NATIONAL NATIVE TITLE TRIBUNAL

Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal **[2018] NNTTA 24 (29 March 2018)**

Application No: **WF2017/0006, WF2017/0007 & WF2017/0008**

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Kevin Allen & Ors on behalf of Njamal (WC1999/008)

(native title party)

- and -

Muccan Minerals Pty Ltd

(grantee party)

- and -

State of Western Australia

(State/Government party)

FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE SUBJECT TO CONDITIONS

Tribunal: President RJ Webb, QC

Place: Perth

Date: 29 March 2018

Catchwords: Native title – applications for determination for the grant of mining leases – negotiation in good faith – evidential burden where Tribunal had previously found a party had failed to negotiate in good faith in relation to the same acts— overall conduct – Tribunal not satisfied the grantee party did not negotiate in good faith - s 39 criteria considered – whether Tribunal able to consider s 39 criteria in the absence of a mining proposal – relevance of connection report to assessment of the s 39 criteria –

whether appropriate to impose conditions – determination that future act may be done subject to conditions

Legislation: *Native Title Act 1993* (Cth), ss 29, 30, 30A, 31, 35, 36, 38, 39, 40, 148

Mining Act 1978 (WA), ss 67, 74, 82, 85

Mining Regulations 1981 (WA)

Aboriginal Heritage Act 1972 (WA)

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

Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited [2017] FCAFC 218 (‘*Sheffield Full Court appeal*’)

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

Doxford/Janice Barnes, Jessie Diver, Owen McEvoy, Deree King, Patrick Fisher (Wangan and Jagalingou)/State of Queensland [2008] NNTTA 54; (2008) 218 FLR 414 (‘*Doxford v Barnes*’)

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*’)

FMG Pilbara Pty Ltd v Cox and others [2009] FCAFC 49; (2009) 175 FCR 141 (*‘FMG Pilbara v Cox’*)

Gregory Wayne Down/Cyril Barnes and Ors on behalf of the Wongatha People/Western Australia [2004] NNTTA 91 (‘*Down v Wongatha*’)

June Ashwin, Geoffrey Alfred Ashwin, Ralph Edward Ashwin and Raymond William Ashwin on behalf of the Wutha People/Western Australia/Contact Uranium Limited [2008] NNTTA 129 (‘*Wutha v Contact Uranium*’)

Kevin Peter Walley on behalf of the Ngoonooru Wadjari People v Western Australia & Ors [1999] FCA 3; (1999) 87 FCR 565 (‘*Walley v Western Australia*’)

Marjorie May Strickland & Ors v Minister for Lands & Anor [1998] FCA 868; (1998) 85 FCR 303 (‘*Strickland v Minister for Lands*’)

Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274 (‘*Koara 2*’)

Moses Silver, Ishmael Andrews & Sammy Bulabul/Northern Territory/Ashton Exploration Australia Pty Ltd [2002] NNNTA 18; (2002) 169 FLR 1 (‘*Silver v Northern Territory*’)

Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd, [2009] NNTTA 35 (‘*Cosmos v Mineralogy*’)

Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal [2014] NNTTA 74 (‘*Muccan 1*’)

Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal [2016] NNTTA 28 (‘*Muccan 2*’)

North Ganalanja Aboriginal Corporation & Waanyi People v Queensland [1996] HCA 2; (1996) 185 CLR 595 (‘*North Ganalanja v Queensland*’)

Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people [1999] NNTTA 361 (‘*Placer*’)

Re Koara People [1996] NNTTA 31; (1996) 132 FLR 73 (‘*Koara 1’*)

Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli [2015] NNTTA 26 (‘*Rusa Resources v Gnulli*’)

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

St Ives Gold Mining Company Pty Ltd v John Walter Graham & Ors on behalf of the Ngadju People and Another [2017] NNTTA 35 (‘*St Ives v Ngadju*’)

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

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

Western Australia/Roberta Vera Thomas & Ors (Waljen)/Austwhim Resources Nl; Aurora Gold (Wa) Ltd,[1996] NNTTA 30; (1996) 133 FLR 124 (‘*Waljen*’)

Western Australia/West Australian Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Leslie Hayes, Glenys Hayes, Judy Hayes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the Thalanyji People (WC99/45), [2001] NNTTA 18 (‘*Western Australia v Thalanyji*’)

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

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

Representatives(s) of the native title party:	Dominic McGann, McCullough Robertson
Representative(s) of the grantee party:	Ken Green, Green Legal
Representatives(s) of the Government party:	Sarah Power, State Solicitor’s Office Christine Weetman, Department of Mining, Industry Regulation and Safety

REASONS FOR DECISION

Introduction

[1] This decision concerns three applications made to the National Native Title Tribunal ('Tribunal') by Muccan Minerals Pty Ltd ('Muccan') under s 35 of the *Native Title Act 1993* (Cth) ('the Act'). All subsequent references to sections of legislation in this determination are to the Act unless otherwise stated. I am conducting this inquiry as the presiding member of the Tribunal.

[2] Muccan seeks a determination that proposed mining leases M45/1160, M45/1162 and M45/1163 ('the proposed leases') may be granted.

[3] Njamal are a negotiation party in this matter because: their registered native title claim overlapped the proposed leases four months after the notification day; and their native title claim is still registered (see ss 29(2)(b)(i), 30(2) and 30A of the Act). Njamal oppose the grant of the proposed leases. Furthermore, Njamal contend that Muccan did not negotiate in good faith as required by s 31(1)(b).

[4] For the reasons outlined below, I am not satisfied that Muccan did not negotiate in good faith pursuant to s 31(1)(b) and I determine that the act (the grant of the proposed mining leases) may be done subject to conditions.

Previous History

[5] Muccan have lodged future act determination applications for the proposed leases on two previous occasions. In both instances, Njamal satisfied the Tribunal that Muccan had failed to negotiate in good faith (see *Muccan 1* and *Muccan 2*). Accordingly, the Tribunal did not have the power to proceed to make determinations on those applications.

NEGOTIATIONS IN GOOD FAITH

[6] In relation to the present future act determination applications, Njamal again contends that Muccan did not negotiate in good faith as required by s 31(1)(b) of the Act. If Njamal satisfies me that Muccan did not negotiate in good faith, then I must not make

a determination on the applications (s 36(2)) and the applications will be dismissed pursuant to s 148(a)).

[7] In inquiring into whether Muccan negotiated in good faith I have taken into account the recent *Sheffield Full Court appeal*. Accordingly, I have considered negotiations that took place after the applications were made.

Negotiations in good faith proceedings and submissions

[8] Njamal contends that Muccan failed to negotiate in good faith. This contention was not extended to the State, and the State did not file any submissions on this point (although I note the State made some brief oral comments at the hearing). At a preliminary conference for these applications, convened in July 2017, I set directions for the lodgement of parties' submissions on the issue of good faith negotiations.

[9] The good faith submissions are voluminous. Njamal's initial submissions comprised contentions and one supporting document (NTP Contentions and NTP1). With leave, Njamal lodged further contentions along with 11 supporting documents (NTP Further Contentions and NTP2-12). Muccan's submissions included contentions, a chronology of events and 107 supporting documents (GP Contentions, GP Chronology and GP1-107). Njamal then lodged a reply to Muccan's submissions (NTP Reply).

[10] On 18 September 2017, by agreement, a hearing was held and each party made oral submissions. No witnesses were called and no exhibits were tendered at the hearing. The hearing was recorded and transcribed, and all references to oral submissions in this decision are taken from that transcript.

[11] I also provided parties the opportunity to submit an addendum or corrigendum to their contentions addressing any matters they considered relevant to the period post the making of the s 35 application period, following the Full Court's decision in *Sheffield Full Court appeal*. Njamal made a supplementary statement of contentions on 30 January 2018 (NTP Supplementary Contentions). On 6 February 2018, Muccan made supplementary contentions (GP Supplementary Contentions).

Preliminary issue - evidentiary burden

[12] The Tribunal has observed on numerous occasions that it is not required to adopt strict rules on the burden of proof, however, the practical effect of s 36(2) of the Act is the evidential burden rests on the party alleging the lack of good faith (see for example *Down v Wongatha; Western Australia v Thalanyji).*

[13] Njamal contends it has already met this evidentiary burden in *Muccan 1* and *Muccan 2* when it satisfied the Tribunal that Muccan failed to negotiate in good faith. Njamal argues the onus now falls on Muccan to satisfy the Tribunal that it has fulfilled its obligation to negotiate in good faith. Muccan contends this point is moot as Njamal have filed evidentiary submissions in this inquiry. However, it is a point in issue between parties so I will address it as a preliminary issue.

[14] Njamal argues a number of provisions in the Act are relevant when considering this contention and should be taken into account, specifically:

- s 109(1) – The Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way;
- s 146 – In the course of an inquiry, the Tribunal may, in its discretion:
    a) Receive into evidence the transcript of evidence in any other proceedings before the Tribunal; and
    b) Adopt any report, findings, decision, determination or judgment of [the Tribunal] … that may be relevant to the inquiry
- s 40 – If the arbitral body is making a determination in relation to an act consisting of the creation of a right to mine in relation to an area and has previously decided an issue during the inquiry then the parties must not seek to vary the decision on that issue without leave of the arbitral body.

[15] Njamal submits the practical effect of these provisions is that it bears no evidentiary onus to satisfy the Tribunal that Muccan failed to negotiate in good faith as this has already been decided in the previous determinations. Rather, Muccan is now required to satisfy the Tribunal that the previous determinations are no longer the case and that it has successfully fulfilled its obligation to negotiate in good faith by addressing the shortcomings found in *Muccan 1* and *Muccan 2*.

[16] In response, Muccan notes the evidential burden is derived from the words of s 36(2), which states:

> If any negotiation party satisfies the arbitral body that any other negotiation party (other than a native title party) did not negotiate in good faith as mentioned in

> paragraph 31(1)(b), the arbitral body must not make the determination on the application.
>
> Note: It would be possible for a further application to be made under section 35.

[17] Muccan contends the reference in this subsection to 'the application' makes it clear that the provision operates in respect of each application made pursuant to s 35 and it follows that with each new application made a new evidential burden arises.

[18] The history of this matter is unique as this is the third time the issue of good faith is being considered by the Tribunal for the same future act. The Act clearly contemplates the possibility of subsequent s 35 applications where it has been found good faith negotiations did not occur (see note at s 36(2)).

Findings on preliminary issue - evidentiary burden

[19] I am not satisfied that s 40 of the Act is relevant to these circumstances. Since the last decision by the Tribunal, further negotiations have occurred over an additional period of time (i.e. the period following *Muccan* 2). This means the relevant facts for consideration have changed and it is not simply a case of reconsidering or re-opening an issue previously decided.

[20] I agree with Muccan's view as stated at [17] above. The statutory prohibition at s 36(2) is clearly and necessarily linked to the making of an application under s 35. In *FMG Pilbara v Cox* (at [11]) the Full Federal Court explained the operation of s 36(2), stating:

> The prohibition on exercise of the power [to make an arbitral determination] only arises when the good faith point is both taken and taken successfully by a negotiation party. If there were no good faith but the point were not taken, the Tribunal would still have jurisdiction and power.

[21] I will consider this matter in the usual way, that is consider the issue of good faith negotiations in the inquiry process now before me, using my discretion to adopt any findings in *Muccan 1* and *Muccan 2* I consider relevant (s 146).

Issues for good faith

[22] The following issues are addressed, in considering whether Muccan negotiated in good faith with Njamal on the applications:

1. Did the lack of information provided to Njamal prevent negotiations in good faith occurring?
2. Did Muccan commit to the negotiation process?
3. Did Muccan act reasonably, when it applied to the Tribunal for a determination?
4. Does Muccan's overall conduct meet the threshold for good faith?

1. Did the lack of information provided to Njamal prevent negotiations in good faith occurring?

[23] Njamal's primary contention in this matter is that the lack of information provided by Muccan regarding the proposed leases prevented Muccan from negotiating in good faith. Njamal states it must have sufficient information about Muccan's proposed project to be able to assess the scale or impact of the proposed leases on its native title rights and interests. It states in circumstances where no details on the nature of the future act, the size of the impact, or even the kind of mining to be undertaken are provided, no real negotiation in good faith can occur (NTP Contentions at 28-40).

[24] Njamal argues Muccan should not be able to rely on compliance with the requirements of the *Mining Act 1978* (WA) alone; nor should it be able to rely on the fact it does not possess information regarding the proposed activities in order to justify the lack of information provided. In oral submissions, Njamal state they are being asked to participate in negotiations that are effectively built upon a fundamental ignorance, and being asked to assume the risk of that ignorance.

[25] Muccan does not dispute that little information has been provided to Njamal regarding proposed mining work over the proposed leases. However, it argues: it does not possess (and never has possessed) the type of information Njamal are seeking; it was not obliged under the *Mining Act* to ever possess this information; and, since the surrender of the underlying exploration licences in early 2009, it has not been possible for Muccan to undertake further exploration work (which presumably could have yielded some further information to provide to Njamal).

[26] It is relevant at this point to briefly explain the difference in legislation governing an application for a mining lease as it was at the time Muccan applied for the proposed leases in February 2006 compared to as it stands now. Current *Mining Act* legislation requires an application for a mining lease to be accompanied by a mining proposal, a statement about the mining operations that are likely to be carried out, or a mineralisation report (see s 74 *Mining Act*). However, at the time Muccan applied for the proposed leases no such information was required under the *Mining Act*. The Tribunal has previously observed that this former system allowed for mining leases to effectively be used as a mechanism to continue exploration (see *Koara 1*).

[27] At the hearing, I sought comment from Muccan as to what information was made available or provided to Njamal that contemplated further work to be done. Muccan pointed to correspondence sent by Muccan to Njamal on 19 March 2015. For reference, a summary of the information contained in this correspondence can be found in *Muccan 2* at [13] to [15]. I note here that, by their own evidence, Muccan agree they have not provided Njamal with any additional information in relation to the proposed leases since *Muccan 2* was decided.

[28] Muccan relies on the findings in *FMG Pilbara v Cox,* which state (at [15]) 'the requirement for good faith is directed to the quality of a party's conduct.' During oral submissions, Muccan noted Njamal's contentions do not appear to call Muccan's conduct during the negotiations into question. Muccan pointed to the following passage from Njamal's contentions:

> The Native Title Party does not contend that the Grantee Party has acted in bad faith. Rather, as a result of the circumstances, the Grantee Party has been prevented from acting in good faith. (NTP Contentions at 29)

[29] Muccan states, by Njamal's construction, an essential element of s 31(1)(b) negotiations is that the native title party receive some objective level of information that is sufficient for assessing the impact of the future act on its native title rights and interests. Muccan argues this is contrary to the Full Federal Court's decision in *FMG Pilbara v Cox*. Muccan states it is an additional requirement not found in the Act, it puts a gloss on the statutory provisions and it places a fetter on Muccan's entitlement to make a s 35 application.

[30] The facts of this issue do not appear to be in dispute, rather it is a question of what is required under the Act in order to satisfy the good faith obligation. There was some discussion between the parties at a listing hearing held on 12 September 2017 whether this argument constituted a question of law or a question of fact. Njamal did not offer its views on whether it was a question of law but argued it was a question of fact that no information regarding Muccan's proposed mining activities (as distinct from exploration activities) was provided. Njamal stated the result was that Njamal was unable to negotiate about the effect of the act on its native title rights and interests. During oral submissions, Muccan argued Njamal's contention is a question of law that was settled by the Full Federal Court in *FMG Pilbara v Cox*, and that decision is binding.

[31] Section 31(1)(b) of the Act describes a 'normal negotiation procedure' as parties negotiating 'in good faith with a view to obtaining the agreement of the native title parties to the doing of the act' (with or without conditions), while s 31(2) describes negotiation in good faith in the following terms:

> Negotiation in good faith
>
> If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.

[32] It has been accepted that 'the act' referred to in s 31(1)(b) comprises, specifically in this case, the grant of a mining lease as well as the rights attached to that grant and the exercise of those rights by the lessee (see *Waljen* at 179).

[33] Overall, the wording of s 31 points to the principle enunciated by Carr J in *Walley v Western Australia* (at 565) that parties' conduct 'should be judged in the context of matters related to or connected with the doing of the particular future act in question'. In *Cosmos v Mineralogy*, Deputy President Sosso observed (at [29]):

> Each matter has to be dealt with on the particular facts presented, and the only clear principle is that the *starting point* and *focal point* of all negotiations has to be the possible effect of the proposed future act on the registered rights and interests of the native title parties. … All that can be said with certainty is that a failure to negotiate about broader issues or the nature of those negotiations may in some circumstances be taken into account *with evidence of the negotiations in relation [to] the registered rights and interests of the native title party* in ascertaining if there have been negotiations in good faith.

[34] In my view, the Act is clear that matters related to the doing of the act are of central importance to good faith negotiations, and the non-native title parties must be responsive to this fact. These matters largely form the context within which a party's conduct should be judged. As explained in *FMG Pilbara v Cox* (at [27]):

> 'Good faith' is to be construed contextually (that is, it is necessary to identify what the 'good faith' obligation is intended to achieve). That obligation is made obvious by the wording of the provision in which it is found within the context of the statutory scheme.

[35] The Preamble to the Act states the purpose of the right to negotiate is to ensure 'every reasonable effort has been made to secure the agreement' of the native title party to the doing of the act. The 'good faith' obligation is a way in which this can be achieved. In *FMG Pilbara v Cox* (at [28]) the Full Federal Court stated the Tribunal was reasonable to conclude FMG had negotiated in good faith during the six month period and that this conclusion was not surprising as:

> it [was] clear that from an early time an extensive draft [Land Access Agreement] (exceeding 50 pages) was made available to [the native title party] dealing with all of the matters which would be expected to arise in such negotiations (as suggested by s 39 of the Act).

[36] This matter is distinguishable from *FMG Pilbara v Cox* as here Njamal are not contending the negotiations ought to have been conducted in a particular way (i.e. on a tenement by tenement basis, as was the case in *FMG Pilbara v Cox*) but rather it asserts the information provided was not sufficient to allow negotiations to occur in good faith (NTP Contentions at 28-40).

[37] In addition to considering whether there is a fundamental need for information about the proposed act, it is also relevant to examine Muccan's conduct in the context of this uncertainty. The question I must consider is whether Muccan acted reasonably in circumstances where little was known about the future work Muccan would carry out over the proposed leases.

[38] In *Cosmos v Mineralogy* it was held (at [32]):

> The greater the possible impact of the '*doing of the particular future act'* on registered native title rights and interests, the greater the obligation imposed on the non-native title parties to negotiate about those possible impacts. If '*the doing of the particular future act'* may result in deleterious impacts on registered native title rights and interests, a non-native title party negotiating in good faith would be keen to minimise or remedy the deleterious impacts and bring to the negotiating table an offer or a package of proposals designed to address the concerns of the native title party.

[39] In *Muccan 1*, Member McNamara extended this reasoning, stating (at [49]):

> The possible impact of the doing of these proposed future acts is more significant than just prospecting or exploration as the grants allow for rights that include exploration right through to production with no further obligation for the grantee party to negotiate with the native title party. As such, there is a greater obligation on the grantee party to provide information that enables parties to negotiate in such a way as to address the concerns of the native title party.

[40] The Court and the Tribunal have repeatedly observed that an inquiry into whether parties have negotiated in good faith requires a contextual evaluation and must consider the negotiations in totality. In *Doxford v Barnes*, Deputy President Sosso observed (at [37]):

> When the Tribunal has to determine if a grantee party has negotiated in good faith it is incumbent on the Tribunal to assess the overall conduct of that party in the context of that party's capacity to negotiate, the attitude and actions of the other parties and the general negotiating environment faced by each of the negotiation parties. In short a contextual evaluation is required.

[41] In the present matter, it is relevant that Njamal was required to negotiate with Muccan in a manner that was largely speculative and involved a large degree of uncertainty. Conversely, it is relevant that Muccan did not possess any information that could have provided further certainty. This latter point does not negate the first but both contribute to the overall context that parties were operating in, and through which their behaviour must be viewed.

[42] As already noted, the circumstances of this matter include negotiations dating back to 2012 and two instances where the Tribunal found Muccan had not met its 'good faith' obligation. In both prior inquiries, Njamal raised the issue of a fundamental lack of information as being relevant to the question of good faith negotiations.

[43] Of relevance in this matter is the fact that the parties exchanged a detailed draft agreement (GP59 and GP63). The draft agreement sought to address a number of the concerns of Njamal, including heritage and compensation. I refer also to comments and findings made in relation to an earlier version of the agreement in *Muccan 2* at [16] – [18].

[44] In *Muccan 1* (at [52]), Member McNamara found that Muccan's 'failure to provide … information did inhibit the native title party's ability to participate in negotiations to

some extent.' He then noted this fact on its own does not amount to a lack of good faith but does affect Muccan's position in relation to its good faith obligations.

[45] In *Muccan 2*, Member McNamara acknowledged that, due to the limited information available, Njamal's ability to assess the scale or impact of the future act on its native title rights and interests remained hampered. He then went on to find that by 'negotiating an agreement over Njamal's concerns, Muccan mitigated to some extent the disadvantage caused by insufficient information about their proposed activities' (*Muccan 2* at [19]).

[46] During the course of the negotiations that followed *Muccan 2*, parties continued to negotiate a draft agreement. At the first Tribunal mediation preceding the present applications, held 18 October 2016, Njamal put forward its view that any agreement will need to cover the exploration phase through to the end of life of the mine. Parties then adopted, by consent, the draft agreement that had been progressed prior to *Muccan 2* as the starting point for the negotiations that ensued. As noted in *Muccan 2* (at [16]), this was a detailed draft agreement, and:

> Should productive mining be approved, [the draft agreement] addresses Njamal's requests for the provision of information, and it includes arrangements for compensation and the commissioning of a socio-economic impact assessment report 'on the effect of the proposed Mining Operations on the Njamal People and their culture for the purpose of informing the Njamal People about those likely impacts'. It provides for heritage work programme surveys, site avoidance and identification surveys, and notification. It stipulates no ground disturbing activities on uncleared areas. There are also provisions for cross cultural awareness programmes for Muccan employees and employment and training for Njamal.

[47] Prior to the lodgement of the 35 applications now before the Tribunal, parties progressed the draft agreement further, with amendments and comments being exchanged by both Muccan and Njamal. It is not necessary for me to consider the reasonableness of the offers (see *Strickland v Minister for Lands*). However, I am satisfied the draft agreement sought to address the potential effect of the act (including through exploration and mining, should it eventuate) on Njamal's native title rights and interests.

Findings

[48] To respond to Njamal's contention (NTP Contentions at 28-40), I am not satisfied good faith negotiations were not possible due to the limited information available in

relation to the proposed act. As observed by the Full Court in *FMG Pilbara v Cox* (at [38]), the Act:

> does not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith and was with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied.

[49] I find that in negotiating an agreement that sought to deal with some of Njamal's concerns, Muccan mitigated, to some extent, the disadvantage caused by lack of information about their proposed activities. The relevant findings in *Muccan 2* on this point (at [19]) also apply to the facts in this matter.

[50] I am satisfied that, despite uncertainties that existed regarding any planned or proposed activities on the land, negotiations were occurring between the parties via a draft agreement. I am also satisfied that Njamal's ability to participate in those negotiations was not prevented, and that Njamal, by their own conduct, accepted as such.

2. Did Muccan commit to the negotiation process?

[51] In the alternative to contention 1 above, Njamal contends Muccan failed to negotiate in good faith by not making an appropriate commitment to the negotiation process and adopting a rigid, non-negotiable position. Njamal states this contention arises from the conduct of Muccan at the fourth and final Tribunal mediation held on 24 May 2017. Njamal argues Muccan's engagement in the mediation process was 'merely to superficially 'box-tick' the requirements under the Native Title Act so as to prevent another finding of lack of good faith' (NTP Further contentions at 23). In contrast, Njamal points to the Synopsis and Outcomes document from the 24 May mediation (NTP2) as evidence of its genuine engagement in the mediation process. Njamal notes in particular: that it committed to organising a meeting of the Njamal applicants; and to provide an amended draft agreement to Muccan within one week of the mediation.

[52] The Synopsis and Outcomes document (NTP2) shows that Mr Wesley Aird of Indigenous Services Australia Pty Ltd ('ISA') attended the mediation on behalf of Njamal. It also indicates that Mr Aird had recently taken carriage of the matter following termination of Castledine Gregory's legal services. The synopsis states:

> Mr Aird advised that Castledine Gregory had not discussed this matter in depth with the Njamal People nor put the draft agreement before them prior to the termination of Castledine Gregory's services on 7 April 2017. Mr Aird commented that he has not had access to any of Castledine Gregory's files but has reviewed version 8 of the agreement, which had been provided by Mr Green. Mr Aird advised he would like McCullough Robertson to review version 8 and put it in a form that can be recommended to the Njamal People for their consideration,
>
> …
>
> Mr Green advised that Muccan is reluctant to make a commitment to any specific next steps at this time due to the history of the matter and wishes to reserve its position. He advised compensation and heritage had been the main issues in contention between parties. Mr Aird advised the Njamal People's day to day heritage procedures are not reflected in the draft agreement and that it needs to be slimmed down to make the heritage processes in the agreement more cost effective. Mr Green advised the cost of heritage surveys has not been the main issue; rather for Muccan it is concerned about addressing road blocks to allow the efficient development and running of the mine.

[53] Njamal states, despite the apparent progress that was being made, and Njamal's commitment to progressing the draft agreement, Muccan failed to make a commitment to any specific next steps, including 'the relatively minor task of reviewing the draft agreement' (NTP Further Contentions at 25). Njamal contends Muccan's reluctance to commit to any specific next steps at this point in time shows it was not meaningfully engaged in the negotiation process.

[54] Muccan's contentions seek to contextualise the position it took at the 24 May mediation. It acknowledges that at the last mediation it reserved its position in relation to specific next steps but argues that given the circumstances its position, and the subsequent lodgement of the s 35 applications, was unsurprising, reasonable and appropriate (GP Contentions at 9.3-9.4).

[55] Muccan notes that on 10 April 2017 it was advised Castledine Gregory no longer acted for Njamal, and was subsequently advised ISA would be representing the group. Muccan highlights this was now the third time it had to engage with a new negotiator in this matter. On 19 April, Muccan was informed ISA had requested an upcoming mediation conference, scheduled for 2 May 2017, be adjourned to 24 May 2017. It stated this was to allow time for ISA to familiarise itself with the matter and prepare for the mediation. Muccan has provided a copy of its email in reply (GP82) dated 20 April 2017 in which it sets out its position. In particular Muccan's email:

a) Noted that each change of negotiator introduced delay and new requirements;

b) Agreed to the adjournment of the mediation to 24 May;

c) Provided an undertaking not to seek an arbitral determination prior to 24 May;

d) Said that unless substantial progress was made at the 24 May mediation, it would thereafter likely seek an arbitral determination; and

e) Set out its expectations of Njamal, including that prior to the 24 May mediation Njamal would have reviewed Castledine Gregory's file concerning negotiations to date.

[56] As earlier explained in this decision, the Tribunal must look at a parties' conduct as a whole when considering the question of good faith negotiations. In *Wutha v Contact Uranium* at [43], Deputy President Sosso observed:

> The task of the Tribunal is not to disaggregate all of the negotiations and make an assessment based on particular behaviour or snapshots in time. The requirement is to look at the overall negotiations and make an assessment.

[57] On 12 August 2016, following the Tribunal's determination in *Muccan 2*, Muccan requested the Tribunal provide mediation assistance in accordance with s 31(3). The Tribunal held four mediation conferences, with the first being held on 18 October 2016 and the last on the 24 May 2017. The Tribunal's Synopsis and Outcomes documents from the four mediations provides some insight into the negotiations that occurred over this period. Relevantly I note: Muccan and Njamal were in agreement about using a draft agreement from earlier negotiations (i.e. prior to *Muccan 2*) as the starting point for these negotiations; Muccan and Njamal used the second and third mediation conferences to go through the draft agreement in detail; and Muccan reviewed a revised draft agreement provided by Njamal on 22 December 2016, and in turn provided a further amended version of the draft agreement to Njamal on 12 February 2017.

[58] Muccan also contends the negotiations which occurred between *Muccan 2* and the 24 May mediation were punctuated by Njamal regularly seeking to delay mediation conferences and regularly failing to comply with outcomes agreed at the mediation conferences. Muccan contends when Njamal did comply with outcomes, it was regularly less than 24 business hours before the mediation conference, making it hard for Muccan to be fully prepared (GP Contentions at 9.23-9.24).

Findings

[59] It is an established principle that the behaviour of the native title party is a relevant consideration in assessing the context of negotiations and the reasonableness of the grantee party's behaviour. As the Tribunal stated in *Wutha v Contact Uranium* (at [25]):

> The approach taken by one party is normally influenced by the approach taken by another. For example, if a native title party refuses to negotiate, a lesser negotiating standard would normally be required of the government and grantee parties. Similarly, if a grantee party is a small miner with few resources and limited capacity to make concessions or offers, what would be regarded as negotiating in good faith could well be different to that of a large mining company with the capacity to make offers and concessions.

[60] While I do not believe it was the intention, I accept that Njamal's conduct in the negotiations, particularly in the context of numerous changes of representation leading to some delay, is a relevant consideration in assessing the overall context of the negotiations and Muccan's conduct.

[61] Overall, the exchange of detailed draft agreements and participation in four mediation conferences does not support a finding that Muccan failed to commit to the negotiation process.

3. Did Muccan act reasonably when it applied to the Tribunal for a determination?

[62] In the alternative to contention 1 above, Njamal also contends Muccan failed to act reasonably when it made the s 35 applications. Njamal states this contention is related to contention 2 as both arise from Muccan's conduct at the 24 May mediation and immediately following.

[63] Njamal states, in compliance with the outcomes of the 24 May mediation, it supplied a revised version of the draft agreement to Muccan on 2 June 2017. Njamal contends Muccan failed to respond to this correspondence, as well as a follow up email sent by Mr Aird on the same date setting out Njamal's next steps for progressing negotiations. Njamal states Muccan then lodged the s 35 applications on 6 June 2017, yet still did not respond to Njamal's correspondence, which evidences a lack of reasonableness. Njamal also note Muccan failed to respond to correspondence from the State, dated 13

June 2017, which 'confirms a lack of meaningful engagement in the negotiation process' (NTP Further Contentions at 37).

[64] In the wake of the *Sheffield Full Court appeal*, Njamal has sought to strengthen its contention that Muccan's behaviour during this time was unreasonable. Njamal states 'the Full Court has made it clear that the obligation to negotiate in good faith is a continuing obligation and one that applies to any post-section 35 voluntary negotiations' (NTP Supplementary Contentions at 15). Njamal goes on to state that at the time of lodging its supplementary contentions on this point, Muccan still had not responded to the 2 June correspondence from Njamal or the 13 June correspondence from the State.

[65] In *Strickland v Minister for Lands* at 322, Nicholson J describes the consequence of the statutory entitlement to lodge a s 35 application, being that the act of lodgement itself cannot be relied upon to establish a lack of good faith. Njamal notes this fact but also highlights that the Tribunal has previously found the circumstances surrounding the making of the application may indicate, or contribute to, an overall lack of reasonableness (see *Rusa Resources v Gnulli*).

[66] In *Young v Kariyarra*, Member Shurven considered whether it was reasonable in the circumstances for the grantee party to lodge a s 35 application. Relevantly it was noted Kariyarra did not respond to the grantee party's last counter offer, no meeting date was ever offered by Kariyarra over the six months of Tribunal assisted mediation, and Kariyarra's decision making process was complex. The grantee party contended, had negotiations continued, it was unclear how quickly they would have progressed. Member Shurven found the grantee party's actions were reasonable in the circumstances.

[67] Njamal contends the facts in *Young v Kariyarra* are distinguishable from these circumstances in that there was no indication negotiations were faltering and Muccan had control over the next steps in progressing the draft agreement. Njamal contend there is not the same commercial certainty justification to lodging the s 35 applications as there was in *Young v Kariyarra*.

[68] Muccan's comments detailed at [54] above are also made in reply to this contention. Importantly I note the contents of the email sent by Muccan to the Tribunal and other

parties on 20 April 2017, stating that it 'undertakes not to seek an arbitral determination prior to [24 May mediation]. However, unless substantial progress towards a mutually acceptable agreement is made on or before that date, then Muccan will likely do so'.

Findings

[69] As stated above, the act of lodgement itself cannot be relied upon as demonstrating a lack of good faith. However, it can be considered a lack of good faith 'if in doing so, the government or grantee party had improper motives, or adopted a negotiating position so unreasonable as to indicate a lack of sincerity in its desire to reach agreement with the native title party' (*Placer* at [30]).

[70] The circumstances surrounding the lodgement show that Muccan had given Njamal notice that lodgement of a s 35 application would likely be its next step if there was not substantial progress made at the 24 May mediation. On my reading of the Synopsis and Outcomes document it does not appear that substantial progress was made at that mediation and parties seemed to still be some distance apart on compensation and heritage. It is unfortunate that Njamal put time and resources into providing a revised draft agreement to Muccan that was ultimately not considered. However, in light of Muccan's 20 April email, the lodgement of the s 35 applications should not have come as a surprise to Njamal. Given Njamal had advised they were making preparations for a meeting of the Njamal applicants, it would have been courteous for Muccan to advise Njamal of their lodgement of the s 35 applications, however I would not classify this alone as a lack of negotiation in good faith.

[71] While the *Sheffield Full Court appeal* did make it clear the obligation to negotiate in good faith continues even after a s 35 application has been made, the Full Court was quite clear that this was in circumstances where parties agree to continue to negotiate (see *Sheffield Full Court appeal* at [59]). I believe it apparent from Muccan's conduct that its participation in negotiations ceased upon lodgement of the s 35 applications. Section 35(3) makes it clear that parties *may* continue to negotiate after a s 35 application is made (and the findings of the *Sheffield Full Court appeal* make it clear that these voluntary negotiations must be conducted in good faith should they occur). However, there is nothing requiring parties to continue to negotiate after this point. I

am not prepared to make any adverse findings regarding Muccan's behaviour based on this point.

4. Does Muccan's overall conduct meet the threshold for good faith?

[72] Although not specifically raised in Njamal's contentions, I believe it is relevant in my consideration of Muccan's overall conduct in the negotiations to consider Njamal's request for economic advice. This issue also relates to the issue of lack of information, dealt with above at [22] to [48]. In *Muccan 2*, Member McNamara considered whether Muccan had 'acted unreasonably' in relation to, amongst other things, Njamal's request for economic advice:

> **Economic advice**
>
> [94] Njamal state that in April 2015, they requested that Muccan 'fund economic advice in order ... to properly consider and assess the financial offer' Muccan had presented. Njamal maintain the request was 'due to the lack of provision of information and the high uncertainty flowing from this fact' (NTP Contentions at 108, NTP17-18/GP36). They contend Muccan 'acted unreasonably in failing to provide a substantive response to the request ... [o]ther than to ask what the purpose of the advice would be' in May 2015 (NTP Contentions at 106 and 113).
>
> [95] Muccan contend their 'request for assistance in understanding how "economic advice" might assist the parties was reasonable'. They state they 'did not understand on what the "economic advice" would be based, what it would constitute or how it would assist the parties'. They state 'there may be good answers to remedy the GP's lack of understanding, but the NTP declined to address those matters' in its subsequent correspondence in July 2015 'or at all' (GP Contentions at 10.10-11, NTP23-24/GP39).
>
> **Findings**
>
> [96] The evidence supports Njamal's contention that Muccan failed to provide a 'substantive response to the request'. Muccan's response was simply to ask:
>
> > please explain ... how any "economic advice" might assist assessing any compensation to which any Njamal Person may be entitled under the NTA [NTP21/GP38]

[73] At the first mediation following *Muccan 2*, held on 18 October 2016, parties revisited the topic of economic advice. Muccan has provided a file note prepared by Mr Ken Green (GP51), who attended the mediation on behalf of Muccan. The file note states Njamal's representative, Mr Andre Maynard:

> …raised the issue of "economic advice". Ken Green confirmed that Muccan had requested further information as to that request. Ken Green invited, and Andre Maynard agreed, to enquire of the Njamal People what the Njamal People hoped to achieve by obtaining "economic advice", particularly in circumstance where no resource had been defined on the mining leases.

[74] The Tribunal's Synopsis and Outcomes document from the first mediation states that parties discussed the costs associated with such advice and Mr Maynard agreed to take instructions on whether there is a need for an economic assessment and report. The Tribunal's Synopsis and Outcomes document from the second mediation, held 12 December 2016, notes that parties discussed 'differing viewpoints regarding the Njamal people's request for an economic assessment' and also 'whether the co-funding of an economic assessment is an option'. An outcome of this mediation was for Mr Maynard to seek instructions on 'the reasons for the Njamal people's request for economic assessment for the project'. On 24 March 2017, Mr Maynard emailed Mr Green (GP73) and provided the following update in relation to the request for an economic assessment:

> The Njamal People request an independent economic advice in respect to the proposed mining leases and the Grantee Party's compensation offer. The reason for this request is to enable the Njamal to be fully informed as to the permitted and likely impacts of the act on their native title rights and interests and to be provided with a general understanding of the industry bench-marks in terms of compensation for acts of the kind proposed by Muccan Minerals.
>
> We refer you to section 33(1) of the Native Title Act. In this regard, as Muccan cannot give any estimation of potential profits to be made from mining on the mining leases, income to be derived or even minerals that are present at quantities to be mined , it is important, for the benefit of both parties, to seek independent advice as to industry benchmarks in terms of compensation for the acts of the kind proposed by Muccan to allow for appropriate compensation to be negotiated.

[75] The Tribunal's Synopsis and Outcomes document from the third mediation, held 27 March 2017, states:

> In relation to the issue of Muccan funding an economic impact assessment, Mr Maynard advised that the Njamal people feel such as assessment would allow them to consider Muccan's offer in context, due to the lack of information about what Muccan is targeting or any information about proposed activities. Mr Maynard confirmed the likely cost of such an assessment to be approximately $5000.

[76] An outcome of the mediation was for Mr Green to take instructions on this issue. The fourth and final mediation, held 24 May 2017, was attended by a new Njamal representative and it does not appear the economic assessment was discussed. I see no evidence to suggest Muccan provided a response to the question of funding an economic assessment following the third mediation.

Findings

[77] I find Muccan's behaviour on this particular point unhelpful, particularly following the findings in *Muccan 2* and the consideration of this issue specifically. It appears Muccan restarted its line of questioning about Njamal's reasons for requesting an economic report. Arguably, Muccan was informed of the reason for this request prior to *Muccan 2*.

Determination on negotiation in good faith

[78] Negotiations in this matter were not assisted by the circumstances, including the fact there was no mining proposal to work with and Njamal had a further change in representation. Despite this, a draft agreement was being negotiated between parties and its structure sought to address the issues that arose as a result of there being no mining proposal.

[79] While I believe Muccan's behaviour in relation to Njamal's request for an economic assessment was unhelpful, particularly given the lack of information available to assist Njamal in the negotiations, I do not believe this on its own leads to a finding that Muccan did not meets its good faith obligations. As observed by Deputy President Sosso in *Cosmos v Mineralogy* at [90]:

> The Tribunal does not place "ticks" and "crosses" in a checklist of actions and then calculate in a mechanistic manner whether a party has passed or failed the test of good faith negotiating. …The task given to the Tribunal is to look at the process of negotiation and assess if the parties in question acted reasonably and fairly having regard to the facts before them, their resources, the external environment at the time and their past and present relations.

[80] Having regard to the entirety of Muccan's conduct in the negotiations, on balance I am satisfied Muccan has fulfilled its obligations under s 31(1)(b), but has certainly done no more than what I regard as the bare minimum. It follows that I have the power to proceed to make a determination on the substantive issue (s 36(2)).

SECTION 39 INQUIRY

[81] I will now consider the matters set out in s 39 of the Act. The Act directs me to have regard to a range of criteria, including the effect of the proposed leases on the rights

and interests of the native title holders, the economic or other significance of the proposed leases, and the public interest in the grant of the proposed leases.

[82] For the reasons set out below, I have determined the grant of the proposed leases may be done subject to conditions.

The proposed leases

[83] The proposed leases are located in the Shire of East Pilbara. Details for each of the leases (using Tribunal spatial data and the Quick Appraisal documents provided by the State (GVP2)) are outlined in the table below:

Proposed lease	**Approx size (km^2)**	**Location**	**Underlying tenure**
M45/1160	9.53	8km north of Shay Gap	• Pastoral leases (73.7%) • General lease (26.3%)
M45/1162	9.52	5km east of Shay Gap	• Pastoral leases (45.7%) • General leases (54.3%)
M45/1163	9.69	33km south of Shay Gap	• Pastoral lease (95.28%) • 'C' class timber reserve (3.51%) • Road Reserve (overlap not given)

[84] The Quick Appraisal documents submitted by the State also detail current and historical mining tenure over the proposed leases. Exploration licences have previously been held over almost all of the area of the three proposed leases. Three miscellaneous licences have previously been granted which partially overlap the area of M45/1162 (the largest overlap being 5.07%). There are currently no live mining tenements overlapping the proposed licences.

[85] I note the State's contentions appear to confuse some of the data contained in the Quick Appraisal documents. The documents provide historical data for both the mining tenements applied for and mining tenements granted. Under the heading 'Historical Mining Activity', the State's contentions list a number of tenements, some of which were applied for but never granted. For example, the State's contentions list the area of M45/1163 as previously being the subject of seven mining leases. On my reading of the data, seven mining leases were applied for but none were ever granted. Similarly, the State's contentions appear to conflate the data for pending tenements

and live tenements. For example, the State's contentions list a number of pending (i.e. not yet granted) prospecting licences as 'current tenure'.

[86] The proposed leases are conversions, under s 67 of the *Mining Act*, of exploration licences E45/2385 and E45/2383. Muccan held these two underlying exploration licences from 2005 until they were surrendered in 2009. Operations Reports (GP4-GP7) lodged with the Department of Mines and Petroleum (now the Department of Mines, Industry Regulation & Safety) during that time show both diamond and reverse circulation drilling took place on E45/2385. Work conducted over E45/2383 appears to have been limited to aerial surveys and collecting surface samples. I note Muccan's 2006-2007 report for E45/2385 (GP6) indicated its target mineral to be gold.

[87] The term of a mining lease in Western Australia is 21 years with a right of renewal for another 21 years. The grant of the proposed leases would confer on Muccan the rights to use the area for the purposes of a mining lease, as set out in s 85 of the *Mining Act.* Use of the area would be subject to the deemed conditions in s 82 of the *Mining Act.* These statutory conditions include the requirement not to use ground-disturbing equipment when mining the land unless done in accordance with an approved programme of works. The proposed leases will also be subject to various conditions and endorsements which the State intends to impose upon grant. These conditions and endorsements are set out in Annexure B.

[88] By correspondence to Njamal dated 19 March 2015 (GP32), Muccan outlined its intention to undertake the following works on the proposed leases, noting the extent to which drilling might actually occur is dependent upon the results of the non-drilling activities:

- Stream sediment sampling;
- Soil sampling;
- Geological mapping and rock chip sampling;
- Aircore drilling;
- Reverse circulation drilling; and
- Diamond drilling.

Section 39 proceedings and submissions

[89] In relation to the substantive inquiry, the following submissions were made:

- Muccan's statement of contentions and supporting documents GP1 to GP107 (being the same documents lodged in support of the NIGF contentions);
- State's statement of contentions and supporting documents GVP1 to GVP7;
- Njamal's statement of contentions and supporting document NTP1 (with attachments 1 and 2);
- Muccan's contentions in reply;
- State's contentions in reply.

[90] At a directions hearing held on 6 November 2017, Njamal was granted leave to provide further evidence regarding the effect of the act on its native title rights and interests. On 29 November 2017, Njamal lodged a redacted copy of a document titled 'Nyamal Connection Report' together with Appendix B. At Njamal's request, I issued non-disclosure directions under s 155 of the Act in relation to these documents. On 11 December 2017, Muccan lodged its further contentions in reply. On 13 December 2017, the State lodged its further contentions in reply.

Njamal's ability to assess the s 39 factors

[91] Njamal has made the broad contention that it is wholly prevented from assessing the s 39 factors due to the lack of information around Muccan's proposed activities. Njamal states that without this information, it is not possible for it to assess the potential impact of the acts on its native title rights and interests. Njamal goes on to state, in circumstances where the native title party is unable to assess the potential impacts on its native title rights and interests by reference to the s 39 factors, it is not possible for the Tribunal to properly balance the interests of the native title party and the grantee party as required under the Act. Njamal concludes, where the Tribunal is prevented from properly assessing the s 39 factors, the Tribunal must determine the acts must not be done (s 38(1)(a)). Although Njamal has provided contentions

addressing each of the s 39 criteria separately, for the most part these contentions are brief, there is little or no supporting evidence, and the primary contention is that due to the lack of information regarding the proposed acts, Njamal are wholly prevented from assessing the criteria.

[92] Muccan's response to this contention argues there is nothing in the Act that predicates anything on the native title party's ability to assess the s 39 criteria. It notes if any assessment it to be undertaken it is to be undertaken by the Tribunal. Muccan points to s 38(1), which mandates that the Tribunal *must* make a determination in accordance with that section, and it *must take into account* the matters referred to in s 39(1). Muccan correctly identifies there is no onus of proof in these proceedings, but the common-sense approach taken by the Tribunal means, in practical terms, that parties have an onus to produce evidence to support their contentions, especially when facts are peculiarly within their own knowledge (*Waljen* at 156).

[93] The State's view on this issue is that, although detailed information of the type described by Njamal is helpful, it is not impossible to assess the impact of the acts in its absence. It notes the rights conferred by a mining lease are outlined in the *Mining Act*. It further notes that those rights are regulated by the *Mining Act* and the *Mining Regulations 1981* (WA). The State contends, in the absence of detailed information regarding proposed future productive mining activities, Njamal should assume Muccan will exercise the full suite of rights conferred by the grant of the mining lease. The State argues that, in this situation, Njamal could and should have provided evidence regarding the exercise of its native title rights and interests in the area of the proposed leases and detailed the effect that the grant of the leases – if exercised to their full extent – would have on the exercise and enjoyment of those rights and interests.

[94] I accept the native title party's task in addressing the s 39 criteria is made harder in the absence of a proposal for productive mining. I am sympathetic to Njamal's position in this regard. I also agree that the Tribunal's task is not assisted by the situation, a difficulty that the Tribunal has examined on a number of occasions, perhaps most thoroughly in *Waljen.* The Tribunal there observed (at 222):

> The s.39 criteria are the centrepiece of the Tribunal's functions in these inquiries. The other statutory provisions establish procedures that enable these criteria to be considered. By their very nature, these criteria only make sense when they can be assessed or weighed against an actual proposal. We have already decided that the act is not just the grant of the lease but also the exercise of rights by the grantee under it.

> This follows from the nature of the s.39 criteria. To have concluded otherwise would have created an artificial situation where an attempt would have to be made to weigh the criteria against the mere grant of the mining lease without regard to what the grantee intends to do. It is only slightly less artificial to have to weigh the criteria knowing that initially the lease will be used for exploration but that later it could be used for a productive mine.
>
> It is difficult, if not impossible, to anticipate what activity the grantee party might be involved in over the 42 years of the mining lease. The grantee party could engage in activities which involve no more land disturbance than low level prospecting or exploring and which, if a mining lease were not involved, could attract the expedited procedure. If a viable ore body is found, then the activity could range from a small mining operation to a large scale venture. It could be open cut, it could be underground. It may last two or three years, or 50 years. It may be in an area where native title rights and interests are extensive, or where they have been impaired by inconsistent mining or pastoral activities. The environment of the locality of the mine could differ widely, from situations which would be affected to a minor extent to those of extreme sensitivity. The activity might or might not be associated with substantial infrastructure involving tailing dams, processing plants, an airstrip, or even a large town. The numbers employed on the project will vary.

[95] Considering this passage, it is apparent the State's suggestion to simply assume any granted mining rights will be exercised to the full becomes a difficult task given the myriad variables involved. However, I am not satisfied the position taken by Njamal necessarily follows. Muccan is correct in noting that, ultimately, it is the Tribunal's task to assess the s 39 criteria in making its determination. I accept that Njamal's ability to address how the act will affect its rights and interests is hampered, and this is something I must factor into my assessment. However, I do not see how Njamal's ability to detail its rights and interests over the area is limited. The Tribunal has repeatedly observed 'where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn' (*Ward v Western Australia* at [25]). In *Waljen* (at 224) the full panel of the Tribunal stated 'it could be argued that without [an actual mining proposal] it is impossible for the Tribunal to properly exercise its discretionary power, except in cases where there is little or no evidence of native title rights and interests that could be affected, no matter what the nature of the project.' I now have the unsatisfactory task of considering the s 39 criteria against minimal information from either party.

'Nyamal Connection Report'

[96] Njamal have submitted as evidence a redacted version of the Nyamal Connection Report, dated June 2009. I note this document was submitted after Njamal had lodged its contentions and was not accompanied by any supplementary contentions. Accordingly, the document is not directly referenced in any of Njamal's contentions.

The document is some 310 pages long. In *Yindjibarndi v FMG Pilbara* I observed (at [35]):

> The Tribunal is not assisted in its task by a seemingly 'scatter-gun' approach to the evidence, where large volumes of material are provided without an apparent focus on the task at hand. For example, it is futile to focus on the desire of the native title party to have the right to negotiate regime apply without providing cogent and directed evidence (and contentions) which address the s 237 criteria.

[97] That inquiry dealt with an expedited procedure objection, therefore the criteria to be considered were different. However, the comments can be equally applied to a future act determination inquiry, in that the evidence and contentions must be directed to the s 39 criteria. The report is significantly redacted but of the portions remaining un-redacted, I have found nothing that spatially, or in any way, relates to the area of the proposed leases. As such, the report is of little assistance in this inquiry. That is not to say similar material may not be helpful in future inquiries, provided the material relates to matters to which the Tribunal may have regard and the Tribunal is given some guidance as to how the materials might be used.

Section 39(1)(a) – effect of the act on: enjoyment of rights and interests; way of life culture and traditions; development of social, cultural and economic structures; freedom of access; and, sites of particular significance

[98] Njamal's contentions address the following five sub-points under s 39(1)(a) as a whole, stating that, due to the lack of information provided about the proposed leases, it is not possible to determine what effect there will be on:

(a) The enjoyment by Njamal of its registered native title rights and interest;

(b) The way of life, culture and traditions of Njamal;

(c) The development of social, cultural and economic structures of Njamal;

(d) The freedom of access by Njamal 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 its traditions; and

(e) Any area or site, on the land or waters concerned, of particular significance to Njamal in accordance with its traditions.

[99] Njamal states it is wholly prevented from properly assessing any impacts on any of the factors listed at (a)-(e) above and that any statements made by Muccan or the State in relation to impacts on these factors should be taken to be purely speculative.

[100] The State's contentions in reply state it does not accept that Njamal has been prevented from assessing this criteria. It states Njamal could assume Muccan will exercise the full suite of rights available through the mining lease, and detail the impact this would have on the enjoyment of its native title rights and interests. The State contends, in the absence of evidence from Njamal as to how the proposed leases will affect its rights and interest in relation to s 39(1)(a), it is not clear what effects – if any – there will be, therefore the Tribunal must conclude there will be no effects.

Effect on registered native title rights and interests

[101] Njamal has provided an extract from the Tribunal's Register of Native Title Claims, which details its registered native title rights and interests over the claim area. Annexure C to this decision sets out in full the rights and interests found on the Register of Native Title Claims for the Njamal claim.

[102] Njamal asserts its native title rights and interests in the land and waters underlying the proposed leases. Citing *Seven Star v Wiluna* at [38], Njamal contends that, for the purposes of the right to negotiate provisions of the Act, determined and registered claimed native title rights and interests are treated as being on the same footing. Njamal then goes on to contend that, pursuant to s 39 of the Act, its native title rights and interests in the land and waters underlying the proposed leases would be negatively affected by the grant of the propose leases.

[103] The State's contentions note there is a distinction to be made between the assumed existence of registered native title rights and interests (which it notes is not in issue in these proceedings) and the actual enjoyment of those rights and interests in the area of the proposed leases. I note Deputy President Sumner's following comments (at [38] of *Seven Star v Wiluna*) which stated:

> … there is still a need under s 39(1)(a)(i) of the Act for evidence on how those native title rights and interests are actually enjoyed or exercised in the particular locality of the future act and of the other matters in s 39(1)(a) (see *Waljen* at 166-167 and *WMC/Evans* at 339-341). In other words, a determination is not based on a worst case scenario where all the registered native title rights and interests are assumed to exist

> and be exercised or enjoyed equally over the whole claim area just by virtue of their registration.

[104] The State also notes that any potential interference with Njamal's enjoyment of their rights and interests must be considered in light of interference that is likely to already be occurring. Specifically, the State refers to the pastoral leases, general leases and reserves that currently exist over the area of the proposed leases. The State contends that, as a minimum, these other interests will have extinguished any exclusive native title rights and interests Njamal may have sought to claim.

[105] In *Waljen* it was observed (at 167):

> The question of whether a particular proposed act has an effect on the native title rights and interests of the particular native title party (or parties) is a matter of fact to be determined on the evidence in each case and will depend on the nature of the act and the native title rights and interests which are capable of being affected. Depending on the case, the effect on native title rights and interests which are affected might be quite minimal or quite extensive.
>
> …
>
> As a matter of practice, where evidence of effects is produced, there would also have to be evidence of those native title rights and interests which it is claimed exist and will be affected. The law does not require that there be comprehensive evidence of native title so that it is established in its broadest possible terms. There needs to be sufficient evidence to demonstrate which native title rights and interests will be affected and how they will be affected.

[106] There is nothing in the material before me, including the heavily redacted Nyamal Connection Report, that documents Njamal's actual enjoyment or exercise of its native title rights and interests over the area of the proposed leases. There is no evidence for instance that Njamal exercises or enjoys its native title rights to camp, hunt, fish, make ceremonial artefacts or extract ochre in the area of the proposed leases. As such, I give little weight to the effect of the proposed leases on Njamal's enjoyment of its native title rights and interests. To mitigate any potential effects, I intend to impose conditions as discussed below.

Effect on way of life, culture and traditions

[107] Njamal has provided no specific contentions on this point and there does not appear to be any specific relevant material contained in the Nyamal Connection Report. The State contends that any effects of the proposed leases on Njamal's way of life, culture and tradition will be regulated and minimised by the State and Federal regulatory regime. Due to the lack of evidence before me, I afford little weight to this criteria.

Effect on development of social, cultural and economic structures

[108] There is no information before me regarding how the proposed leases will affect Njamal's development of social, cultural and economic structures. Given Muccan has no immediate plans for productive mining, the grant of these proposed leases is unlikely to create any significant commercial or employment opportunities for Njamal in the near future. As such I find that any effects on Njamal's development of social, cultural and economic structures, either positive or negative, are likely to be minimal.

Effect on freedom to access and carry on rites and ceremonies

[109] Njamal has not provided any specific contentions on this point, nor has it provided any evidence of Njamal people accessing the area or using it for carrying on rites, ceremonies or other cultural activities.

[110] Muccan has provided no statements or policy documents regarding how it intends to operate which would be relevant to my findings on this criteria.

[111] In considering freedom of access, I am conscious there is already likely to be some restrictions on Njamal's access stemming from the pastoral leases that overlap the area of the proposed leases. Any further restrictions to Njamal's access as a result of Muccan's exploration work are likely to be temporary and confined to a small area. However, if Muccan move to productive mining, restrictions to Njamal's access are likely to be considerable in size and duration, and at this stage, there is no way of knowing where the affected areas will be.

Effect on areas or sites of particular significance

[112] I am to have regard to the likely effect of the proposed leases on any areas or sites that are of particular significance. An area or site is 'of particular significance' if it is of special or more than ordinary significance to the native title party in accordance with their traditions (*Cheinmora v Striker Resources*). While the Act does not prevent consideration of sites or areas located outside of the proposed leases, the evidence must show a clear nexus between those sites and any potential activities undertaken by the Muccan (*Silver v Northern Territory* at [35]).

[113] Both the State and Muccan have produced reports from the Department of Aboriginal Affairs' Aboriginal Heritage Inquiry System ('AHIS'), which show there are no registered sites or 'other heritage places', as defined under the *Aboriginal Heritage Act 1972* (WA) ('AHA'), on the proposed leases. The State contends, should there be a prospect of interference with any sites of particular significance, the AHA regime will apply, regardless of whether sites are registered or not. The State contends the AHA regime and its associated processes are likely to prevent any interference with any areas or sites of particular significance.

[114] Njamal says the State and Muccan have attributed great weight to the AHIS reports in their contentions. Njamal notes the Tribunal has previously accepted the AHIS should not be seen as an exhaustive list of sites (see *Seven Star v Wiluna* at [50]), and therefore little if any weight should be given to these reports.

[115] Appendix B to the Nyamal Connection Report is titled Nyamal Site Register. I note the report's table of contents describes Appendix B as 'Site Map and Register', however the redacted copy of Appendix B provided to the Tribunal does not contain a map. Of the 44 sites detailed on the register, 16 are redacted. While the majority of the remaining sites do not list enough detail to locate them, it is possible to determine an approximate location of a few sites based on their descriptions. For example, one site is described as being 'below Yarrie station'. Of those where an approximate location is possible, none appear to be located within the area of the proposed leases.

[116] The State contends Njamal has not provided evidence to show that any of the sites mentioned in the Nyamal Connection Report fall within the area of the proposed leases, or that they fall outside the proposed leases but would otherwise be affected by the grant of the proposed leases. The State also contends Njamal has not taken any steps to explain the relevance of the sites detailed in the report or to clarify which sites it alleges are of particular significance.

[117] Muccan has not provided any comment on its approach to heritage that may be of assistance in this matter. I note it appears a heritage survey was never conducted on the underlying exploration licences (discussed in greater detail at [140]-[142]).

[118] I acknowledge the AHIS is not a complete register of sites and there are a number of factors that may mean a site of particular significance is not recorded there. However,

a common sense approach would suggest that details of any sites not recorded on the register would likely be within the knowledge of Njamal. As such, the onus is on Njamal to identify any such sites and to provide evidence that establishes their existence and significance.

Section 39(1)(b) - interest, proposals, opinions or wishes of Njamal in relation to the management, use or control of the area

[119] This criterion directs me to consider the effect of the act on Njamal's interests, proposals, opinions or wishes in relation to the management, use or control of land or waters to which Njamal holds registered rights and interests. As noted by the State, this is a criterion where evidence from Njamal is essential for me to make any conclusive findings.

[120] Njamal again contends that due to a lack of information about the proposed leases it is not possible to determine the effects of the proposed leases on the s 39(1)(b) criteria and it has been wholly prevented from properly assessing this criterion. Njamal contends I should follow the precedent set in *Weld Range v Wajarri Yamatji*, where the Tribunal recognised the importance of the native title party's opinions and wishes in the context of this criterion. Specifically, the Tribunal found, among other things, that significant weight be afforded to the native title party's opinions and wishes, which included that mining should not be permitted on an area of special significance without their overall agreement, and protection of their heritage. Njamal concludes that in this matter I must determine the acts must not be done in circumstances where the native title party does not have the requisite information to be able to assess its opinions and wishes in relation to the management, use and control of the land.

[121] The State contends this criterion directs Njamal to provide evidence of its interests, proposals, opinions or wishes in relation to the management, use or control of the land. As such, it is not necessary for Njamal to assess the impact of the proposed leases on those interests, proposals, opinions or wishes. Therefore, the State contends, it is not clear why Njamal was prevented from providing evidence on this point.

[122] As noted by both Muccan and the State, the factual circumstances in *Weld Range v Wajarri Yamatji* differ significantly to this matter. The native title party's evidence in that matter was extensive, including numerous affidavits, a site visit and an on-country

hearing with oral evidence provided by traditional owners. The evidence established the particular significance of a number of sites, as well as the Weld Range area more broadly. The Tribunal was satisfied that, historically, it was an area of intense occupation and traditional ceremony, and found (at [337]) the importance of the Weld Range area to the native title party 'should not be understated'. The native title party provided primary evidence from traditional owners which clearly detailed their wishes for the area. Specifically, the native title party articulated that it did not oppose mining but would prefer it does not occur in the Weld Range, and if it does occur then it meets certain 'special requirements' namely in regards to heritage. Njamal has not explained why the findings in *Weld Range v Wajarri Yamatji* are directly relevant to the present matter and I can see no obvious parallels to draw from the comparison.

Findings

[123] I cannot assume the Njamal people object to mining over their claim area, or for that matter that they support it. The panel observed in *Waljen* (at 224):

> Like most other groups in the community, Aboriginal people have a wide range of opinions and attitudes to mining. In some cases the fact that there is a large, economically viable project likely to bring substantial benefits to the community, including employment, might be a factor influencing a particular native title party to support a project, even though the operation might have some adverse effect on their native title rights and interests and way of life. It would be unduly paternalistic for the Tribunal to assume that all native title parties would want all their native title rights and interests, way of life and culture and traditions protected in the face of a proposal that would produce significant economic benefits to their community.

[124] I am, however, prepared to draw an inference from the contentions lodged on their behalf that Njamal has a strong desire to be informed about any potential activities over their claim area, including any work Muccan may undertake pursuant to these proposed leases.

Section 39(1)(c) - economic or other significance of the proposed leases

[125] In considering this criterion, I am required to evaluate the economic or other significance of the proposed leases specifically, rather than a consideration of the significance of exploration and mining more broadly.

[126] Muccan and the State both contend the grant of the proposed leases will be of economic significance at a local, State and national level. The State contends the

benefits would include State royalties and export income. Muccan contends, at a local level, the grant of the proposed leases would allow the improved management, use and/or development of a local resource, engage local or proximate businesses to provide services to Muccan's project, and would involve the payment of rates to the local authority. I note royalty payments and export tax would only be payable if and when productive mining commences.

[127] Njamal contends, in the absence of any information about Muccan's proposed exercise of the rights to be granted, it is not possible to evaluate any economic or other significance.

[128] In correspondence sent to Njamal in 2015 (GP32), Muccan noted the findings of a 2008 mineral exploration report regarding drilling that had occurred within the area of M45/1163. The report described the geochemical results as 'disappointing' and Muccan explained that the results were 'not indicative of a commercially exploitable resource'.

Findings

[129] I am prepared to accept that Muccan's continuing exploration will have some limited positive economic effect. While there is potential for this to increase if productive mining occurs, the evidence does not support great weight being placed on this due to its uncertainty.

Section 39(1)(e) - any public interest in the grant of the proposed mining leases

[130] Njamal relies on the Tribunal's findings in *Seven Star v Wiluna*, where it was found the grant of the proposed tenement was not in the public interest due the grantee party's exploration strategy having no rational or scientific basis. Njamal argues Muccan has not provided sufficient information regarding its proposed methodology and there is no evidence of public interest.

[131] Njamal also relies on the Tribunal's findings in *WDLAC v Holocene*, where it was concluded that that the act must not be done. In that matter the Tribunal found, although there was public interest in the mining development, this had to be weighed against the interests of the native title party.

[132] Muccan contends there is public interest in the grant of the proposed leases, including allowing the management, use and/or development of a local resource. The State similarly contends the public interest is served by the development of mines on the proposed leases due to the economic benefits that will accrue.

Findings

[133] Although I have found little weight can be afforded to the economic potential of the proposed leases, I am satisfied there is public interest in their grant. The Federal Court and Tribunal has found on numerous occasions there is public interest in 'developing and maintaining a vibrant mining industry which generates much needed export income, and creates jobs and wealth for the Australian economy' (*Drake Coal v Smallwood* at [108]).

Section 39(1)(f) - any other matters relevant to my considerations

[134] This criterion allows me to give weight to a broad range of matters in my consideration of the issues, however, any matters considered must fall within the scope, subject matter and purpose of the Act (see *Koara 1*).

Environment effect

[135] The State contends the environmental effect of the grant of the proposed leases may be a relevant factor. It submits that any effects on the local environment caused by the development of the propose leases will be regulated and minimised by:

(a) The limitations on the rights to be granted, which are imposed by the *Mining Act* and the *Mining Regulations*, including the conditions placed on the grant under s 82 of the *Mining Act*;

(b) The draft conditions and endorsements the State intends to impose on the propose leases upon grant (as outlined at Annexure B); and

(c) The State and Federal regulatory regime with respect to environmental protection and the protection of Aboriginal heritage.

[136] It will generally be appropriate for the Tribunal to consider the potential environmental effect of the proposed leases. It is uncontroversial to note that mining

has the potential to be intrusive and environmentally damaging. This is particularly so in the case of open-cut mining, which is a common method used in gold mining (although there has been no indication from Muccan that they would use this method).

[137] As has been expressed throughout this decision, it is difficult to consider a factor such as this in the absence of a mining proposal. It appears to be a very real possibility that productive mining will never eventuate. If, however, it does eventuate, there may be potential for significant environmental impacts.

[138] Njamal seeks to rely on the Tribunal's findings in *Waljen*, where it was noted there are difficulties in giving weight to the State's environmental protection regime without knowing what exactly is proposed, including proposals for rehabilitation of the environment. While this observation was made by the panel in *Waljen*, they found it was not necessary to consider the adequacy of the State's environmental protection regime given no aspects of the environment were raised which required special attention in the determination.

Mining in the area

[139] Muccan contends it is relevant that the proposed leases are located within an extensively mined region and that M45/1163 sits immediately adjacent to an iron ore mine and a copper project, operated by another proponent. Muccan has provided a map (GP104) which shows the location of the proposed leases as well as a considerable number of mines and infrastructure within the wider Njamal claim area.

Exploration notification and heritage survey

[140] I am aware that during the *Muccan 1* inquiry an issue was raised by Njamal regarding exploration work previously conducted by Muccan on E45/2385 (being the underlying exploration licence to M45/1163). Njamal alleged this work, specifically 13 drill holes, was undertaken without notifying Njamal or conducting a heritage survey over the area. Njamal contended this was in breach of the terms of the Regional Standard Heritage Agreement ('RSHA') entered into by Njamal and Muccan for the exploration licence. Further, Njamal contended Muccan's actions were conducted with an unacceptable risk of breaking the AHA, or at least in non-compliance with the

guidelines set out by the Department of Mines and Petroleum (as it was then known) for consulting with Indigenous people.

[141] Muccan's response to Njamal's contentions stated it had been unable to determine whether a heritage survey was conducted over E45/2385. Ultimately, Member McNamara found that this issue was largely peripheral to the question of whether Muccan had negotiated in good faith but noted that '[i]t is an issue which seems to have a greater impact in the context of the substantive inquiry' (see *Muccan 1* at [93]).

[142] In correspondence sent to Njamal immediately following *Muccan 1*, Muccan sought to address this issue (GP32). Ms Cecilia Camarri, on behalf of Muccan, wrote:

> 1.6 The fact that the drilling occurred over 8 years ago has meant that some avenues of inquiry, which might otherwise have been made, could not be investigated.
>
> 1.7 The inquiries that were undertaken did not reveal that such a notice [as required by the RSHA] was issued or such a survey was undertaken.
>
> 1.8 In the circumstances, I can only suggest that the absence of any notice or survey prior to the drilling of those 13 holes occurred by way of an oversight. I note also that this area had been subjected to a number of exploration programs in the 1990's and had previously been disturbed by such activities.

Findings

[143] In this matter, there is no evidence before me to suggest any party holds any specific environmental concerns for the areas. As such, I do not see any reason to look beyond the State's contention that its environmental protection regime is adequate in the circumstances.

[144] In relation to other mining activity in the vicinity of the proposed leases, it is not apparent from Muccan's contentions what the relevance of this information is and I am not prepared to make any findings based on the limited information provided. While it is not beyond the purview of this decision to consider the broader landscape in which the proposed leases are situated, the contentions must explain its direct relevance to the subject tenements. It is not clear from the map whether the mine sites identified are historical or current. In relation to the iron ore mine and a copper project, Muccan have provided a 'Company Fact Sheet' (GP106), which shows the iron ore mine was rehabilitated in 2015 while the copper project is 'on hold pending more favourable economic conditions'. It is also not possible to know whether Njamal holds, or held, agreements with the proponents of any or all of the mines. Were such

agreements to exist, they may have addressed a range of Njamal's concerns such as heritage and environmental conservation, access and the location of infrastructure.

[145] While it is apparent there has been extensive mining activity in the Njamal claim area, I make no specific findings on the effect this has had in relation to the area of the proposed leases.

[146] In relation to the issue of Muccan allegedly failing to notify Njamal of proposed work and failing to conducting a heritage survey (as per the terms of the RSHA), I have not placed great weight on this point, although it is of some concern. It was not raised in the contentions for this inquiry and I am hesitant to make any specific adverse findings without further comment from the parties. Nevertheless, the alleged breach clearly caused Njamal some concern and I do not imagine Muccan's response allayed those concerns to any great extent.

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

[147] The Act directs me to have regard to the nature and extent of any existing non-native title rights and interests, and any existing use of the area of the proposed leases by persons other than the native title party. I have outlined the various interests held over the proposed leases at [83] above. In considering the s 39(1) criteria, I have had regard to these existing interests and uses, and have given weight to them where relevant.

[148] Muccan contends General Lease I123408 is of particular relevance to this inquiry. According the Quick Appraisal documents, I123408 overlaps M45/1160 by approximately 26.31% and M45/1162 by approximately 52.21%. Muccan have provided a lease document dated 1977 and titled 'Special Lease for Mining Operations (Shay Gap Townsite)' (GP107). The document states the general lease is granted for the purpose of laying out, developing, provisioning, constructing, operating and use as a town site.

[149] Muccan contends that the grant of the general lease 'was wholly inconsistent with native title rights and interests and accordingly had the effect of extinguishing any such rights and interests' in the area (GP Contentions at 14.4). Muccan have provided relevant case law to support its contention that a lease of this sort has an extinguishing

effect, but has not provided any evidence regarding the practical effect of the lease on Njamal's rights and interests.

Findings

[150] Determining whether native title has been extinguished is a function reserved for the Federal Court (see *North Ganalanja v Queensland* at [43]). For the purposes of considering the s 39 criteria, the Tribunal must assume any registered rights and interests exist as if determined by the Federal Court (*Drake Coal v Smallwood* at [68]).

[151] To the extent that Muccan's contention is to suggest Njamal's actual enjoyment of its rights and interests has been affected by the General Lease, I have afforded it no weight. There is no evidence of the rights granted through the General Lease being exercised, and conversely there is no evidence of Njamal's rights and interests being enjoyed over that area.

Conclusion and conditions

[152] Section 38 of the Act provides that I am to make one of three decisions:

(a) a determination that the act must not be done;

(b) a determination that the act may be done; or

(c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

[153] In *St Ives v Ngadju*, Member McNamara observed (at [158]) the Tribunal 'is required to make a determination having regard to all the criteria in s 39, informed by the factual material provided by the parties. Those criteria reflect an attempt to strike a balance between the protection of native title and the rights and interests of the broader community.'

[154] Njamal's contentions state (at [58]) it is 'willing to consent to a determination on the condition that production activities cannot occur until:

(a) Sufficient information about the Proposed Future Acts including location, size and type of production activities is known by the Grantee Party;

(b) The information is provided by the Grantee Party to the Native Title Party; and

(c) An appropriate agreement is entered into between the Grantee Party and the Native Title Party.'

[155] Muccan contends Njamal's proposed condition, in effect, accords Njamal a right of veto to any future productive mining and therefore should not be imposed by the Tribunal. Muccan states the condition does not impose any obligation on Njamal to negotiate with a view to any future agreement. Rather, it provides Njamal with an absolute right as to whether to agree with Muccan and that this agreement could be withheld for any reason. Finally, Muccan states the purpose of the Tribunal is to finally determine the issues where negotiations have failed to do so. A condition of the nature sought by Njamal abrogates that responsibility.

[156] This matter has presented challenges in reaching an informed view of the likely effect of the grants due to the lack of evidence provided by both Muccan and Njamal. Given the limited evidence provided, I am not satisfied the effect of the acts is such that they must not be done. However, I am conscious the grant of these mining leases would afford Muccan significant rights. Given the uncertainties that exist regarding Muccan's future activities, and the difficulties this creates in assessing their effect, I find it appropriate to make this determination subject to conditions.

[157] The Act affords the Tribunal broad discretion to impose conditions to be complied with by any of the parties, subject to certain statutory limitations. That discretion must be exercised by reference to the s 39 criteria and is controlled by the subject matter, scope and purpose of the Act (see *Koara 1*). Any conditions made subject to the determination take effect as if they were the terms of a contract among the negotiation parties (see s 41(1)). In reaching my decision, I have had regard to the Tribunal's findings in *Koara 1*, *Koara 2* and *St Ives v Ngadju*. In each of these matters the Tribunal was required to consider the s 39 criteria in the absence of a mining proposal.

The Tribunal imposed conditions in each instance with the purpose of minimising the potential for deleterious effects on the native title party's rights and interests.

[158] Muccan is correct in noting the purpose of s 38 is to have an arbitral body finally determine the issues. It then follows that any determination made by the Tribunal must not leave the outstanding issues between parties unresolved. Based on this principle, the Federal Court has held that conditions imposed by the Tribunal which require parties to negotiate further about proposed mining operations are an invalid exercise of power (see *Evans* at [214]). For this reason it is not appropriate for me to consider the condition proposed by Njamal and repeated at [154](c)] any further.

Condition regarding notice of proposed works

[159] I am satisfied it is appropriate in this matter to impose a condition that ensures Njamal receives notice of, and further information on, any future mining proposal. This will assist in addressing Njamal's desire to be informed in circumstances where currently the nature, scale and extent of any future mining operations is yet to be determined.

Conditions on heritage

[160] It appears likely that no heritage survey was conducted on the underlying exploration licences. While I see no reason to doubt that Muccan will comply with the State's regulatory regime, there still exists a risk that sites of particular significance which have not yet been identified will be inadvertently damaged or destroyed. Muccan has provided no indication of its approach to safeguarding Aboriginal heritage and given the uncertainties regarding its future activities, I find it appropriate to impose conditions requiring Muccan to conduct further heritage surveys with the participation of the Njamal people.

Condition on access

[161] Although restrictions on access to the subject area is likely to already exist, the grant of the proposed leases may lead to further restrictions, particularly if the area is eventually used for active mining operations. It is therefore appropriate to impose a condition ensuring that any right of access to the area of the proposed leases is not to be restricted except in relation to those parts of the land to be used for exploration or mining operations or for safety or security reasons.

General

[162] I have also imposed conditions requiring Muccan to take reasonable measures to ensure its employees, agents and contractors comply with the conditions and ensuring that any entity to which the proposed leases are assigned is also bound by the conditions.

Determination

[163] The determination of the Tribunal is that the act, namely the grant of mining leases M45/1160, M45/1162 and M45/1163 to Muccan Minerals Pty Ltd, may be done subject to conditions set out in Annexure A, noting also the endorsements and conditions to be imposed by the State set out in Annexure B.

Raelene Webb, QC
President
29 March 2018

ANNEXURE A: CONDITIONS TO BE COMPLIED WITH BY THE PARTIES

Notice of proposed works

1. When, prior to commencing any exploration or productive mining or construction activity on mining leases M45/1160, M45/1162 or M45/1163, the grantee party submits a plan of proposed operations and measures to safeguard the environment or any addendums thereafter to the State for assessment and written approval, the grantee party must at the same time give to the native title party a copy of the proposal or addendums, excluding sensitive commercial data, and a plan showing the location of the proposed operations and related infrastructure, including proposed access routes.

Aboriginal cultural heritage

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

2.2 To ensure compliance with condition 2.1 and subject to conditions 2.4 and 2.5, the grantee party must not conduct exploration or productive mining or construction activity over a part or whole of mining leases M45/1160, M45/1162 or M45/1163 unless it has first caused an Aboriginal site survey to be conducted over that part or whole of the mining leases.

2.3 The site survey must be conducted by a Site Survey and Clearance Team which (subject to condition 2.4) must include as many persons as are nominated by the native title party up to a maximum of three nominees, and be conducted in a professional and efficient manner in accordance with the 'Aboriginal Heritage Due Diligence Guidelines' published by the Government of Western Australia dated 30 April 2013 or any subsequent guidelines or requirements which may be published or prescribed for the purpose of the *Aboriginal Heritage Act 1972* (WA) to the extent that those guidelines or requirements are relevant to the conduct of site surveys, or as otherwise agreed between the native title party and the grantee party. The grantee party must pay the reasonable fees and expenses of the nominees of the native title party in relation to the survey. Further unpaid nominees of the native title party may be included in the Site Survey and Clearance Team at the discretion of the grantee party.

2.4 The grantee party must give written notice to the native title party of its intention to conduct the site survey and when giving notice must include a suitable topographical

map showing the areas proposed to be surveyed, and the location of the mining leases. If, within 30 days of receipt of the notice, the native title party fails to nominate any persons for the Site Survey and Clearance Team then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act 1972* (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act 1972* (WA) then the grantee party must take reasonable steps to consult with the native title party.

2.5 The site survey required under condition 2.2 must be completed within 60 days of the native title party's nomination, with the parties cooperating in good faith on the conduct of the survey. If the survey is not carried out in this time due to the failure of the native title party to cooperate in good faith with the grantee party then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act 1972* (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act 1972* (WA) then the grantee party must take reasonable steps to consult with the native title party.

2.6 If requested in writing either by the native title party or the grantee party at any time before, or in the course of, or at the conclusion of the site survey, the native title party (or their nominees) and the grantee party (or its agents, representatives or contractors) must meet on the mining lease(s) area for the purpose of identifying the boundaries of the sites.

2.7 Where, in respect of a part or the whole of the mining leases, a site survey has been conducted in accordance with these conditions the grantee party is not required to conduct any further site survey and clearance over that part or the whole of the mining lease(s) (as the case may be).

2.8 The grantee party must not disclose to any person any information given to it by the native title party regarding sites, except (and only then on a confidential basis):

(a) with the written consent of the native title party;

(b) to a bona fide prospective assignee of the mining lease;

(c) to an actual assignee of the mining lease;

(d) to employees, agents, contractors and consultants for the sole purpose of ensuring that no sites are interfered with and as far as the information relates only to the location of those sites; and

(e) as required by law.

2.9 No exploration or mining operations are to be carried out by the grantee party on sites indicated by the site survey except with the written consent of the native title party or pursuant to s 18 of the *Aboriginal Heritage Act 1972* (WA).

2.10 If the grantee party gives notice to the Aboriginal Cultural Material Committee under s 18 of the *Aboriginal Heritage Act 1972* (WA) it must forthwith serve a copy of that notice on the native title party and the Government party.

2.11 Within 30 days of receipt of a copy of any notice given to the Aboriginal Cultural Material Committee under s 18 of the *Aboriginal Heritage Act 1972* (WA), the native title party will inform the grantee party in writing if the native title party wishes to be consulted concerning the proposed use of the land in the notice under s 18 of that act. If so informed, the grantee party will promptly supply details of the proposed use and make itself available to meet with the native title party to describe that proposed use within 21 days of the native title party giving it notice. The native title party will organise for interested members of the native title claim group to attend the meeting.

2.12 The Government party must forthwith upon receipt by the Minister of a notice and recommendation from the Aboriginal Cultural Material Committee in respect of a site on the area of the mining leases, give a copy of the recommendation and any related report excluding any confidential information provided to the Committee by other than the native title party to the native title party.

2.13 Where the Minister gives or declines to give consent under s 18 of the *Aboriginal Heritage Act 1972* (WA) to the proposed use of the land the subject of the notice and recommendation, the Government party must forthwith inform the native title party of the decision.

Access

3. Any right of the native title party to access or use the land the subject of mining leases M45/1160, M45/1162 or M45/1163 is not to be restricted except in relation to those

parts of the land which are used for exploration or productive mining operations or for safety or security reasons related to those activities.

General

4.1 The grantee party shall take all reasonable action to ensure compliance with these conditions by its employees, agents and contractors.

4.2 Upon assignment of mining leases M45/1160, M45/1162 or M45/1163, the assignee shall by bound by these conditions.

ANNEXURE B: DRAFT ENDORSEMENTS AND CONDITIONS TO BE IMPOSED ON THE PROPOSED LEASES BY THE STATE

ENDORSEMENTS

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

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

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

3. The Lessee 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

4. The rights of ingress to and egress from, and to cross over and through, the mining tenement being at all reasonable times preserved to officers of Department of Water and Environmental Regulation (DWER) 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 DWERs relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

6. The taking of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless current licences for these activities have been issued by DWER.

7. Advice shall be sought from the DWER if proposing any mining/activity in respect to mining operations within a defined waterway and within a lateral distance of:

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

8. Measures such as drainage controls and stormwater retention facilities are to be implemented to minimise erosion and sedimentation of adjacent areas, receiving catchments and waterways.

9. All activities to be undertaken so as to avoid or minimise damage, disturbance or contamination of waterways, including their beds and banks, and riparian and other water dependent vegetation.

In respect to Proclaimed Surface Water Areas, Irrigation District Areas and Rivers (RIWI A Act) the following endorsements apply:

10. The taking of surface water from a watercourse or wetland is prohibited unless a current licence has been issues by the DWER.

11. Advice shall be sought from the DWER and the relevant water service provider if proposing mining activity in an existing or designated future irrigation area, or within 50 metres of a channel, drain or watercourse from which water is used for irrigation or any other purpose, and the proposed activity may impact water users.

12. No mining activity is to be carried out if:

    - It may obstruct or interfere with the waters, bed or banks of a watercourse or wetland
    - It relates to the taking or diversion of water, including diversion of the watercourse or wetland

    Unless in accordance with a permit issued by the DWER.

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

13. The taking of groundwater and the construction or altering of any well is prohibited without current licences for these activities issued by the DWER, unless an exemption otherwise applies.

In respect of M45/1160 only:

14. The grant of this Lease does not include any private land (General Lease I123408) referred to in Section 29(2) of the *Mining Act* 1978 except that below 30 metres from the natural surface of the land.

In respect of M45/1162 only:

15. The grant of this Lease does not include any private land (General Leases J998592) referred to in Section 29(2) of the *Mining Act* 1978 except that below 30 metres from the natural surface of the land.

CONDITIONS

1. 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.

2. Unless the written approval of the Environmental Officer, DMIRS 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.

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

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

    - the grant of the Lease; or
    - registration of a transfer introducing a new Lessee;

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

In respect of M45/1160 only:

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

In respect of M45/1162 only:

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

7. Mining within a radius of 150 metres of any Australian Telecommunications Commission microwave repeater station being confined to below a depth of 60 metres from the natural surface.

8. No interference with the Australian Telecommunications Commission microwave station ray-line.

In respect of M45/1163 only:

9. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any mining activities on Timber Reserve 13648.

ANNEXURE C: NJAMAL REGISTERED NATIVE TITLE RIGHTS AND INTERESTS

The following Native Title Rights & Interests were entered on the Register on 03/10/07

The applicants claim native title to the area covered by the application. The native title rights and interests claimed which are derived from that native title include, but are not limited to, the following rights and interests:

1) Over areas where a claim to exclusive possession can be recognised, the applicants claims:

   (a) except as stated in Schedule P, the right to possess the land and waters claimed;

   (b) the right to be asked, and the enforceable right to say no, with respect to any proposed activity by any person not part of the native title claim group within or affecting the determination area;

   (c) except as stated in schedule P, the right to occupy the land and waters claimed;

   (d) except as stated in schedule P, the right to use and enjoy the land and waters claimed;

   (e) except as stated in schedule P, the right to make decisions about the use and enjoyment of the land and waters claimed;

   (f) except as stated in schedule P, the right to control the access of others to the land and waters claimed;

   (g) except as stated in Schedule Q, the right to control the use and enjoyment of others of the resources of the land and waters claimed;

   (h) except as stated in Schedule Q, the right to receive a portion of any resources taken by others from the land or waters claimed;

   (i) the rights and interests listed in 2 below.

2) Over areas where a claim to exclusive possession cannot be recognised, the applicant claims:

   (j) the right to maintain and protect places of importance on the land and in the waters claimed;

   (k) except as stated in Schedule P, the right of free access to the land and waters claimed;

(l) except as stated in Schedule Q, the right to use and enjoy the resources of the land and waters claimed;

(m) except as stated in Schedule Q, the right to trade in the resources of the land and waters claimed;

(n) the right to carry out the activities set out in Schedule G(a)-(d)

Schedule G states

Members of the native title claim group have continuously carried out activities on the land and waters within the claim area. These activities are:

(a) residing on and travelling over the area;

(b) making use of the resources of the area through activities including, but not limited to, hunting, fishing, gathering bush tucker and bush medicine, camping, extracting ochre and other materials, building dwellings and making ceremonial artefacts and implements;

(c) exercising the responsibility for looking after the area in accordance with their traditional laws and customs, including exercising native title rights;

(d) passing on knowledge of the area;

in accordance with custom and tradition.

Schedule P states:

To the extent that the native title rights and interests claimed may relate to waters in an offshore place, those rights and interests are not to the exclusion of other rights and interests validly created by a law of the Commonwealth or the State of Western Australia or accorded under International Law in relation to the whole or any part of the offshore place.

Schedule Q states:

To the extent that any minerals, petroleum or gas within the area of the claim are wholly owned by the Crown in rights of the Commonwealth or the State of Western Australia, they are not claimed by the applicants.