the native title party (paragraphs 46-47 GVP Reply).

[95] The Government party also contends that it is relevant that the native title party has consented to petroleum exploration within the determined area in the past, providing reasons and referring to *Backreef Oil v Nyikina Mangala* at [91], which reads as follows:

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

conditions are met, although that was not put forward by the native title party in the present matter.

[96] The Government party contends that, even if the activities progress to drilling, the native title party is capable of accommodating such exploration activity along with its hunting, fishing and camping activities. While the native title party has consented to petroleum exploration in the past I cannot know how comparable the circumstances are and accordingly I do not think it is particularly relevant.

[97] The grantee party provided some information about how water will be affected, clarifying that the proposed licence is in 'a syncline and completely separated from the flood prone Fitzroy river high water level' (page 3 GP Additional). I note this differs from Mr Watson's viewpoint about large amounts of water running in and around the proposed licence during the wet season (at paragraph 28). The native title party contends in its reply that the grantee party's statement is not supported by evidence whereas Mr Watson's viewpoint is supported by his first-hand knowledge and the CSIRO report (Annexure A to the NTP reply). The native title party contends that the report and Mr Watson's knowledge indicate the proposed licence is in an environmentally sensitive area and explains portions of the CSIRO report as follows (paragraphs 4-5 NTP Reply):

> 4. The map titled 'Fitzroy River cross-section overview' with Annexure "A" shows the position of Myroodah Station. Directly below Myroodah Station is the tenement area which, though not marked on the map, can be approximately located by comparing the cross-section map with the map circulated by the Tribunal on 20 August 2014. A sense of the different scales of the respective maps can be gained by locating Myroodah Station and Looma to its North-West on each of them.
>
> 5. The cross-section map in Annexure "A" reveals that the tenement area covers portions of the Liveringa Group of bedrock as well as Wallal sandstone and a small portion of Noonkanbah formation. This is relevant to the highlighted portions of the report text in Annexure "A" which, in summary, state that groundwater from the Liveringa Group of bedrock may be discharging into the Fitzroy River and that further research into groundwater/surface water interactions in the lower Fitzroy River is required in order to manage the environmental implications of development.

[98] More generally, the grantee party provided the following information about its proposed activity: 'this would be a typical uranium exploration program, except closer drill spacing would be adopted for the smaller area of E04/2141 plus it is more advanced by the CRA Drilling of 1979, DMP WIMEX Report A8849 Item 1414, Mineral Claims 04/8251-8279. Areva would be targeting the Erskine Sandstone as CRA did on application E04/2141' (page 2 GP Additional). The grantee party has not explained that statement further and it is assumed

that the above reference to Areva should be a reference to the grantee party. The grantee party requests that the native title party summarise any damage suffered by the environment and local community from the 1979 CRA drilling, to which the native title party notes an absence of grantee party evidence about the 1979 CRA drilling and notes CRA is an entirely different entity to the grantee party.

[99] Although not directly raised in relation to s 39(1)(a)(i), the grantee party notes 'the excerpts and articles included in my submission emphasises my interest in uranium safety technology, environmental understanding and Aboriginal history' (page 3 GP Additional).

[100] I note the Government party's information about the regulatory regime above. The Government party contends that some issues under s 39(1)(a) will be addressed by the environmental assessment process the Government has in place, to be activated if productive mining takes place. The Government party also describes the grantee party's intended activities based upon the 8 September 2013 letter (see [48] above).

[101] In terms of the existing use of the land by persons other than native title parties and existing non-native title rights and interests (see s 39(2)), I note the existence of the indigenous held pastoral lease (100 per cent overlap), historical lease (100 per cent overlap) and exploration permits (43.3 and 56.7 per cent overlaps) (see above). No information has been provided about the nature of the interests and the specific activities involved.

[102] For the historical lease (H396/444) and exploration permits 457 and 458, I assume the interests would involve access to the proposed licence which would already have some impact on the extent of the native title party's access and enjoyment of their native title rights and interests. In respect of the indigenous-held pastoral lease, it is to be distinguished from an ordinary pastoral lease where the lawful activities of the pastoralist prevail over native title rights and interests; in *Monadee v Western Australia*, it was found that the usual factors in assessing the effect of pastoral interests on the exercise of native title rights and interests do not automatically occur (at [28]; see also *Lungunan v Areva Resources* at [47]).

Consideration of s 39(1)(a)(i)

[103] Where, as in this matter, 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 National Native Title Register, and then consider evidence of the likely effects of the future act on those determined native title rights and interests.

[104] The native title party's registered native title rights and interests are described at [82] above.

[105] 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]. The native title party's deponents indicate current use and enjoyment of the proposed licence area. I accept that the rights and interests as described in the Federal Court's determination are exercised on the proposed licence area.

[106] The native title party contentions regarding the potential effects of the grant of the proposed licence on the criteria in s 39(1)(a)(i) of the Act are summarised above at [89] to [90] above.

[107] The challenge to the capacity of the grantee party to exercise the rights permitted by grant is to some extent confirmed by the grantee party in correspondence to the DMP dated 8 September 2013 as referred to in the GVP Reply at paragraph 42. That is, the intended work program commences with on-ground survey with a Geiger counter and depending on results a drilling program will follow. However, at paragraph 42(f) of the GVP Reply (also shown on page 2 of the 8 September 2013 letter; annexure C to Mr Watson's affidavit) it says that any drilling program will need to be on a joint venture basis, suggesting that the grantee party, individually, does not have the capacity, and noting the grantee party's reference to the need to 'engage an experienced mining company in a joint venture capable of putting a project into production' (GP Reply page 2).

[108] The Government party contends (see [94] and [96] above) that hunting, fishing and camping activities are unlikely to be affected based on the grantee party's correspondence referred to at [48] above which suggests that the grantee party will undertake activities up to the point of drilling, but would require a joint venture partner to proceed beyond that point. The Government party says that even if activities progress to drilling those grantee party activities are capable of being accommodated alongside the hunting, fishing and camping. The drilling program would be on a 50m grid with 50m spacing.

[109] Were drilling of that intensity to occur over the whole of the tenement area, it is clearly possible that that the enjoyment of registered native title rights and interests could be affected. However, it would seem probable that: prospecting and therefore drilling would not extend to the entire area of the tenement; exploration activities would be conducted sequentially rather than contemporaneously; exploration activities will be of limited duration and only a small amount of the proposed licence would be disturbed at any one time.

[110] The impact of grantee party activities of concern to the native title party relate significantly to the risk to water and the consequential impact on the viability of the hunting grounds and consequently camping activities. The native title party's ability to exercise its exclusive native title rights in the tenement area are spoken of in the context of hunting, fishing and camping and the use of natural resources such as paperbark. There is no evidence that mere presence would negatively impact these activities, rather, and despite the regulatory framework, the impact to the environment as a result of exploration activities is seen as the impediment to the enjoyment of registered native title rights and interests.

[111] As stated at [91] above the Government party contends that concern regarding contamination are unsubstantiated and the risk of harm to water sources are low due to the nature of the activities and the regulatory environment, including the production of a radiation management plan and the requirement on the grantee party to comply with it.

[112] Having taken the above into consideration, I am of the view that 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 endorsements and conditions (see [56] above) and those set out in the 'conditions' section of this determination.

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

Way of life, culture and traditions of the native title party and any effect

[113] With reference to the evidence of [name withheld for cultural reasons] and Mr Watson, the native title party also contends that the evidence indicates frequent use of the land and waters in the western portion of the proposed licence 'meaning the likelihood of direct interference with their community and social activities, way of life, culture and traditions is significant' (paragraph 20 NTP Contentions). I am of the view that the hunting, cooking and teaching

practices outlined above and the practice of calling out to country and associated activities to protect people from harm (for example, see [133] and [136] below) are relevant.

[114] The Government party addressed s 39(1)(a)(i) and (ii) simultaneously so the comments under s 39(1)(a)(i) have been taken into consideration. Relevant to this sub-section, the Government party contends that exploration and the traditional activities 'in this case' are not 'fundamentally incompatible', based upon the native title party's consent to petroleum exploration in the past (as raised at [95] above) (paragraph 48 GVP Reply). The grantee party has not specifically addressed the criterion, however, the information about effect under s 39(1)(a)(i) is considered to the extent that it is relevant.

Consideration

[115] As set out at [55] and [56] the State and Federal regulatory regime 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 1981* (WA), 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).

[116] At [59] above it is apparent that the grantee party will be required to produce a radiation management plan to be approved by the Radiological Council, where uranium exploration is to occur. However, it seems that regulation 16.7 (Preparation of a Radiation Management Plan) is only activated when drilling is proposed (not for other exploration activities prior to drilling). This suggests that, based on the statements that drilling would only occur should a joint venture be secured ([48] above]), any Radiation Management Plan would be that of the joint venture partner.

[117] 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. Despite the uncertainty about the identity of the organisation which might ultimately conduct the authorised exploration activities, I am satisfied that, despite that uncertainty and because of the regulatory regime (which would equally apply to any such joint venture partner or assignee), any physical interference with the native title party's way of life, culture and traditions will not be significant.

[118] 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 endorsements and conditions (see [56] above) and the conditions below are likely to minimise such impact.

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

Evidence provided

[119] The Government party asserts that the Tribunal can conclude there will be no effect on the development of the social, cultural and economic structures of the native title party as no specific contentions were made by the native title party. The grantee party has not specifically addressed this criterion.

[120] The native title party has not addressed this criterion, apart from the general assertion in [84] above. The material in the affidavits does suggest there are social and cultural structures, through the hunting and teaching activities involving various generations. In terms of any effect, Mr Watson, after describing his concern about the anticipated possibility of an accident occurring on the proposed licence in the course of taking uranium samples, explains that 'an accident' with the samples of the uranium would exclude the traditional owners from contaminated areas and kill wildlife, which would 'mean the end of various activities and 'teaching young kids cultural way, passing on traditions for that area' (paragraph 29 Mr Watson's affidavit).

Consideration

[121] I acknowledge that the activities described at [84] to [88] above, which the native title party's deponents attest to conducting on the proposed licence, appear to have a positive social impact for the native title party, including children, and the Looma community. However, it appears unlikely that the grant of the proposed licence will physically interfere in a significant way with those structures provided there is flexibility in the proposed drilling practices.

[122] Any drilling program would follow the development of a Radiation Management Plan. As explained at [59](b) above, the preparation of a Radiation Management Plan is prescribed by regulation 16.7.

[123] I have no evidence to make a finding in relation to any economic benefits which might accrue to the native title party as a result of the grantee party's activities, except perhaps for fee-for-service activities such as cultural heritage clearance work.

[124] On the basis of the evidence before me, I find that the grant of the proposed licence, on balance, is likely to have a marginal beneficial effect on the development of the social, cultural and economic structures of the native title party.

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

Access and carrying out rites and ceremonies and any effect

[125] Again, the Government party notes that the native title party made no specific contentions on this point. There are contentions and ample evidence from the native title party regarding access to the proposed licence. Some of the evidence is relevant to rites and ceremonies as it shows clear communication rituals carried out by the deponents and members of the community, in relation to specific sites or events for cultural purposes (specifically, [name withheld for cultural reasons]'s evidence described at [133] and [161(c)(i)] below and [name withheld for cultural reasons] and Ms Milgin's evidence at [136] below).

[126] The native title party has noted [name withheld for cultural reasons]'s and Mr Watson's evidence (see [84] above) in support of s 39(1)(a)(i)-(iv). The native title party has also referred to [name withheld for cultural reasons] and Mr Watson's evidence as indicating frequent use of the land and waters in the western area of the tenement. I am satisfied that [name withheld for cultural reasons]'s evidence about hunting practices, teaching practices, camping and using bark as outlined above under s 39(1)(a)(i), in addition to Mr Watson's evidence about hunting, cooking, fishing and other activities (paragraphs 31-33 in particular) establish that the native title party regularly accesses the area of the proposed licence for various purposes. In relation to Myroodah Station, located two kilometres east of the proposed licence (according to Tribunal mapping), which Mr Watson notes is owned by the Indigenous Land Corporation, he deposes 'we access the station for camping and hunting and fishing all the time' (paragraph 30) .

Effect of grant on freedom of access and freedom to carry out rites and ceremonies

[127] In terms of any effect, Mr Watson has stated his concern that an accident with the uranium, if that occurred, would lock the traditional owners out of contaminated zones (paragraph 29 Mr Watson's affidavit). This suggests a concern about future access, but there is very little information provided.

[128] In terms of the practice of communicating with country in relation to burial sites, [name withheld for cultural reasons] notes a concern which could potentially arise if the proposed licence is granted, as he describes the explorer not knowing how to 'go on country there. You have to call out to the spirit of our old people buried there'.

[129] The Government party notes that the holder of an exploration licence does not have a right of exclusive possession and may not restrict access to Aboriginal persons except for safety reasons (paragraph 54 GVP Reply). There is little information about where exactly the grantee party intends to access and thus, how much of the proposed licence will be subject to safety precautions, within the proposed licence.

Consideration

[130] Having regard to my findings concerning s 39(1)(a)(i) above, I accept that on the basis that conditions, comprising both the Government party's proposed conditions and endorsements (see [56] above) and the conditions below, are applied, are likely to minimise any effect on the native title party's freedom of access or freedom to carry out rites and ceremonies.

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

Evidence in relation to sites of 'particular significance'

[131] The native title party contends that there are sites of particular significance within the proposed licence and the affidavit evidence of [name withheld for cultural reasons] and Ms Milgin in particular draw attention to *Jilibobel*, burial sites and *Mungaiyara*.

Jilibobel (hill)

[132] The native title party contends that [name withheld for cultural reasons]'s evidence about a site known as Jilibobel (described as a dangerous place and a hill south west of Garden Well within the proposed licence) demonstrates the particular significance of the site to the native title party and the responsibility of the Nyikina Mangala People to 'abide by Law passed down through the generations dictating avoidance of the vicinity of Jilibobel and carrying out specific cultural rituals and ceremonies when venturing in specifically delineated surrounding areas' (paragraph 27 NTP Contentions). [Name withheld for cultural reasons] describes his knowledge of and the story attached to Jilibobel as follows:

> 7. There is a big danger place in the place where this kartiya wants the tenement. I told this in my statement before. It is at a hill we call Jilibobel – this place is down and in – south west from the jila place that the kartiya people call garden well.
>
> 8. I don't go near that place – that Jilibobel place. The people who live here don't go there. The Nyikina Mangala people don't go there. There is a danger place there because of the Bulgardoo that lives in the big cave at Jilibobel.
>
> 9. I don't go anywhere close to the Jilibobel place. It's too much danger there.
>
> 10. A long time a dog ran after kangaroo and they jumped around in front of Jilibobel. That thing in the cave at Jilibobel came out, that Bulgardoo – opened its door and took them down into the cave. No one ever goes near that area. What's happening in that cave is danger.
>
> 11. The place – Jilibobel – it is one of the biggest danger places I know. Our people know that. What will the kartiya man – the explorer- what will he do there? He doesn't know what to do there and in these danger places. Might be that he goes there – if he gets this tenement. He doesn't know cultural way. He might get killed by Bulgardoo. Bad things happen to people in Looma too if someone goes to [sic] close to Jilibobel. Looma is close to this place. People at Myroodah might get bad things if this kartiya goes to these danger places.

[133] [Name withheld for cultural reasons] also describes how he goes the 'safe way' past Jilibobel if he goes hunting and says he knows the words to say to speak to country and tell country that he is passing as a safe way 'to stop bad things happening to the people there and to us' (paragraph 13 [name withheld for cultural reasons]'s affidavit) which involves using a special stone and mud and calling out in his language of Mangala or Walmajarri to give a warning (paragraph 16). He states that it is the law from his old people that says the site has to be

avoided and the avoidance of this site is such that [name withheld for cultural reasons] describes avoiding it in the air if a plane is flying over for surveying (paragraphs 14-15).

[134] [Name withheld for cultural reasons]'s evidence about Jilibobel is supported by Ms Milgin's affidavit. She describes Jilibobel (using a different spelling) as a hill in the proposed licence, south of Garden Well, for which [name withheld for cultural reasons] carries the story, being a story given to him by his old people and which he gives to the young people. At paragraphs 11 and 15 of her affidavit it reads:

> 11. In the tenement there is a place called Jilibubel. Jilibubel is a hill in the tenement. I know it very well. I would not go near Jilibubel. This place has a very big story in cultural way for it – very powerful story. This place – Jilibubel – it is a very real danger place. Not just a danger place for our people though – for everyone the bad can happen – kartiyas also. I know this story for Jilibubel. My people know this story.
>
> ...
>
> 15. We do not go there to Jilibulel and we know to stay away – and how to go through the places there – at a distance from these dangerous places. We know what we have to say and do to protect ourselves from these places ...

[135] The native title party cites *Lockyer v Iron Duyfken* (at [54]) and contends that in that matter, the Tribunal found that 'a site was one of particular significance as there was a story attached to it, the site was associated with injury by supernatural forces and also there was general acknowledgement among the relevant Aboriginal community that the site was a dangerous place' (paragraph 26 NTP contentions).

Burial sites

[136] The native title party also provides evidence about burial sites on the eastern side of the proposed licence. [Name withheld for cultural reasons] describes the responsibility he has to protect them, stating 'you have to call out to the spirit of our old people buried there ... you got to know how to speak to them in a cultural way' (at paragraphs 18 and 19). Ms Milgin deposes that 'there are many places that our old people are buried on the eastern side of the tenement ... There are Mulagi (spirits) around there – you got to call out to country and let them know you are there' (at paragraph 16). Specifically, [name withheld for cultural reasons] describes 'our old people' being buried 'at the bottom of the hill and right around the hill at garden well bore' (paragraph 17).

[137] The expedited procedure determination over the proposed licence, *Lungunan v Richmond*, contained evidence about burial sites. In the present matter, the native title party contend (at paragraph 30 NTP contentions):

> As Member O'Dea recognised in his Determination relating to the NTP's expedited procedure objection application, the Tribunal has previously accepted that a burial site may be a site of particular significance [citing [35]], notwithstanding the fact that the evidence does not specifically describe the connection between the site and the laws and customs of the native title holders [citing *State of Western Australia/Glen Derrick Councillor and Others on behalf of the Naaguja Peoples; Leedham Papertalk and Others on behalf of the Mullewa Wadjari Community/Bayform Holdings Pty Ltd,* [2010] NNTTA 41 at [43].

[138] At [35] of *Lungunan v Richmond* it reads as follows:

> The Government party submits that there is insufficient evidence to demonstrate that the sites referred to by [name withheld for cultural reasons] are sites of particular significance to the native title party (GVP Contentions, paragraph 56). I agree with the Government party's submission insofar as it refers to the site said to exist along the eastern edge of the proposed licence and the hill near Garden Bore and 6 Mile Pool. In my view, [name withheld for cultural reasons]'s evidence about these sites lacks the precision required to enable the Tribunal to be satisfied that they are sites of particular significance, both in relation to their location and their relationship to the law and culture of the native title party. However, I do not accept the Government party's submission in relation to the hills associated with the dreaming site or the burial site near Garden Well. With regard to the hills, [name withheld for cultural reasons] clearly outlines the foundations of the site's significance in accordance with the native title party's traditions. While [name withheld for cultural reasons] does not provide the site's exact location, I consider his evidence to be sufficient to support a finding that it is a site of particular significance to the native title party. Although [name withheld for cultural reasons]'s evidence about the burial site does not directly address the issue of the site's significance in accordance with the traditions of the native title party, the Tribunal has previously accepted that a burial site may be a site of particular significance notwithstanding the fact the evidence does not specifically describe the connection between the site and the laws and customs of the native title holders: see *Bayform Holdings* at [43]. In the present case, I am prepared to infer that the burial site is of particular significance to the native title party.

Mungaiyara (soak water)

[139] The native title party also describes water places within the tenement with particular details about a soak called Mungaiyara. [Name withheld for cultural reasons] states (at paragraph 23):

> Around the road that runs down the middle of the tenement there is good soak water, spring water named Mungaiyara. There are four water places out there in that place the explorer wants the tenement. One of them is a salt water place. There is a story for these places. I can't tell the story in English.

[140] Ms Milgin states '[name withheld for cultural reasons] can also tell the story of the water places in the tenement and describes Mungaiyara, a jila place, as providing fresh water for the

people and for the animals, making the proposed licence area a good hunting place (at paragraph 17). At paragraph 18, she states:

> It is very important that this water place does not get poisoned by people digging up the ground. This water place is been for old people and now us. These places are very important to us. They are the land on which our people lived and that we must protect and leave to our children to protect.

[141] [Name withheld for cultural reasons] expresses concern that the soak water won't be good for hunting or fishing if the soak water is poisoned by the explorer and he suspects that the uranium might be bad for the water and kill the animals and other fish. He says 'the best thing is leave that place alone. Stop bad things happening' (paragraph 25 [name withheld for cultural reasons]'s affidavit).

Effect of grant on any sites of particular significance

[142] The native title party contends that it is clear that the grant of the proposed licence would have a 'major effect' on a site of particular significance for the native title party, noting the danger for people at Myroodah and Looma if the grantee party were to access Jilibobel (paragraph 28 NTP contentions).

[143] In terms of the burial sites at the bottom of and around the hill at Garden Well, [name withheld for cultural reasons] states (at paragraphs 18-19):

> If a kartiya goes onto a burial place where our old people are buried – they don't know how to go on country there. You have to call out to the spirit of our old people buried there.
>
> If the explorer goes digging around the tenement he might dig up our old people. This is a bad thing – make us unhappy. The old people need to rest. The spirits need to rest. You got to know how to speak to them in a cultural way.

[144] With reference to the burial sites on the eastern side of the tenement, Ms Milgin states that it is 'not alright that our old people's place where they are buried is disturbed by people exploring' and she attests that 'there are Mulagi (spirits) around there – you got to call out to country and let them know you are there' (paragraph 16). The Government party contends that the effect under s 39(1)(a)(v) is in relation to effects on the areas or sites of particular significance, rather than effects of grant on people.

[145] The native title party contends that it is relevant that the grantee party didn't submit contentions addressing his intentions as to how uranium exploration will be conducted in a

manner that addresses the cultural heritage concerns and also that there are problems with communicating with the grantee party (see s 39(1)(f) below). Mr Watson's evidence addresses these two concerns and he notes there is no heritage protection agreement with Mr Richmond (paragraph 23).

[146] The grantee party has not specifically addressed the sites claimed to be of particular significance nor has provided specific evidence about how it would avoid those sites. Within the grantee party reply, Mr Richmond stated 'GPS coordinates to give precise locations of cultural sites to be avoided would be appreciated' (page3 GP Additional material) and he did make general reference to the excerpts and articles attached to his reply as showing his interest in 'uranium safety technology, environmental understanding and Aboriginal history'. However neither of these aspects of his reply provide a specific assurance or undertaking.

[147] The Government party places reliance on the operation of the AHA and also aspects of the grantee party's work program, stating (at paragraphs 60-61 GVP Reply):

> 60. Secondly, the sites in question will be protected by the Aboriginal Heritage Act 1972 (WA) ("AHA") as previously submitted. Disturbance to Aboriginal heritage sites is prohibited by s 17 of the AHA without Ministerial approval. There is no evidence which would lead to the conclusion that the GP would be likely to breach the AHA.
>
> 61. Thirdly, it appears from the GP's work program that the GP is open to consulting with traditional owners about land access. Accordingly, there is a reasonable prospect that the GP will consult the native title holders such that any potential site disturbance is avoided.

[148] In relation to the AHA, the native title party raises the following:

(a) Concerns about proposed amendments to the AHA with reference to KRED's *Submission in response to the Aboriginal Heritage Bill 2014 (WA) –Draft Bill for Public Comment*, provided with its contentions, and noting that the application of the AHA is currently unknown and that there is concern among traditional owner stakeholder groups that the draft bill significantly decreases the already-limited protections for Aboriginal heritage sites. Mr Watson's evidence expresses this concern (at paragraph 24);

(b) Distinctions between s 5 AHA and s 39(1)(a)(v) are drawn, as the definition of an area to which the AHA applies is more restrictive than the terms of s 39(1)(a)(v) (citing *Young v Western Australia* at [57]);

(c) Careful consideration should be given to the Tribunal's finding in the associated expedited procedure determination (*Lungunan v Richmond* at [38]-[39]) that the AHA would not be adequate to satisfy the risk of interference with sites of particular significance, noting that the affidavit of [name withheld for cultural reasons] in that determination has been provided as part of the current inquiry (i.e. [name withheld for cultural reasons]'s 2013 affidavit).

[149] I also note the Government party's general comments about the regulations for uranium mining above (see [59]-[60]). In terms of the regulatory regime (at paragraphs 33-39 GVP Contentions) and the grantee party's capacity to exercise the rights of grant lawfully, the native title party refers to paragraphs 10-26 and 34 of Mr Watson's affidavit (see summary at [92] above). Mr Watson also makes the comment 'we are worried that the draft conditions and endorsements aren't enough to protect our heritage places' (paragraph 24). The Government party takes issue with Mr Watson's evidence regarding the Warden's Court decision (see [170(e)] below). As explained at [180] below, I consider the Warden's Court material to be of little relevance.

Consideration

[150] 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.

[151] In *Lungunan v Richmond* at [35], Member O'Dea said: 'I do not accept the Government party's submission in relation to the hills associated with the dreaming site or the burial site near Garden Well. With regard to the hills, [name withheld for cultural reasons] clearly outlines the foundations of the site's significance in accordance with the native title party's traditions. While [name withheld for cultural reasons] does not provide the site's exact location, I consider his evidence to be sufficient to support a finding that it is a site of particular significance to the native title party'.

[152] In this matter there is also the evidence of Mr Watson which, in my view, strengthens this conclusion both in relation to Jilibobel and to the burial sites. The evidence in relation to

Jilibobel and the burial sites has been detailed and sufficiently explains the particular significance.

[153] At [38] of *Lungunan v Richmond* Member O'Dea said 'The grantee party … has not explained how it intends to avoid interference with the sites referred to by [name withheld for cultural reasons] or generally'. He went on 'There is no evidence before the Tribunal that the grantee party has offered to enter a heritage agreement, and the Government party has not indicated that it will impose a condition requiring the grantee party to do so'.

[154] Despite these statements and the Tribunal's conclusion in that matter, there is no evidence that this concern about interference to sites of particular significance has been addressed.

[155] The Government party contends 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 *Western Australia v Thomas/Waljen.* The Government annexes the Draft Tenement Endorsement and Conditions noting Endorsement 1 which provides that 'The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any regulations thereunder'.

[156] I note that the grantee party has indicated a willingness to 'sit down with' the native title party for an informal discussion (page 6 GP Reply) and has stated it would appreciate receiving GPS coordinates of locations of cultural sites to be avoided.

[157] I accept the particular significance of the area referred to as Jilibobel and the burial sites as established on the evidence submitted in this inquiry. I am confident that the conditions and endorsements to be imposed on the grant by the Government party, and the relevant conditions below, will minimise any effects of the proposed licence on this site/area.

[158] I find the soak water to be of importance to the exercising of native title rights and interests, however the soak water itself is not of particular significance as that term has been interpreted as the evidence does not demonstrate it as being of more than ordinary significance.

[159] The Government party's *Aboriginal Heritage Due Diligence Guidelines,* published on 30 April 2013 and publicly available 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. This issue has been addressed in the condition section below.

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

[160] The native title party refers to the following at paragraphs 37-40 of their contentions:

(a) The native title party understands that there is no 'veto' but the 'evidence, interests, proposals or wishes of the native title party ought to be given significant weight' where exploration will affect an area and sites of particular significance to the native title party (citing *Weld Range v Wajarri Yamatji* (at [310] and *Western Desert Lands v Holocene* at [161]-[162]);

(b) paragraph 25 of [name withheld for cultural reasons]'s affidavit is relevant, noting his statement in relation to the soak water: 'the best thing is leave that place alone. Stop bad things happening'

(c) Ms Milgin's statement that it is important that *Mungaiyara* (see s 39(1)(a)(v) above) is not poisoned and must be protected now and by future children (paragraph 18 Ms Milgin's affidavit); and

(d) in relation to the Camballin Floodplain that abuts the proposed licence, relevant views are contained within the 'Nyikina and Mangala Wardoowarra Wila Booroo Natural and Cultural Heritage Plan' (annexure G to Mr Watson's affidavit).

[161] I also note some relevant aspects of the native title party's affidavits as follows:

(a) [Name withheld for cultural reasons]'s statement 'we do not want explorers going out to these special places without talking to us first' after describing the four other heritage places, a burial site near Garden Well/Bore, dangerous place along the

eastern edge of the proposed licence area and 'some hills to the South West of Garden Well' (paragraphs 23-35 [name withheld for cultural reasons]'s 2013 affidavit);

(b) Concern regarding digging activity around burial places (paragraph 19 [name withheld for cultural reasons]'s affidavit);

(c) the process of communicating with country described as follows:

(i) Anyone from 'our community' needs to 'yell out aloud and introduce themself to the place', with consequences if this is not done (paragraphs 30-33 [name withheld for cultural reasons]'s 2013 affidavit; see also paragraphs 16 and 28-29 of [name withheld for cultural reasons]'s affidavit regarding calling out in his language in the cultural way to stop bad things from happening);

(ii) if the explorer goes onto country, it would be sufficient for a proper person to accompany and introduce the explorer and any workers (paragraph 30 [name withheld for cultural reasons]'s 2013 affidavit);

(iii) under 'our law anyone who is not Nyikina Mangala needs to ask permission before they can go out on to our country' (paragraph 39 [name withheld for cultural reasons]'s2013 affidavit);

(iv) in relation to burial places, [name withheld for cultural reasons] describes the explorer not knowing how to 'go on country there. You have to call out to the spirit of our old people buried there' (paragraph 18 [name withheld for cultural reasons]'s affidavit);

(d) the possibility of agreement in his statement 'when we have an agreement with an explorer we can tell them where special places are' and 'the best way to protect these places under our law and white law is to have an agreement with companies who want to explore this area' (paragraphs 35-36 [name withheld for cultural reasons]'s 2013 affidavit);

(e) Concerns about safe exploration due to a perceived lack of resources (paragraphs 24 and 26 Mr Watson's affidavit);

(f) Environmental concerns (e.g. paragraphs 28-29 Mr Watson's affidavit);

(g) Concern about the lack of evidence from Mr Richmond about how he will address cultural heritage concerns and lack of heritage protection agreement (paragraph 23 Mr Watson's affidavit);

[162] The Government party has noted the following (at paragraphs 62-67 GVP Reply):

(a) In relation to the NTP's contention about Camballin Floodplain and Mr Watson's evidence about the risk of poisoning Fitzroy River, the Government party contends 'this evidence appears to rely upon a misconception of the nature of the activities contemplated by an exploration licence' and ignores the conditions to be placed and the regulatory regime;

(b) In response to [name withheld for cultural reasons]'s viewpoint ('best thing is leave that place alone. Stop bad things happening') the Government party contends that the opinion is not determinative and should be given no more weight than other factors; and

(c) the native title party has consented to other resource exploration in the determined area in the past (see [95] above).

[163] In relation to [162](c), I note that the consent spoken of is in relation to the cases cited within [91] of *Backreef Oil v Nyikina Mangala* (i.e. EP6/97-98, EP2-96-97 and EP10/04-5, which were the tenements the subject of Tribunal consent determinations WF2002/0008, WF2002/0007 and WF2007/0018-19 respectively). Those tenements are located within the native title party's determination area, and in the vicinity of proposed licence, though that consent occurred many years ago involving other grantee parties under other circumstances.

[164] Also, I consider the Government party's information regarding regulations for uranium exploration to be relevant to the native title party's environmental concerns.

[165] The grantee party has made the general comment that the excerpts accompanying the grantee party reply show its interest in uranium safety (see [99] above) but has not specifically addressed this criterion.

Consideration

[166] The native title party states that it does not want the act to be done. In particular, I note that the native title party indicates a strong opposition to uranium mining on environmental grounds.

[167] 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 (see paragraphs 42 and 53 GVP Contentions).

[168] My findings in relation to the wishes and proposals of the native title party are set out within this criterion and 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 v Holocene* at [145] and [216].

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

Material provided

[169] The Government party contends that the grant of the proposed licence is of 'potential economic significance to the nation, the State and the Shire of Derby/West Kimberley' (at paragraph 62 GVP Contentions). After listing various cases in which the Tribunal has found the grant of a *mining lease* to offer economic benefits, the Government party contends that there is no reason why the Tribunal should not make a similar finding for an exploration licence.

[170] The native title party contends that there is insufficient evidence before the Tribunal to support a finding that the grant of the proposed licence will provide economic benefit to members of the public, whether to the local residents of Looma, Myroodah or Jarlmadangah, or the Western Australian or Australian public more broadly (at paragraphs 47 and 48 NTP Contentions). Specific viewpoints of the native title party about economic issues are provided as follows:

(a) it is concerned that the grantee party is inadequately resourced to develop the tenement lawfully, as described under s 39(1)(b) above. Leaving the issue of compliance with legal obligations to one side, this assertion, if justified, would suggest a limited capacity to hold economic or other significance to Australia, the State of Western Australia and the Aboriginal people who live in the area of the proposed licence;

(b) Mr Watson deposes that 'in the past when I have met with Mr Richmond he has told me that he works on a low budget in conducting his work on the licence areas that he holds' (paragraph 12);

(c) In relation to the grantee party's 8 September 2013 submission to DMP (i.e. 'at this stage there is not a company policy but any Joint Venture would be required to liase [sic] with all parties for the benefit of Aboriginals on a successful project that goes into production') Mr Watson deposes that the 'Nyikina Mangala have not got any reason to feel that Mr Richmond or whichever joint venture company there is will "liaise with all parties for the benefit of Aboriginals"' (paragraph 16);

(d) the native title party contends that the other parties have failed to adduce any evidence indicating any demonstrated history of the grantee party of providing employment to local Aboriginal people, and refers to Mr Watson's deposition that never, to Mr Watson's knowledge, has Mr Richmond provided employment opportunities to local Aboriginal people in respect of his work programs. This is not disputed by the grantee party;

(e) Mr Watson deposes that he knows that Mr Richmond has had exploration licences or prospecting licences taken from him by other companies through the Warden's Court (paragraph 17). He attaches three copies of Warden's Court decisions forfeiting tenements the grantee party had applied for (Annexure D-F). He goes on to state that some of the Warden's Court decisions are 'not good' and 'show Mr Richmond has not met his minimum spend commitment' (at paragraph 18 Mr Watson's affidavit). Specifically he refers to a 1997 decision (*David Jones Roberts v William Robert Richmond* (citation not provided), a journal summary of which is included at Annexure F), in which the Warden's Court found that Mr Richmond had little or no regard for the expenditure requirements of the *Mining Act* and regulations. The native title party describes the evidence, particularly Mr Watson's, as establishing the 'Grantee's history of failing to meet minimum spend commitment under the Mining Act' (paragraph 49 NTP Contentions);

(f) Mr Watson also describes his and Nyikina Mangala senior people's awareness of Mr Richmond on-selling tenements, stating 'we cannot know who Mr Richmond will sell the tenement to' (at paragraph 21).

[171] The grantee party has not provided any specific figures about the anticipated economic impact to flow from grant of the proposed licence, though he expresses general confidence about Kimberley tenements as follows: 'if we can get through the heritage issues without undue barriers to exploration and development then I am confident some Kimberley tenements will produce resources given time' (at paragraph 21 GP Reply).

[172] The grantee party has indicated the amount Mr Richmond spent on unnamed exploration projects between 2006 and 2012. The grantee party also states 'one must engage an experienced mining company in a joint venture capable of putting a project into production' (page 2 GP Reply), which, taken with his other statements about wanting to commence discussions with another company for a joint venture, suggest the anticipated but unconfirmed involvement of another company.

[173] As for employment, the grantee party explains that the exploration has not progressed to the stage that employment could be offered (paragraph 16 GP Reply); I note that he does not provide any indication of when that stage might be reached.

[174] On the issue of Warden's Court decisions, the Government party contends that Mr Watson's reference to those decisions is irrelevant to the issues before the Tribunal. The grantee party responded to paragraph 18 of Mr Watson's affidavit by explaining the circumstances behind each forfeiture (at pages 3-4 GP Reply). I note my comment about Warden's Court material at [180] below.

Consideration

[175] The evaluation of the economic or other significance of the act under this sub-section requires specific evidence about the subject future act. I adopt the approach of Member Sosso in *Drake Coal v Smallwood* at [102]-[104] as follows:

> [102] A few observations can be made about the statutory task required of the Tribunal. First, the paragraph focuses on the significance of the *act.* It is not a generalised inquiry about the importance of exploration or mining to the economy (localised or national). It is a specific evaluation about the impact of the future act the subject of the inquiry. Accordingly, the Tribunal is not required under this paragraph to look any further than the evidence of how the proposed future act will impact on the economies and persons specified. Issues about the benefits of the mining industry to the health of the local, Queensland or Australian economy are not relevant to this paragraph. The only focus of this paragraph is the act in question and the only issue which the Tribunal is required to evaluate is the significance of the future act. The symbolic, cumulative or ripple impacts of the future act fall outside the purview of this paragraph.

> [103] Second, the inquiry is not limited to the economic consequences of the proposed future act – see *Western Australia v Thomas* (1996) 133 FLR 124 at 175. The term "other significance" is potentially broad and can only be sensibly dealt with in terms of the evidence produced at a particular inquiry. I do not read the term "other significance" as being limited to impacts of an economic or wealth related nature. It could be that the doing of the future act could have beneficial impacts for the advancement of medical or related research. For example, the minerals proposed to be extracted could be critical for medical research, or any other field of human endeavour. The "significance" of granting the right to mine must therefore be viewed in an expansive sense and not purely and necessarily from the quantum of money that will be generated from the extraction of the relevant material from the relevant land or waters.
>
> [104] Finally, the Tribunal is required to evaluate the significance of the proposed act to indigenous persons living within close proximity to the proposed tenement. It should be noted that the Act is not worded to limit the inquiry to members of the native title claim group. Rather, the inquiry focuses on the significance of the act to indigenous persons generally. For example, it may be that a proposed mine will generate jobs and related benefits to indigenous Australians who live nearby whether or not they are members of the claim group. The 1998 amendments to this paragraph were designed to ensure that in any proper inquiry the interests of local indigenous persons living and having responsibilities in the general area were given proper weight.

[176] It is the economic or other significance of the future act in question to which I must turn my mind (see *Western Australia v Thomas/Waljen* at 175-176). By the nature of an exploration licence, it is not yet known whether a resource will be found and any benefits to accrue from production are speculative at this point and no anticipated estimates have been provided. I draw on my comments regarding the nature of exploration activity in *Peregrine Resources v Ashwin* at [100]-[101**]**:

> [100] ....Further economic benefits are likely to flow if a resource is identified, but at the present stage those benefits are purely hypothetical. While it is acknowledged that exploration is a prerequisite to production, I have not given much weight to this possibility.
>
> [101] I accept that the proposed licence will generate some economic benefits through rental payments and expenditure on exploration...

[177] The scale of the grantee party's operations is an important consideration. In *Jensen v Mithaka People* the following approach was taken (at [50]-[52]):

> [50] There is very little material before the Tribunal on the economic and other benefits that would flow from the grant of the proposed mining lease. It appears that the grantee party is a small miner. The proposed scale and nature of his opal mining operations could be categorised as small and localised. It is doubtful if the grant of the mining lease would generate either considerable wealth to the grantee party or significant economic benefits either to the local community or the broader Queensland economy.
>
> [51] It is the case, nonetheless, that there is an economic and social benefit in facilitating small mining, and in the context of south western Queensland, a viable and vibrant opal mining industry. The fact that this particular tenement will not create significant economic or social benefits for the broader community is not of itself determinative. It is the case that cumulatively the grant of such tenements assists in facilitating an opal mining industry, which looked at in the broader scheme of things, is of advantage to the State of Queensland and, in particular, to certain small communities of western Queensland that are largely dependent on opal mining activities.

> [52] I therefore find that if the mining lease is granted, and opals are extracted, there may be some associated economic and social benefits for the local economy. Clearly the mining operations will be small scale and the economic benefits generated will be relatively limited. However, the grant of the tenement when looked at in the broader perspective of maintaining an opal mining industry is likely to have a positive economic impact.

[178] In this matter, the grantee party is a sole/small operator and as such, one might expect the exploration activity to be relatively small scale, subject to the evidence presented. The grantee party has provided very little evidence and I have no specific anticipated figures or other indications of the economic or other benefits reasonably expected to result.

[179] The native title party also raised the issue of on-selling tenements. I note that Mr Richmond has not indicated that he intends to on-sell tenements but he also has not challenged the native title party's suggestion that on-selling might occur. I am not satisfied that the comments regarding a joint venture provide any real assurance; there is no joint venture currently in place, and even if that arrangement came to fruition, there is no certainty on the material before me as to who the relevant company would be and what the likely effect would be, nor an indication of intentions if a joint venture does not take place. If the intention was clearly established in this case then it may raise some questions of uncertainty regarding economic prospects but I cannot comment further on this speculative issue.

[180] The Warden's court decisions indicate some historical facts and circumstances but they occurred many years ago and don't relate to the proposed licence.

[181] I also note the Government party has not provided evidence specific to this tenement but has contended that grant of the proposed licence is of 'potential' economic significance.

[182] In *Weld Range v Wajarri Yamatji*, in the context of a mining lease, the Project was described as of potential economic benefit (at [321]):

> [321]There is no doubt that further work needs to be done to finalise the Project and it cannot be said at this stage that the Project will definitely proceed. It is more accurate to describe the Project as of potential economic benefit at this stage. Nevertheless, the evidence establishes that there are reasonable prospects for a successful Project and I have not discounted the weight to be given to its economic significance to any great extent because a final decision on it has yet to be made.

[183] The Tribunal went on (at [322]) to accept there would be some economic benefit to the local area though the extent of that significance was unknown, and anticipated on site employment figures were considered:

> [322]... I accept that there will be some economic benefit to the locality of Cue but it is uncertain how significant this will be. The mining operation is not a large project and will employ some 20-

> 25 people on site. There was no evidence dealing with whether this would be local employment or fly in fly out. Nevertheless, some weight can be given to this local effect, even though it may be relatively small.

[184] I accept this contention and note that the Tribunal has previously accepted the economic benefits arising from the grant of mining and exploration tenure in Western Australia, in the absence of any evidence to the contrary (see *FMG v Yindjibarndi Aboriginal Corporation* at [35]). There is no evidence to the contrary in this case. I also note that there will be at least a minimal economic benefit to the local area through expenditure brought about by exploration activities (and I note the native title party's views about resourcing and past budgets above) and to the State through the fees payable (see *Seven Star v Wiluna* at [63]). On the material before me, I find the impact on the local, State and national economies to be marginal.

[185] As for the economic significance to local Aboriginal people, the native title party's contentions and evidence demonstrate concern. The grantee party has not provided material indicating any intention to employ any local indigenous people, nor established that the grant would lead to any other specific economic benefits for them. There could foreseeably be some indirect benefits flowing from the general anticipated expenditure for the local area, but nothing specific to local Aboriginal people. I also note the uncertainty as to whether a joint venture would take place and whether the effects of any such venture would create circumstances leading to economic benefits to the local indigenous population. I cannot find that the economic significance of the act to the Aboriginal people in the area would be anything beyond marginal.

[186] Section 39(1)(c) allows consideration of the 'other significance' of the act, which could encompass broad considerations as explained in *Drake Coal v Smallwood* above. The grantee party's statement of confidence about Kimberley tenements (see [171] above) suggests potential benefits for the Kimberley region, however, there is little supporting information and any such benefit would appear to be beyond the scope of the future act in question for s 39(1)(c) purposes.

[187] Considering all of the circumstances, there is a lack of direct evidence before the Tribunal but I am satisfied there will be economic benefit, albeit minimal.

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

Evidence provided

[188] The Government party refers generally to *Evans v Western Australia* and *Australian Manganese v Stock* in support of its statement that the Tribunal has repeatedly held that mining and exploration activities serve the public interest. It contends that 'the public interest will be served by the grant of the proposed tenement given the economic benefits that will accrue at a local, State and national level' (paragraph 64 GVP Contentions). These points are not supported by any specific details about the proposed licence.

[189] The native title party refers to the evidence of [name withheld for cultural reasons], Mr Watson and Ms Milgin as describing (a) 'the danger the public face if the grantee disturbs sites of particular significance in the proposed tenement' and (b) environmental concerns held by the public in the local area and the native title party. The evidence regarding these matters has been set out under ss 39(1)(a) and 39(1)(b) above.

[190] The grantee party did not specifically address s 39(1)(e). The grantee party's statement about Kimberley tenements ('if we can get through the heritage issues without undue barriers to exploration and development then I am confident some Kimberley tenements will produce resources given time' (paragraph 21 GP Reply) has some relevance, though it is quite general and broadly expressed.

Consideration

[191] 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 Australia* at 215; *Backreef Oil v Nyikina Mangala* at [105].

[192] As noted, the grantee party contends that 'some Kimberley tenements will produce resources given time'.

[193] Taking all of the above into consideration, I accept that, on balance, there is some public interest in the grant of the proposed licence.

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

[194] Section 39(1)(f) affords a wide discretion for the Tribunal to take into account other matters that the Tribunal considers relevant. In *Cameron v Hoolihan* the Tribunal explained the breadth of s 39(1)(f) at [82] as follows*:*

> The term 'any other matter' as used in section 39(1)(f) provides the Tribunal with a broad charter to take into consideration any matter lodged with the Tribunal that may be of relevance in making a section 38 determination. There is no logical reason from the wording of the paragraph to read it down or to limit its operation by reference to either the matters outlined earlier in section 39 or to supposition in advance of what the negotiation parties actually submit. The only limiting factor is that the matter must be relevant to the inquiry. This paragraph does not give the Tribunal a charter to inquire into matters that fall outside the very narrow issue of whether a particular future act should or should not be done.

[195] After considering the material from parties, there are three matters I consider to be relevant, categorised as environmental issues, on-selling tenements, and the contact between parties.

Environmental issues

[196] Specifically in relation to s 39(1)(f), the native title party contends it is relevant that, despite applying for the future act determination, 'the Grantee has declined to file a statement in this matter addressing his intentions as to how his exploration program for uranium on the proposed tenement will be conducted in a manner that adequately address the NTPs serious environmental concerns and the NTPs cultural heritage concerns in respect of the sites of particular significance in the area that the tenement is located' (paragraph 52). I note that cultural heritage issues have already been addressed under s 39(1)(a)(v).

[197] The native title party evidence of [name withheld for cultural reasons] and Ms Milgin has explained concerns about soak water being affected and I note the Government party's response on that issue (see [91] above).

[198] As noted above, the native title party considers the area of the proposed licence to be environmentally sensitive, with reference to Mr Watson's knowledge as a traditional owner and the CSIRO support. The native title party also draws the Tribunal's attention to:

(a) highlighted portions of the United Nations report ([37] above) which, in its view, 'identify the need for further understanding of the relationship between radioactive material in an environment and the potential effects on the biota residing in that environment, and the need for Member States (which includes Australia) to more

effectively oversee the environmental risk management of the nuclear power industry' (paragraph 12 NTP Reply); and

(b) The Age newspaper article dated 9 December 2013 describing a million litre spill of radioactive material at Energy Resources of Australia's Ranger uranium mine at Kakadu as well as Australian uranium mining generally and the Fukushima nuclear crisis.

[199] In the grantee party's reply and additional material, the following viewpoints regarding environmental matters were found:

(a) Any exploration or development has to meet stringent environmental laws (page 2 GP Additional and page 6 GP Reply);
(b) Mr Richmond claims that it is unlikely that water would run north to the Fitzroy Flood Plain, referring to the position of the proposed licence and maps he attached (page 2 GP Additional);
(c) The exploration program would be a typical uranium exploration program, except closer drill spacing would be adopted for the smaller area of the proposed licence, 'plus it is more advanced by the CRA Drilling of 1979, DMP WIMEX Report A8849 Item 1414, Mineral Claims 04/8251-8279. Areva would be targeting the Erskine Sandstone as CRA did on application E04/2141' (page 2 GP Additional) (I note that the reference to Areva is unexplained; see [98] above); and
(d) The grantee party notes that the excerpts and articles attached to the reply emphasise Mr Richmond's 'interest in uranium safety technology, environmental understanding and Aboriginal history' (page 3 GP Additional) (no specific articles referred to).

[200] In relation to the native title party's opinion about the capacity of the grantee party to exercise rights lawfully (paragraph 43 NTP contentions), the Government party objects to the relevance of the Warden's Court decisions and associated paragraphs within Mr Watson's affidavit. The Government party contends that the native title party is 'attempting to use that evidence as a basis for demonstrating that the GP has a tendency to breach conditions of his licences, and therefore the NTP seeks an inference to be drawn that the GP is likely to breach conditions relating to environment or heritage protection' (at paragraph 14 GVP Reply). The Government party further contends that the native title party seeks for an inference to be

drawn that the grantee party is likely to breach an environmental condition due to a past breach of a condition relating to minimum expenditure requirements, after contending that the Warden's Court material is irrelevant in the legal sense (with reference to Gummow J's analysis of similar fact evidence in *D F Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597).

[201] As explained above, the Government party also submitted a Guide to Uranium Mining in Western Australia which provides information on: why uranium is radioactive (page 10), ways to minimise exposure to radiation (exposure types including inhaling, ingesting or through external exposure to gamma rays) such as wearing dust masks, hand washing and moving away from or shielding from radiation sources (page 11), and the risks of an acute dose of radiation (page 12). Under the 'Community Safety' section, the measures to 'ensure radiation safety for workers and the communities living near mine sites and transport routes' including approval of a Radiation Management Plan, employment of a permanent specialist Radiation Safety Officer, induction and training for employees, emergency planning, personnel and environmental monitoring, strict regulation of the mining, processing and transportation of radioactive materials with oversight from the Resources Safety Division of DMP and the Radiological Council (page 14). I note the native title party requested that the Tribunal disregard the Guide (other than page 22), as explained at [70](b) above.

[202] Even though environmental matters are governed by separate legislation, the wording in s 39(1)(f) is broad and environmental impact and the Federal and State environmental protection regimes can be considered (see *Minister for Lands v Buurabalayji Thalanyji Aboriginal Corporation* at [273]) and have been taken into account in the past when deemed relevant by the arbitral body. As Deputy President Sumner stated in *Western Desert Lands v Holocene* (at [185]):

> Under this criterion the Tribunal can have regard to the environmental protection regime of the Government party described in Waljen (at 212-214) and Koara 2 (at 292-295), the findings of which are adopted. The environmental controls imposed by the Government party can be taken into account because they may assist to ameliorate the effect of the future act on some of the factors in s 39(1)(a).

[203] 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 *Western Australia v Thomas*/*Waljen*

at 212-214 and *Minister for Mines v Evans* at [53]-[62], the findings of which are adopted here.

[204] I note that the native title party, through the affidavit evidence of [name withheld for cultural reasons] and Ms Milgin for example, has set out its perception of the environmental risks associated with the targeting of uranium mining.

[205] 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.

On-selling tenements

[206] The native title party has also raised concern with what Mr Watson describes as Mr Richmond's 'history where he sells-on his tenements. We cannot know who Mr Richmond will sell the tenement to and whether the new explorer will be safe and work in the best way to protect our environment concerns' (paragraph 21 Mr Watson's affidavit).

[207] The Tribunal has considered that the interests of the grantee party, such as its economic viability and capacity to comply with conditions imposed, can be relevant to s 39(1)(f). In *Western Australia v Thomas/Waljen*, when describing s 39(1)(f) generally, the Tribunal stated (at 176):

> One of the issues that has arisen is whether the interests of the grantee party can be taken into account under this criterion. It was common ground that a grantee party as a party to the inquiry is entitled to procedural fairness and, to that extent, to have its views heard and taken into account. The more difficult issue is whether the substantive interests of the grantee party are to be considered. In our view it is legitimate for the Tribunal to consider those interests under this criterion.
>
> One obvious interest of a grantee party is its economic viability and its capacity to comply with conditions that might be imposed. Grantee parties could be small prospectors who are converting their prospecting licences but who may not do much more than prospect and who might sell their interests in the tenement at some subsequent stage. In other cases they may be large Australian and multi-national companies. In our view we are entitled to have regard to the different capacities of grantee parties to comply with conditions. We are also entitled to take into account whether there has already been considerable expenditure at the exploration or prospecting licence phase.

> Therefore, although the interests of the grantee party are not specifically mentioned in s.39(1), we believe that those interests may be relevant in a particular case and could be taken into account under s.39(1)(f).

[208] In this matter, the grantee party intends for a joint venture to take place; Areva Resources has been mentioned specifically, for example page 6 of GP Reply: 'one couldn't find a better company than Areva with world wide experience and good safety record to do business with. If. I managed to secure a joint venture with Areva'. As explained above, the grantee party later clarified this statement indicating there currently is no joint venture in place, though he intends to make a proposal to Areva and contact other companies specialising in uranium for a 'possible joint venture type deal' (page 2 GP Additional). On the material before me, there currently are no solid plans for a particular company to be involved. The grantee party intends to involve another company in exploration activities, which supports the imposition of a condition regarding any joint venture partner or assignee being bound to the conditions the subject of this decision.

Contact between parties

[209] The native title party has raised concerns about the accessibility of the grantee party. At paragraph 11 of his affidavit, Mr Watson/Jilkindi states:

> In the past when I have met with Mr Richmond, he has told me that he does not have a phone number that he can be contacted on. Mr Richmond has told me that he relies on an email address and I know Nyikina Mangala have sometimes found it difficult to make contact with Mr Richmond or to get a response from him in reasonable time.

[210] Also, at paragraph 16, Mr Watson takes issue with the statement in Mr Richmond's 8 September 2013 letter to DMP (i.e. 'at this stage there is not a company policy but any joint venture would be required to liase [sic] with all parties for the benefit of Aboriginals on a successful project ...'), asserting that the native title party do not have any reason to feel that the grantee party or any company subject to any joint venture will liaise with Aboriginal persons and that there is no relationship in place between them, noting 'Mr Richmond has always been in the past very difficult for me to contact' (paragraph 16).

[211] In the grantee party's reply (at pages 1, 2 and 6) the following assertions are made in response:

(a) Mr Richmond spent months in 2011 trying to make contact with elder Mr John Watson and that after making contact by telephone, Mr Watson indicated that Mr Richmond should not come without a lawyer;
(b) Mr Richmond spent four months in Broome in 2012 to form a relationship, which involved two meetings with Mr Watson/Jilkindi. Mr Richmond refers to emails he provided (see Attachment A below);
(c) Mr Richmond was always available by email unless he was in the bush;
(d) Mr Richmond often experiences technical difficulties using internet cafes and being in remote areas;
(e) When Mr Richmond is not in the bush he accesses internet up to three times per day; and
(f) An interstate letter can be received by Mr Richmond in three days.

[212] In relation to the emails regarding (b) above, much of the correspondence involved KRED representatives. The content isn't explained and only some of it relates to the proposed licence; nonetheless, it shows some communication efforts mostly in 2011 and 2012.

[213] The Government party contends that Mr Watson's statement at paragraph 11 of his affidavit falls short of providing an evidential basis for regarding the grantee party as inaccessible noting that Mr Watson merely said the Nyikina Mangala '*sometimes* found it difficult to make contact ... or to get a response from him in reasonable time'. The Government also points out that Mr Watson's statement is hearsay. The Tribunal is not bound by the rules of evidence so I am not persuaded as to the irrelevance of Mr Watson's deposition about communication with the grantee party on the basis of hearsay alone. In relation to the grantee party's 8 September 2013 letter (see Annexure C to Mr Watson's affidavit and paragraph 42 GVP Reply), the Government party also contends that there is no evidence to suggest that the grantee party will not act in accordance with what was conveyed in the work program (i.e. Mr Richmond's statement that 'care will be taken and consultations and heritage with traditional owners prior to a drilling program').

[214] I am of the view that this issue is relevant in so far as it affects the relationship between parties and the ability to communicate about intended activities and avoidance of important sites. The parties would benefit from improved communication and I have addressed heritage sites in the conditions below.

Section 39(2) – Existing non-native title interests

[215] In my consideration of each sub-criteria in s 39(1)(a), 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.

Section 39(4) – Issues relevant to the inquiry on which the negotiation parties agree

[216] On the evidence before me, there are no relevant issues on which the parties agree.

Conditions

[217] Where the evidence presents the need for it, the Tribunal is entitled under s 38(1)(c) of the Act to make a determination that conditions accompany a determination that the act may be done.

[218] There are various parameters to the imposition of conditions. Section 38(2) of the Act prohibits the imposition of a condition which would entitle the native title party to payments worked out by reference to profits made, income derived or things produced by the grantee party as a result of doing anything in relation to the relevant land or waters after the tenement is granted. It is possible for a bank guarantee condition to be made within the meaning of ss 41(3)-(4). Also, s 41(5) prescribes some requirements for an amount to be paid and held in trust.

[219] I adopt the following parts of the Tribunal's explanation about conditions in *FMG Pilbara v Yindjibarndi #1* at [175] to [179] as follows:

> [175] Conditions will usually not be imposed unless the evidence adduced supports a need for such (see *Magnesium Resources v Slater* at [92]-[96], where the 'Koara 2' conditions were considered). The purpose of the power in s 38(1)(c) to impose conditions is to address the effect of a proposed act on native title rights and interests (see *Western Australia v Thomas 2* at [106]).
>
> [176] The Tribunal must make a determination, taking into account the criteria in s 39, which provides certainty to parties (see *Evans v Western Australia* per R D Nicholson J at 213-214; see also *Minister for Lands v Strickland* at [14]). As R D Nicholson J explained in *Evans v Western Australia* (at 214):
>
> > I regard it as inherent in s 38 the arbitral body not leave the outstanding issues between the parties unresolved. For conditions to permit of such issues being unresolved would not be in conformity with the legislation providing the power to make conditions.

> [177] In that decision, the Federal Court regarded condition 3.1 to 3.7 of the original determination (*Re Koara*), which required further negotiation about proposed mining operations, to be an invalid exercise of power (see 214):
>
> > In my view this construction and understanding of s 38 follows from the need to have in mind the Act is to be construed consistently with its objects (s 3) and beneficially... It must be acknowledged the Act in its present form places the Tribunal in an impossible position. It is asked at the time of the determination of whether an act may be done to formulate conditions pertaining to a mining stage the nature of which is not yet known. It is not empowered to delegate to an arbitrator the resolution of conditions at a later time.
>
> ...
>
> [178] As for the breadth of content for conditions, the Tribunal's comments in *Western Australia v Thomas 2* are informative. There, the view is that 's 38(1)(c) provides the Tribunal with a very wide discretion in relation to conditions' (at [106]) and 'at least as a general rule, conditions ought to relate to or be connected with the specific future act or acts the subject of the determination', though the effect of the act in relation to the broader project can be relevant (at [108]-[109]). In the present matter, there is no doubt the grant of these two proposed leases forms part of the larger Solomon Project, which is a project in the magnitude of billions of dollars. Also, 'just as conditions may incidentally relate to or benefit persons other than native title parties, so may conditions incidentally relate to matters going beyond the particular tenements and their potential effects on native title' (at [109]).
>
> [179] In terms of defining who conditions apply to, I adopt the Tribunal's view in *Minister for Lands v Strickland* as follows (at [17]):
>
> > ...the power in s 38(1)(c) does not extend to imposing conditions requiring the Government party specifically to do things in relation to the public generally, Aboriginal people or registered native title claimants who are not native title parties.

[220] In this matter, the parties have not requested any specific conditions. However, the evidence explained above has demonstrated the need for conditions relating to access, preserving cultural heritage which invokes the need for consultation, and the possibility of a joint venture or other arrangement.

Government party endorsement and conditions

[221] As noted above, the terms of the Government party's proposed endorsements and conditions shall be a condition of this determination.

Access condition

[222] The native title party accesses the area of the proposed licences for various purposes as I have found at [125]-[130] above. I am of the view that it is appropriate to impose the following condition:

Any right of the native title party to access or use the land the subject of E04/2141 is not to be restricted except in relation to those parts of the land which are used for exploration purposes or for safety or security reasons relating to those activities.

Aboriginal heritage conditions

[223] I have found there are sites of particular significance to the native title party (see [132]-[138], [152] and [157] above). Their location has not been described such that those areas can specifically be avoided. The grantee party has shown a willingness to receive GPS coordinates to give precise locations to be avoided. Whether the sites are such that GPS coordinates could assist in maximising avoidance is unknown. However, it is clear that the effect of grant on these sites can be minimised by the following conditions for the purpose of addressing the native title party's concerns under s 39(1)(a)(v):

(a) *The grantee party shall comply with the Aboriginal Heritage Act 1972 (WA) and any other applicable Aboriginal heritage legislation;*

(b) *The processes set out in the Aboriginal Heritage Due Diligence Guidelines (version 3.0 dated 30 April 2013, published by the Department of Aboriginal Affairs and Department of Premier and Cabinet) must be adopted;*

(c) *The grantee party must not conduct exploration operations over any part of E04/2141 unless it has first caused an Aboriginal Heritage Survey to be conducted over the whole of the tenement. An Aboriginal Heritage Survey means a survey conducted by a suitably qualified archaeologist, ethnographer, anthropologist or other heritage professional with nominated Aboriginal consultants who provide first-hand knowledge and guidance about the Aboriginal heritage of the area. The survey must be conducted with six persons nominated by the native title party, and be conducted in a professional and efficient manner in accordance with the Aboriginal Heritage Due Diligence Guidelines. The grantee party must pay the reasonable fees and expenses of the nominees of the native title party in relation to the survey;*

(d) *The grantee party must give written notice to the native title party of its intention to conduct the survey. In the event that the native title party fails to nominate survey participants within 60 days of receipt of such notice, the grantee party need not conduct such survey unless required to do so to meet the requirements of the Aboriginal Heritage Act 1972 (WA);*

(e) *If the grantee party intends to give notice to the Aboriginal Cultural Material Committee under s 18 of the Aboriginal Heritage Act 1972 (WA), it must first meet with the native title party in person and use all reasonable endeavours to reach agreement with the native title party in relation to the most appropriate way to avoid, or minimise disruption to, the sites of particular significance to the native title party (as established by the evidence in this matter). The grantee party must pay the reasonable fees and expenses of such a meeting;*

(f) *Information obtained during any of the processes above shall not be disclosed by the grantee party to any other person or entity for any purpose other than minimising disruption to sites unless (a) the native title party gives its written consent; (b) the person or entity is a prospective or actual assignee or the subject of a joint business arrangement (c) the person/entity is an employee, contractor or consultant; or (d) as required by law.*

Joint venture and/or assignment

[224] The grantee party's material conveys an intention for a joint venture to take place at some point. The holder of a tenement is entitled to transfer it, subject to legislative and other requirements. However, the evidence has shown there are concerns which justify conditions and I would only decide that the future act may be done if one of the conditions has the effect of binding the tenement holder, whether that be the specific grantee party or another entity such as through a joint venture arrangement, to the conditions described above. Thus, the following conditions are appropriate:

The grantee party must not assign any interests in E04/2141 unless the assignee executes and delivers to the native title party a deed by which the assignee undertakes to be bound by all the conditions as if it were the grantee party.

The grantee party must not enter into a joint venture agreement, or any other arrangement involving another person or entity gaining beneficial or legal ownership (in full or part) in respect of E04/2141, unless the joint venture partner/person or entity executes and delivers to the native title party a deed by which the joint venture partner/person or entity undertakes to be similarly bound by all the conditions above.

Determination

[225] The determination of the Tribunal is that the act, being the grant of exploration licence E04/2141 to William Robert Richmond may be done subject to the following conditions:

1. The grantee party is bound by the following:

ENDORSEMENTS

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

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

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

3. The licensee attention is drawn to the provisions of the:

- Waterways Conservation Act, 1976
- Rights in Water and Irrigation Act, 1914
- Metropolitan Water Supply, Sewerage and Drainage Act, 1909
- Country Areas Water Supply Act, 1947
- Water Agencies (Powers) Act 1984
- Water Resources Legislation Amendment Act 2007

4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.

5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the DoWs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:

6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for these activities has been issued by the DoW.

In respect to Waterways the following endorsement applies:

7. Advice shall be sought from the DoW if proposing any exploration within a defined waterway and within a lateral distance of:

- 50 metres from the out-most water dependent vegetation of any perennial waterway, and
- 30 metres from the out-most water dependent vegetation of any seasonal waterway.

CONDITIONS

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

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

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

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

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

6. The licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-

- the grant of the licence; or
- registration of a transfer introducing a new licensee;

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

7. No interference with Geodetic Survey Station Myroodah and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

2. Any right of the native title party to access or use the land the subject of E04/2141 is not to be restricted except in relation to those parts of the land which are used for exploration purposes or for safety or security reasons relating to those activities.

3. The grantee party shall comply with the *Aboriginal Heritage Act 1972* (WA) and any other applicable Aboriginal heritage legislation;

4. The processes set out in the Aboriginal Heritage Due Diligence Guidelines (version 3.0 dated 30 April 2013 and published by the Department of Aboriginal Affairs and Department of Premier and Cabinet) must be adopted;

5. The grantee party must not conduct exploration operations over any part of E04/2141 unless it has first caused an Aboriginal Heritage Survey to be conducted over the whole of the tenement. An Aboriginal Heritage Survey means a survey conducted by a suitably qualified archaeologist, ethnographer, anthropologist or other heritage professional with nominated Aboriginal consultants who provide first-hand knowledge and guidance about the Aboriginal heritage of the area. The survey must be conducted with six persons nominated by the native title party, and be conducted in a professional and efficient manner in accordance with the Aboriginal Heritage Due Diligence

Guidelines in condition 4 above. The grantee party must pay the reasonable fees and expenses of the nominees of the native title party in relation to the survey;

6. The grantee party must give written notice to the native title party of its intention to conduct the survey. In the event that the native title party fails to nominate survey participants within 60 days of receipt of such notice, the grantee party need not conduct such survey unless required to do so to meet the requirements of the *Aboriginal Heritage Act 1972* (WA);

7. If the grantee party intends to give notice to the Aboriginal Cultural Material Committee under s 18 of the *Aboriginal Heritage Act 1972* (WA), it must first meet with the native title party in person and use all reasonable endeavours to reach agreement with the native title party in relation to the most appropriate way to avoid, or minimise disruption to, the sites of particular significance to the native title party (as established by the evidence in this matter). The grantee party must pay the reasonable fees and expenses of such a meeting;

8. Information obtained during any of the processes above shall not be disclosed by the grantee party to any other person or entity for any purpose other than minimising disruption to sites unless: (a) the native title party gives its written consent; (b) the person or entity is a prospective or actual assignee or the subject of a joint business arrangement (c) the person/entity is an employee, contractor or consultant; or (d) as required by law;

9. The grantee party must not assign any interests in E04/2141 unless the assignee executes and delivers to the native title party a deed by which the assignee undertakes to be bound by all the conditions as if it were the grantee party; and

10. The grantee party must not enter into a joint venture agreement, or any other arrangement involving another person or entity gaining beneficial or legal ownership (in full or part) in respect of E04/2141, unless the joint venture partner/person or entity executes and delivers to the native title party a deed by which the joint venture partner/person or entity undertakes to be similarly bound by all the conditions above.

Mr J R McNamara
Member
21 May 2015

ATTACHMENT A

Documents accompanying grantee party reply

(a) A surrender form (Mining Act 1978 s 95 reg 43) dated 5 October 2011 for exploration licence 51/1280 held by the grantee party

(b) A surrender form (Mining Act 1978 s 95 reg 43) dated 5 October 2011 for exploration licence 51/1281 held by the grantee party

(c) A document entitled 'Plaints 1995/1996' with handwritten annotations including 'Roberts Plaintiff. Events prior to hearing'

(d) Pages 13-22 of Tribunal determination *Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation* [2014] NNTTA 70

(e) An information page on Mt Marion Lithium Project published by Reed Resources Ltd

(f) A diagram showing Fitzroy Trough with Myroodah Syncline and Fitzroy River circled and the proposed licence drawn on to it

(g) A diagram entitled 'Simplified Geology Cainozoic sediments omitted' with the proposed licence drawn on to it

(h) Emails with subject line 'RE: Uranium exploration' between Melissa [surname unknown], Hunt and Humphry, and Mr Richmond dated 6 May 2010

(i) An email from Mr Jeremy Goff, Kimberley Land Council ('KLC'), to Mr Richmond dated 9 September 2011 and Mr Richmond's response email dated 10 September 2011

(j) An email dated 16 September 2011 with subject line '2012 work program schedule request' from Ms Merrilee Powers, KLC, to other KLC staff members and Melissa of Hunt and Humphry, as forwarded to Mr Richmond on 26 September 2011

(k) A copy of an electronic calendar entry for meeting between Mr Richmond and Mr Wayne Bergmann for 29 October 2012

(l) An email dated 31 October 2012 from Mr Richmond to representatives from the Tribunal, DMP and KLC regarding exploration licence E04/2028

(m) An email chain from 15-16 August 2012 between Mr Richmond and staff from KRED Enterprises Pty Ltd regarding a possible meeting to discuss mineral projects

(n) An email dated 17 August 2012 from Mr Richmond to staff at Kred Enterprises Pty Ltd attaching a letter from Mr Richmond to Anthony [surname unknown] regarding the Frome Rocks Project

(o) An email exchange on 19-20 August 2012 with subject line 'NNTT conference on 22 August' between Mr Richmond and Ms Ania Maszkowski of KLC

(p) An email exchange on 6 December 2012 with subject line 'Granite project' between Mr Richmond and Mr Leuwin O'Connell of KRED Enterprises Pty Ltd

(q) A newspaper article entitled 'Aboriginal council keen to explore uranium' (date and publication unknown)

(r) A newspaper article entitled 'Lovelock praises nuclear' by Graham Lloyd (date and publication unknown)

(s) An article by Mr Daniel Zavattiero, Executive Director of Uranium for Minerals Council of Australia, dated April 2014 and entitled '2014 is set to be a big year for Australia's uranium industry' (publication not specified)

(t) A newspaper article entitled 'Our prosperity depends on finding fresh resources' (date and publication unknown)

(u) A newspaper article entitled 'The power of sun, wind and drain' with a handwritten annotation 'A.F.R Wed July 30 2014';

(v) An article entitled 'the nuclear butterfly effect' (date and publication unknown)

(w) Newspaper article entitled 'Academic slams tyranny of Greens' by Trevor Sykes with annotation 'Australian Financial Review 4 June 14'

(x) Newspaper article entitled 'Aboriginal 'industry' muddies the waters' by Anthony Dillon (date and publication not visible)

(y) Newspaper article entitled 'Martin speech blasts 'bloody Greenies' by Daniel Emerson, as published in the Advertiser News in November 2012

(z) Newspaper article entitled 'Let's go nuclear, for the reef's sake' by Ove Hoegh-Guldberg and Eric McFarland (date and publication not visible)

(aa) Newspaper article entitled 'Economic vandals must be jailed' by Stephen Galilee, as published in The Australian (annotated date of 4 April 2014)

(bb) Newspaper article entitled 'The native title div...' published in the The West Australian (annotated date of 27 March 2010)

(cc) Newspaper article entitled 'Radiation tolerant 'cleaning' alga discovered' (date and publication not visible)

(dd) Article entitled 'Depleted uranium as fuel cuts path to less waste' (Online source not specified)

(ee) Article entitled 'Intelligent absorbent removes radioactive material from water' by Darren Quick, as published on www.uncensored.co.nz and dated 1 November 2011;

(ff) Article entitled 'Drone squirts foam to clean up nuclear waste' (source and date not specified)

(gg) Newspaper article entitled 'Genome proves Aboriginal descent from first humans out of Africa' with handwritten annotation 'Australian, Sept 23, 2011'

(hh) Newspaper article entitled 'Early Australia's India connection: A new take on first peoples' from The Economist, with handwritten annotation 'Jan 25-28, 2013'

(ii) Newspaper article entitled 'Old time prospector lives for that last big find' by Nic Sas (source not specified)

Note: In addition to documents 1-35 above, a Curtin University Proxy Form and a copy of a passport were provided. These were provided due to technological error and do not form part of the decision-making process.