NATIONAL NATIVE TITLE TRIBUNAL

FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/ Western Australia **[2012] NNTTA 142 (19 December 2012)**

Application No: **WF2012/0022**

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

- and -

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

FMG Pilbara Pty Ltd (grantee party/applicant)

- and -

NC (deceased) and Others on behalf of the Yindjibarndi People (Yindjibarndi #1) (WC03/3) (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION

Tribunal: Daniel O'Dea, Member
Place: Perth
Date: 19 December 2012

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

Legislation: *Native Title Act 1993* (Cth), ss 29, 30, 31, 35, 36(2), 38, 39, 66B, 109, 146, 238

Mining Act 1978 (WA), ss 82, 85

Aboriginal Heritage Act 1972 (WA), s 18

Environmental Protection Act 1986 (WA)

Wildlife Conservation Act 1950 (WA)

Cases:	*Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387
	Cheedy on behalf of the Yindjibarndi People v Western Australia [2010] FCA 690
	Doxford & Ors, Re [2003] QLRT 58
	Evans v Western Australia (1997) 77 FCR 193
	FMG Pilbara Pty Ltd/NC (deceased) and Ors OBH Yindjibarndi People/Western Australia [2009] NNTTA 91
	FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/Western Australia, [2011] NNTTA 107
	FMG Pilbaray Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/Western Australia [2012] NNTTA 11
	FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Gurama Aboriginal Corporation/Western Australia [2009] NNTTA 69
	Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd (1998) 163 FLR 274
	Neowarra v Western Australia [2003] FCA 1402
	Puutu Kunti Kurrama & Pinikura People; Puutu Kunti Kurruma & Pinikura People #2/Manganese Resources Pty Ltd; Anthony Warren Slater/Western Australia [2011] NNTTA 2
	Ward v Western Australia (1996) 69 FCR 208
	Western Australia v Thomas (1996) 133 FLR 124
	Western Desert Lands Aboriginal Corporation v Western Australia (2009) 232 FLR 169
	WMC Resources v Evans (1999) 163 FLR 333
Hearing date:	On the papers
Representatives for the grantee party:	Mr Ken Green, Green Legal
Representatives for the Government party:	Ms Emma Owen, State Solicitor's Office Mr David Crabtree, Department of Mines and Petroleum

REASONS FOR DECISION

Background

[1] On 12 January 2011, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of a future act, namely the proposed grant of mining lease M47/1453 ('the proposed lease') under the *Mining Act 1978* (WA) ('*Mining Act*') to FMG Pilbara Pty Ltd ('the grantee party'), a subsidiary of Fortescue Metals Group Ltd ('FMG').

[2] The proposed tenement comprises 720.17 hectares 61 kilometres north of Tom Price in the Shire of Ashburton and is located entirely within the area subject to the Yindjibarndi #1 native title claim (WC03/3 - registered from 8 August 2003) ('the native title party').

[3] On 30 July 2012, being a date more than six months after the s 29 notice was given, the grantee party made a future act determination application pursuant to s 35 of the Act ('the s 35 application'). On 31 July 2012, I was appointed by President Graeme Neate as the Member to constitute the Tribunal for the purpose of conducting an inquiry into the s 35 application.

[4] On 6 August 2012, the Tribunal notified representatives of the grantee and Government parties that I had accepted the s 35 application and advised that a preliminary conference would be held for the purpose of settling matters for an inquiry into the s 35 application. As there is no solicitor on the record for the native title party in the claim proceedings in the Federal Court (WAD6005/03), notice was also given by way of registered post to each of the living persons comprising the applicant in respect of the native title party's claim. The notification included draft standard directions which, among other things, proposed a timeframe that provided the native title party with the opportunity, if they chose, to lodge submissions relating to whether the Government and/or grantee parties negotiated in good faith with the native title party as required by s 31(1)(b) of the NTA, for the Government and/or grantee parties to lodge replies to those submissions, and for all parties to lodge submissions regarding the criteria in s 39 of the NTA.

[5] A preliminary conference was held on 20 August 2012 and was attended by representatives of the Government and grantee parties, as well as Ms Janette Tavelli, who was instructed by two of the persons comprising the native title applicant, Mss Sylvia Allen and Aileen Sandy (it should be noted that Ms Tavelli attended the conference only on the

understanding that she had no standing to make any submissions on behalf of the native title party and was present in her capacity as a member of the public, such conferences being open to the public pursuant to s 154(1) of the NTA). In the absence of any contention from the native title party that the grantee and/or Government parties failed to negotiate in good faith, draft directions were amended to remove those relating to a s 36(2) good faith inquiry. In summary, the directions made at the preliminary conference required the Government and grantee parties to lodge submissions by 17 September 2012 and the native title party to do so by 15 October 2012. The directions were provided to the representatives of the Government and grantee parties by email on 21 August 2012 and to the persons comprising the native title applicant by registered post on the same day. The Government party and the grantee party both lodged statements of contentions and supporting documents on 17 September 2012. No contentions, evidence or other documents were received from the native title party by the date set down in the directions.

Native title party representation during the proceedings

[6] At the time the s 35 application was lodged, there was no solicitor on the record for the native title party in the claim proceedings in the Federal Court (WAD6005/03). As of 4 October 2012, the Register of Native Title Claims has included, in lieu of an address for service, the known addresses of each of the living persons comprising the applicant in those proceedings. The Tribunal has for some time been aware of the divisions among the persons comprising the applicant and within the native title claim group. As I noted in *FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/Western Australia* [2012] NNTTA 11 ('*FMG Pilbara 2012*'), three of the living persons comprising the native title applicant (Mss Mavis Pat, Sandy and Allen) made application on 5 September 2011 to the Federal Court under s 66B of the Act ('the First s 66B Application') to remove the remaining living persons (namely, Messrs Thomas Jacobs, Alum Cheedy and Michael Woodley). Since that time, Ms Pat has withdrawn from the application and a further s 66B application was made in the Federal Court on 15 June 2012 by a number of individuals, including Messrs Jacobs, Cheedy and Woodley, to replace the current applicant ('the Second s 66B Application'). That application was heard before McKerracher J on 2 October 2012, who has reserved judgment.

[7] As I observed in *FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/Western Australia* [2011] NNTTA 107 ('*FMG Pilbara 2011*'), it is the

applicant who has the exclusive right to deal with matters arising under the Act in relation to the claimant application. Accordingly, there is a serious question as to the capacity of the native title party to participate in proceedings such as these in circumstances where there is clearly a dispute between the persons who jointly comprise the applicant preventing them from speaking with one voice. For the purposes of this matter, I adopt the principles noted in [14]-[16] in that determination and the cases cited therein.

[8] On 11 September 2012, the Tribunal received a letter from Ms Christina Araujo, consultant solicitor for Yindjibarndi Aboriginal Corporation RNTBC ('YAC'), requesting that the inquiry into the proposed lease be adjourned until the Second s 66B Application had been determined. Ms Araujo's letter was made in the following terms:

> As you may know, an application to replace the Applicant for the Yindjibarndi #1 Claim (the "Yindjibarndi Applicant"), made by Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guiness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Juidth Coppin and Maisie Ingie (the "Replacement Applicant") under s 66B of the *Native Title Act 1993* ("replacement Application), is currently before the Federal Court.
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> The Replacement Application was filed in the Federal [Court] on 15 June 2012, pursuant to an authorisation meeting of the Yindjibarndi #1 claim group, held in Roebourne on 24 March 2012. A condition attached to the authorisation of the Replacement Applicant requires the re-appointment of YAC as agent for the Yindjibarndi Applicant, following a successful determination of the Replacement Application.
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> The hearing of the Replacement Application was scheduled for 30 August 2012; however, in light of the continued prosecution of an earlier s 66B application, by Aileen Sandy and Sylvia Allen, Justice McKerracher decided on the day to adjourn the hearing to allow the parties a further opportunity to resolve issues in contention. One such issue was the progress of the two future act determination applications currently before the Tribunal; and his Honour included that issue in the list of issues that were to be the subject of the mediation conducted by Deputy District Registrar Trott on 30 and 31 August. In the event, the parties were unable to reach agreement and so the Replacement Application is now scheduled for hearing 2 of October 2012.
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> YAC seeks an adjournment of section 35 future act determination applications, WF12/22 and WF12/23, until after the Replacement Application has been determined. Justice McKerracher indicated through the Deputy District Registrar that a decision will likely be handed down in December 2012.
>
> It is YAC's firm view that its appointment as agent for the Applicant, pursuant to s 84B of the *Native Title Act* 1993, remains on foot for the following reasons:
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> 1. the appointment of YAC under s 84B, by a unanimous decision of the members of the Yindjibarndi Applicant, in late 2007, placed YAC on the same footing as peak bodies appointed under s 84B 9such as the PGA and WAFIC);
> 2. YAC's subsequent engagement of the services of Slater & Gordon, and YAC's subsequent termination of those services, did not terminate YAC's agency;
> 3. Until such time as the Court determines the Replacement Application, YAC's agency may be terminated only by a unanimous decision of the members of the current Yindjibarndi Applicant.
>
> As demonstrated by recent correspondence concerning the grant of Exploration Licence application E47/2585 (see correspondence attached) FMG Pilbara Pty Ltd continues to engage

> with YAC, in its capacity as agent, and thus appears to accept YAC's authority as agent in relation to the Yindjibarndi claim.
>
> In any event, in light of the concerns raised by the Tribunal in ... [*FMG Pilbara 2012*] ... at [33]), it seems prudent to adjourn the hearing of the section 35 future act determination applications, until the Replacement Application has been finally determined and YAC's appointment as agent re-confirmed.
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> *Good Faith Requirement – section 31(1)(b) of the NTA*
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> I have been instructed that during the course of a directions hearing for the section 35 future act applications, Ms Janette Tavelli of Integra Legal, informed the Tribunal that two members of the current Yindjibarndi Applicant, Aileen Sandy and Sylvia Allen, have no issue with the question of whether FMG has negotiated in good faith with the native title party. I am further instructed that the remaining four members of the current Applicant, along with all members of the Replacement Applicant, and YAC, do not share that view; and in fact contend to the contrary, that FMG has not negotiated in good faith, as required by section 31(1)(b) of the *Native Title Act 1993* (Cth) in relation to the relevant mining tenure, and therefore the National Native Title Tribunal does not have jurisdiction to determine the section 35 future act applications.
>
> I am instructed accordingly to request:
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> 1. an adjournment of WF12/22 and WF12/23 until after the decision of the Federal Court in relation to the section 66B application, due in December 2012; and, upon resumption of the matter before the Tribunal;
> 2. an amendment to the Tribunal's current directions to allow for a hearing on the question of whether FMG has fulfilled the requirement set out in section 31(1)(b) of the *Native Title Act 1993* (Cth) of negotiating in good faith with the native title party.

[9] Some initial observations should be made about this letter. First, as noted at [5] above, Ms Tavelli attended the preliminary conference on 20 August 2012 as an observer. Ms Tavelli was not asked for, and did not make, any submissions about whether the Government party and/or the grantee party negotiated in good faith with the native title party, nor did she have standing to do so. Second, the Tribunal has already expressed its view about YAC's status as agent in relation to the native title party's claim in *FMG Pilbara 2012* at [33]. Third, as E47/2585 lies wholly within the area over which a determination of native title has been made and in respect of which YAC is the registered native title body corporate, it was appropriate for the grantee party to contact YAC in relation to the tenement.

[10] On 11 September 2012, the Tribunal wrote to the representatives of the Government and grantee parties seeking their comments on the letter. On 17 September 2012, Ms Emma Owen wrote to the Tribunal advising that the Government party is 'committed to determining the mining tenement applications at the earliest possible time and hence does not consent to the adjournment sought by YAC.' The grantee party responded on 19 September 2012 and indicated that, though it opposed the adjournment, it would not object to the Tribunal making directions allowing contentions and evidence to be filed on behalf of Ms Pat and Messrs Jacob, Cheedy and Woodley in relation to the good faith issue provided those directions did

not affect the existing timetable and on condition that Mss Allen and Sandy did not object to the issue being raised. On 21 September 2012, the Tribunal notified Ms Araujo, as well as the representatives of the Government and grantee parties and each of the persons comprising the native title applicant, that the Tribunal would consider any contentions and evidence filed on behalf of the native title party on the question of whether the Government party and/or the grantee party negotiated in good faith with the native title party provided that:

- within 14 days of the date of the notice, the persons comprising the native title applicant confirm to the Tribunal that they seek to allege that the Government party and/or the grantee party failed to negotiate in good faith with the native title party or do not object to the issue being raised; and
- any such contentions and evidence be provided to the Tribunal within a further 14 days.

[11] The notice also stated that, in relation to the s 39 criteria, the Tribunal will consider any evidence provided to it by persons who purport to hold native title over the relevant area.

[12] On 4 October 2012, Ms Araujo wrote to the Tribunal by email advising that the 'native title party' 'confirm that they seek to allege that the grantee party and/or the Government party failed to negotiate in good faith.' However, it was not clear from Ms Araujo's email whether she was conveying the instructions of any of the persons comprising the native title applicant and none of them contacted the Tribunal independently. The directions of 21 September were made on the basis that, if the Tribunal was to entertain an assertion by the 'native title party' that the grantee or Government parties had failed to negotiate in good faith, the Tribunal would need to know which of the persons comprising the applicant sought to make the assertion and be assured that the balance of those persons did not object to the issues being raised. Accordingly, the Tribunal notified Ms Araujo that it could not entertain any submissions in relation to the issue of good faith made by YAC on behalf of the 'native title party' because no indication had been given as to which of the persons who comprise the applicant were making the assertion and, if the assertion was being made on behalf of only some of those persons, that the others did not object to the issue being raised.

[13] No submissions were made by, or on behalf of, the native title party and no evidence was provided by any person purporting to hold native title over the relevant area by the date set down in the directions made on 20 August 2012. On 18 October 2012, the Tribunal wrote to the representatives of the Government party and the grantee party and to each of the

persons comprising the native title applicant informing them that I intended to determine the matter 'on the papers' (that is, without a formal hearing). In that letter, the Tribunal also sought the views of the parties as to whether it was appropriate for the Tribunal, should it make a decision that the act may be done, to impose upon the grant of the proposed lease similar conditions as those which have been imposed on the grant of mining lease M47/1431 in *FMG Pilbara 2011* at [115], in addition to the other conditions and endorsements proposed by the Government party. The conditions were as follows:

- Any right of the native title party (as defined in ss 29 and 30 of the *Native Title Act 1993* (Cth)) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations, or for safety and security reasons relating to those activities;
- If the grantee party gives a notice to the Aboriginal Cultural Material Committee, under s 18 of the *Aboriginal Heritage Act 1972* (WA), it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial data), on the native title party;
- Where, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safeguard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his or her 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 mining operations and related infrastructure, including proposed access routes;
- Upon assignment of the mining lease, the assignees shall be bound by these conditions.

[14] The parties were given until 5 November 2012 to comment on the proposed conditions. No response was received concerning that letter from the Government or grantee parties, though it should be observed that the proposed conditions are drafted in similar terms to conditions 8-11 of the Draft Tenement Endorsement and Conditions Extract provided to the Tribunal by the Government party and reproduced at [21] below. On 6 November, the Tribunal received a letter from Mr George M Irving, Legal Services Director, Juluwarlu

Group Aboriginal Corporation and Solicitor and In-House Counsel for YAC. The letter made a number of points critical of the orders made by the Tribunal on 21 September, sought to re-agitate the question of YAC's competency to represent the native title party as its agent and sought an adjournment of the proceedings before the Tribunal until such time as the Federal Court had handed down its decision in relation to the Second 66B Application. This decision, Mr Irving suggested, would be handed down 'in the next month or so'. The letter was copied to both the Government and grantee parties and the legal representatives in other matters of Mss Allen and Sandy. At my direction, the Tribunal sought comment on Mr Irving's letter from the Government and grantee parties by 9 November. On 8 November, the Government party advised that it 'is committed to determining mining tenement applications at the earliest possible time and hence does not consent to the adjournment sought by YAC'. The following day, the grantee party filed submissions in response to Mr Irving's letter and the Tribunal's request.

[15] It is the view of the grantee party, and a view with which I agree, that nothing in the letter sent by Mr Irving on 6 November raises issues which had not been addressed in the Tribunal's response of 21 September to Ms Araujo's letter on 11 September. Between the time the Tribunal made the orders in response to Ms Araujo's letter on 21 September 2012 and 6 November 2012, nothing had been heard from YAC or any other of those members of the applicant group whom YAC purports to represent. In the circumstances, it is my view that there are no grounds for revisting the orders made in response to Ms Araujo's letter.

[16] On 20 November 2012, the Tribunal then received by facsimile a letter dated 15 October 2012 and signed by several members of the Yindjibarndi #1 native title claim, namely Tootsie Daniel, Kimberlee Mack, Jasmin Mack, Lorraine Coppin, Finola Woodley, Maisie Ingie, Kaye Warrie, Lyn Cheedy, Judith Coppin, Angus Mack, Stanley Warrie and Thomas Jacobs. The letter was apparently sent in response to the Tribunal's letter of 18 October 2012, though I note that it was provided well outside the time set down for comment. The letter refers to the existence of unregistered sites in the area of the proposed lease, which are said to include water courses, rock holes, rock shelters and caves, Thalu and ochre sources used for ceremonial purposes, and requests that the Tribunal impose an additional condition that the proposed lease should not be granted until the native title party has been able to access the area to record, in private, any sites and associated ceremonies. The letter also mentions the authors' concerns about the first of the conditions proposed by the Tribunal, contending that the condition could be used by the grantee party to exclude heritage

consultants engaged by the native title party. On 23 November, the Tribunal provided parties (including each of the persons comprising the native title applicant) with a fair summary of the 20 November letter and asked for comments on the proposed condition by 5 December 2012. The Government party provided comments on 4 December, and the grantee party did so on 5 December. I discuss the proposed condition and associated comments later in this decision.

[17] This is the second time that a matter involving these parties has come before the Tribunal in circumstances where the divisions within the native title party have affected its capacity to file evidence or contentions that could be accepted by the Tribunal (see *FMG Pilbara 2012*). The native title party has been aware of these circumstances since the Tribunal's decision in *FMG Pilbara 2011*. The consequence is that the Tribunal is placed in the difficult position of having to apply the criteria set out in s 39 in the absence of evidence from the native title party, though that is not to say the native title party were not given the opportunity to place evidence before the Tribunal that could be considered in relation to those criteria. It is possible that the Second s 66B Application, if successful, would have removed the obstacles preventing the native title party from fully participating in this inquiry. However, it is by no means certain that the Federal Court's decision will be made within the timeframe indicated by Ms Araujo or Mr Irving. It is also possible that, even if the applicants succeed, the matter will not be finally resolved in the first instance. In this respect, I note the comments made by McKerracher J during an interlocutory hearing on 30 August 2012, a transcript of which was provided by the grantee party, where his Honour alluded to the 'novelty' of the issues involved in the application and the likelihood that the outcome will be subject to appeal.

[18] The Tribunal is required to dispose of future act inquiries in a timely, certain and efficient matter (see *Puutu Kunti Kurrama & Pinikura People; Puutu Kuntu Kurrama & Pinikura People #2/Manganese Resources Pty Ltd; Anthony Warren Slater/Western Australia* [2011] NNTTA 2, [22]-[24]). The Tribunal can, in appropriate circumstances, make its own inquiries. However, the Tribunal is not required to make out a party's case for it where that party chooses not to produce relevant evidence: *Western Australia v Thomas* (1996) 133 FLR 124 ('*Waljen*') at 162. While I have been mindful of the inherent difficulties involved in accepting submissions purportedly made on behalf of the native title party given the split in the applicant group, the Tribunal has gone to some effort to facilitate the native title party's participation in this inquiry. Apart from the letter of 20 November 2012, the native title party

has not taken up the opportunities provided to it to do so. The Tribunal has previously considered material provided by the native title party in closely related s 35 applications within the vicinity of the proposed lease, notably *FMG Pilbara Pty Ltd/NC (deceased) and Ors OBH Yindjibarndi People/Western Australia* [2009] NNTTA 91 (‘*FMG Pilbara 2009*’), *FMG Pilbara 2011* and *FMG Pilbara 2012*. However, as I observed in the latter decision, the conflicting evidence submitted in *FMG Pilbara 2011* by a number of persons comprising the native title applicant, as well as senior members of the native title claim group, meant that the evidence about the area’s significance could not be accepted. While that evidence, if accepted, would have been of general relevance to this inquiry, in the circumstances, I am unable to rely on it for the purpose of determining the matter now before me.

The Inquiry

[19] The following submissions were provided in relation to the inquiry:

- Government party’s statement of contentions and supporting documents GVP1 to GVP15 lodged 17 September 2012; and
- Grantee party’s statement of contentions and supporting documents GP1 to GP19 lodged 17 September 2012.

Government party submissions

[20] Government party documentation establishes the underlying tenure of the proposed lease to be unallocated crown land. There are no Aboriginal communities or *Aboriginal Heritage Act* 1972 (WA) (‘AHA’) registered sites or heritage places identified within the proposed lease, although there are a number of other heritage places located in close proximity to it. The area was previously subject to two temporary reserves, one of which was held between 1963 and 1966 and the other between 1977 and 1979 and which overlapped the proposed lease by 100 per cent and 99.4 per cent respectively. The Government party provides additional information concerning the temporary reserve granted in 1963 (TR70/2703) which indicates that the grant included a right of occupancy, and asserts on that basis that any native title rights to manage and control the area have therefore been extinguished (at paragraph 38, citing *Neowarra v Western Australia* [2003] FCA 1402 at [607]). There is no evidence of any previous or current mining activity apart from the two active tenements currently held by the grantee party, being the underlying exploration licence granted in 2003 (E47/1334) and a miscellaneous licence granted in 2010 (L47/363).

Applications for three separate miscellaneous licences were made between 2010 and 2011 but were all withdrawn prior to grant. The Government party also provides a copy of the submissions made by the native title party in relation to the proposed lease pursuant to s 31(1)(a) of the NTA ('the s 31(1)(a) submissions').

[21] The *Mining Act* entitles the grantee party to exercise the rights set out in s 85 subject to the covenants and conditions referred to in s 82. In addition to the prescribed conditions, the Government party proposes the following endorsements and conditions on the grant of the proposed lease, which are outlined in document GVP2:

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.
3. The Lessee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to work and mine for iron.

Conditions

1. Survey.
2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
3. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
5. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DMP for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.
7. No activities being carried out within the proposed railway corridor (designated FNA) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.
8. Any right of the native title party (as defined in sections 29 and 30 of the Native Title Act 1993) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those or related activities.

9. If the lessee gives a notice to the Aboriginal Cultural Material Committee (ACMC) under section 18 of the Aboriginal Heritage Act 1972 it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the lessee to the ACMC in support of the application (exclusive of sensitive commercial and cultural charter), on the native title party.
10. Where the lessee submits to the Director of Environment a proposal to undertake developmental/productive mining or construction activity, the lessee must give to the native title party a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.
11. Upon assignment of the mining lease the assignee shall be bound by Conditions 8, 9 and 10.

[22] I note that draft condition 9 refers to 'sensitive commercial and cultural charter'. This appears to be a typographical error and should read 'sensitive commercial and cultural data'.

[23] I refer to the Government party's statement of contentions in relation to the s 39 criteria when addressing the criteria below.

Grantee party submissions

[24] The grantee party notes that the proposed lease forms part of FMG's Solomon Project and provides the following documents in relation to that project:

- FMG's Annual Report for the financial year ending 30 June 2011 (GP8);
- FMG's Quarterly Report for the period ending 30 June 2012 (GP9); and
- FMG's ASX Announcement dated 4 September 2012 (GP10).

[25] In addition to these documents, the grantee party provides maps of the proposed lease and the surrounding tenements and associated infrastructure and a copy of the Mining Statement prepared in accordance with ss 74(1)(ca)(ii) and 74(1a) of the *Mining Act*, which outlines the mining operations that are likely to be carried out in, on and under the land the subject of the proposed lease. The grantee party also submits copies of the objection lodged on behalf of the native title party under s 24MD(6B)(d) of the Act to the proposed grant of L47/363 and the decision of the independent person dismissing the objection for failure to comply with directions.

[26] As with the Government party's contentions, I refer to the grantee party's statement of contentions when addressing the s 39 criteria below.

Interpretation of ss 38 and 39 of the Act

Legal principles

[27] I rely on the principles enunciated in the following Tribunal future act determinations:

- *Waljen*;
- *WMC Resources v Evans* (1999) 163 FLR 333 (‘*WMC/Evans*’);
- *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169; and
- *Cheedy on behalf of the Yindjibarndi People v Western Australia* [2010] FCA 690.

I also rely on the principles set out in *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Gurama Aboriginal Corporation/Western Australia* [2009] NNTTA 69.

[28] Section 38 of the Act sets out the types of determination that can be made and relevantly are:

> ’**38 Kinds of arbitral body determinations**
>
> (1) Except where section 37 applies, the arbitral body must make one of the following determinations:
> (a) a determination that the act must not be done;
> (b) a determination that the act may be done;
> (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.
>
> *Determinations may cover other matters*
>
> ...
>
> *Profit-sharing conditions not to be determined*
>
> (2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
> (b) any income derived; or
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.’

[29] Section 39 lists the criteria for making such a determination:

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

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

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

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

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

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

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

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

Existing non-native title interests etc.

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

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

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

Laws protecting sites of significance etc. not affected

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

Agreements to be given effect

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

(a) must take that agreement into account; and

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

[30] The making of a determination involves the exercise of discretionary power by reference to the criteria in s 39. The Tribunal's task was explained in *Waljen* (at 165-166).

> We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.
>
> The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.

> The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.

[31] The Tribunal's inquiry function is summarised in *Waljen* (at 162-163) and involves, among other things, the Tribunal making a determination based on logically probative evidence and application of the law.

[32] Regardless of whether the registered native title rights and interests are determined or claimed, there is still a need 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 all the other matters in s 39(1)(a) of the Act (*WMC/Evans* at 339-341). While there is no onus of proof as such, it is ordinarily the responsibility of a native title party to produce evidence on these matters as for the most part these are peculiarly within their knowledge (*Waljen* at 154-163; *Ward v Western Australia* (1996) 69 FCR 208 at 215-218). This approach has been endorsed by the Land and Resources Tribunal, Queensland (*Doxford & Ors, Re* [2003] QLRT 58 at [7]-[12]).

Findings on the Section 39 criteria

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

[33] The extract from the Register of Native Title Claims in relation to the Yindjibarndi #1 Claim, WAD6005/03 (WC03/3), sets out three areas where native title rights and interests have been registered: area A (where a claim for exclusive possession can be sustained), area B (where a claim for exclusive possession cannot be sustained), and area C (where a claim to exclusive possession cannot be sustained over land and waters which are 'nature reserves' or 'wildlife sanctuaries', as those terms are defined in the *Wildlife Conservation Act 1950* (WA) created before 31 October 1975). The difference between these sets of rights appears to be that area A includes 60 listed rights, areas B and C, 59 listed rights. Area A includes a different 'right number one', which is expressed as 'the right to possess, occupy, use and enjoy the area as against the world'. Areas B and C do not contain this right, but otherwise the rights in all three are identical. Given the prior existence of temporary reserve T70/2703 which, according to the Government party's documentation, entitled the holder to a right of occupancy, it appears that the proposed licence falls within area B.

[34] In the s 31(1)(a) submissions, the native title party states that its registered native title rights and interests will be affected in the following ways:

i. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from freely exercising and enjoying their registered native title right to possess, occupy, use and enjoy the area, as against the world. This in turn will prevent the Yindjibarndi from freely exercising their religious beliefs and freely practicing the religious observances associated with the area generally and with particular sites that are situated in the area.

ii. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from exercising and enjoying their registered native title right to control the access of others to the area.

iii. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from exercising and enjoying their registered native title right to make decisions about the use and enjoyment of the area by persons who are not members of the Yindjibarndi People.

iv. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from exercising their native title right to take, use and enjoy the resources of the area, other than minerals and petroleum for a various purposes including for cultural, religious, spiritual, ceremonial and/or ritual purposes.

v. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from exercising and enjoying their registered native title right to maintain, conserve and protect significant places and objects and significant ceremonies, artworks, song cycles, narratives, beliefs or practices within the area by preventing by all reasonable lawful means any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object or any such ceremony, artwork, song cycle, narrative, belief or practice.

vi. The grant of the Lease without the free, prior and informed consent of the Yindjibarndi will prevent the Yindjibarndi from exercising and enjoying their registered native title right to prevent any use of, or activity in, the area which is unauthorised or inappropriate in accordance with traditional laws and customs in relation to significant places and objects in the area or of ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area.

[35] As can be seen from the extract quoted above, the s 31(a) submissions do not illustrate how the claimed rights and interests are exercised or enjoyed over the area of the proposed lease. In *FMG Pilbara 2012* at [50], I accepted the Government party's contention that, unless and until the Tribunal receives evidence from the native title party of the effects of the act on the factors identified in s 39(1)(a), it must conclude that there will be no effects. The s 31(a) submissions identify in general terms the effect of the act on the native title party's registered rights and interests; however, they do not identify the effect of the proposed lease rights and interests as they are actually exercised or enjoyed by those claiming to hold native title to the land and waters concerned.

[36] While it should be noted that the underlying tenure of the proposed lease is unallocated Crown land, the area is already subject to existing mining tenure, namely exploration licence E47/1334 and miscellaneous licence L47/363, both of which are currently held by the grantee party. Although the Tribunal has found on numerous occasions that, given the intermittent nature of exploration activities, the interference with the exercise of registered native title

rights and interests is only temporary, I note that L47/363 was granted for the purposes of 'pipeline power line road taking water communication facility water management facility bore field aerial rope way conveyor system storage or transportation facility for minerals or mineral concentrate'. Although the activities associated with the grant of the proposed lease are likely to involve more substantial disturbance to the land and waters concerned (the Mining Statement indicates that the grantee party intends to utilise open pit mining methods), the activities authorised by L47/363 are likely to involve some level of interference with the native title party's capacity to exercise or enjoy their registered rights and interests over the land and waters concerned. However, given that no evidence has been provided in relation to the exercise or enjoyment of the native title party's registered rights and interests in the area, it is inappropriate to express a view about the likely extent of the interference, if any, caused by activities authorised by L47/363. In any event, in the absence of evidence from the native title party as to the effect of the act on the enjoyment or exercise of the rights and interests claimed, I am unable to conclude that there will be any effect as a result of the grant of the proposed lease.

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

[37] The Government party contends that in the absence of specific evidence from the native title party as to its way of life, culture and traditions in relation to the area of the proposed lease, the Tribunal should conclude that the grant of the proposed lease will have little or no effect (at paragraph 40). With reference to my findings in relation to s 39(1)(a)(i), I cannot conclude that there will be a significant impact on the native title party's way of life, culture and traditions.

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

[38] The Government party contends that in the absence of specific evidence from the native title party as to the effects of the proposed lease on the development of the social, cultural and economic structures of the native title party, the Tribunal should conclude that the grant of the proposed lease will have little or no effect (at paragraph 41). Again, with reference to my findings in relation to ss 39(1)(a)(i) and 39(1)(a)(ii), I cannot conclude that there will be a significant impact on the native title party's way of life, culture and traditions.

[39] The grantee party contends that the grant of the proposed lease will have a beneficial, rather than adverse, effect on the development of any social, cultural and economic structures

of the native title party (at paragraph 7.3). The grantee party refers by way of example to a media release made by FMG on 6 August 2012, which reports the award of a contract for the construction of a tailings storage facility embankment at FMG's Solomon Project to Ngarluma Yindjibarndi Foundation Limited, Eastern Guruma Pty Ltd and NRW Holdings Ltd. The media release states that the contract is 'valued at $99 million' and follows the award to the joint venture last year of a contact for early earthworks at the Solomon Project valued at $229 million. The media release also quotes FMG's General Manager Solomon, Mr Anthony Kirke, who is reported as stating that FMG is 'exploring contract opportunities for the Eastern Guruma traditional owners and the Wirlu-murra Yindjibarndi Aboriginal Corporation within Solomon's long-term operations, as well as its construction.'

[40] The grantee party also refers to an extract from the ISX (Indigenous Stock Exchange) website (www.isx.org.au) concerning Ngarluma Yindjibarndi Foundation Limited as follows:

> In 2000, Elders from the Ngarluma, coastal people, and the Yindjibarndi, tableland people, formed with Woodside Energy Ltd and their North West Shelf Venture partners an agreement under which compensation for land use of the Burrup Penninsula and areas of the Shire of Roebourne is obtained. The Ngarluma and Yindjibarndi Foundation Ltd was formed to receive this compensation, and ensure the long term management of the funds.
>
> The Foundation is governed by a 12 member Board of Governance which is guided by a Constitution with specific rules and purposes. It instructs the structure of Board representation, Foundation membership, and the control and use of the money.
>
> ...
>
> Annually, the Foundation distributes $250,000 in requests from members for assistance with education for their children and young people, necessitous funds to fund with food and travel for medical assistance, purchase of health related white goods or to provide support in times of emergency.
>
> ...
>
> **How the organisation works**
>
> The Foundation is a Company Limited by guarantee. The company is governed by a 12 member Board under normal Corporations Law regulations. The Day to day operations and management is delegated to the Chief Executive officer.
>
> The Foundation manages a Charitable Trust which provides support for its funding of education activities and assistance of people in necessitous circumstances. The Trust is a Public Benevolent Institution and is endorsed for charitable tax concessions including Income Tax Exemption, GST Concessions and Fringe Benefit Tax exemptions.
>
> **How the Board works**
>
> Almost 1000 Ngarluma and Yindjibarndi people make up the membership of the Foundation. From this membership, 4 Yindjibarndi and 4 Ngarluma Directors are voted by the membership onto the Board. The Constitution also prescribes 4 professional members, which includes a qualified finance Director.
>
> Each Board Director has a 4 year term and a portfolio area of work for which they carry responsibility. The Board meets bi-monthly to discuss an agenda of items that focus on matters of policy, business development, membership matters, grant applications and finances.

> It is the responsibility of the Board to protect some of the capital invested in the Foundation each year for the future. Two hundred and fifty thousand dollars is invested each year and as the graph shows in 40 years time, when the mining of the current gas fields may cease, a legacy will be left in perpetuity for the Ngarluma and Yindjibarndi people.

The grantee party contends that the proposed lease will contribute to such initiatives, which will have a flow-on effect to the native title claim group.

[41] It appears from the evidence produced by the grantee party that the Solomon Project has already created opportunities for Indigenous enterprise in the region. As the information concerning Ngarluma Yindjibarndi Foundation Limited shows, there are structures in place to ensure that the benefits of those opportunities will be enjoyed by the native title claim group. The expansion of the Solomon Project is likely to create further prospects for social and economic development. I say this notwithstanding my previous acceptance of submissions in relation to other matters concerning the grantee party and the native title party to the effect that the social and economic conditions of Aboriginal people in the Pilbara in general and the Yindjibarndi people residing in Roebourne in particular remain poor (see *FMG Pilbara 2009* at [63]-[65]). However, in light of the evidence presented in this matter by the grantee party, I find that the grant of the proposed lease is likely to have some beneficial effect on the development of the social and economic structures of the native title party or some members thereof.

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

[42] The Government party contends that, in the absence of particulars and supporting evidence, the Tribunal should conclude that the grant of the proposed lease will have little or no adverse effect on the access of the native title party to the relevant land and the carrying out of rites, ceremonies or other activities (at paragraph 44). The Government party also refers to draft condition 8 of the Draft Tenement Endorsements and Conditions listed in document GVP2 and set out at [21] above, which limits the ability of the grantee party to restrict access to members of the native title party. Having regard to this condition and the fact that the native title party has not produced any evidence to the contrary, I am satisfied that there will not be a significant impact on the freedom of the native title party to access the land and to carry on rites and ceremonies and other activities of cultural significance on the land.

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

[43] As noted at [20] above, there are no registered sites or other heritage places on the Register of Aboriginal Sites maintained under the AHA in the area of the proposed lease. The s 31(a) submissions state that the grant of the proposed lease will prevent the native title party from exercising and enjoying its rights to 'maintain, conserve and protect significant places and objects.' Similarly, the letter of 20 November 2012 refers to the existence of unregistered sites, including water courses, rock holes, rock-shelters and caves, Thalu and ochre sources. However, neither document provides any particulars or evidence in relation to the sites. Furthermore, as the authors of the letter say that they cannot describe the location of the sites, it is by no means certain that they are in fact located within the proposed licence. In any case, given the lack of evidence and the generality of the submissions, there is no basis on which to conclude that the sites referred to are sites of particular significance to the native title party. The evidence noted in *FMG Pilbara 2011* (at [85]-[86], [90]-[91], [112]) may have been of assistance in this respect, but for the reasons cited there, it cannot be accepted. The Government party submits that the AHA regime will in any event apply to the proposed lease, and the grantee party's attention is specifically drawn to it by draft endorsement 1 of the Draft Tenement Endorsements and Conditions.

[44] Moreover, maps provided by the grantee party showing the extent to which the proposed lease has been surveyed indicate that there are no sites of archaeological or ethnographic significance in the areas surveyed. While the first map shows that there are still areas within the proposed lease that have not been subject to an archaeological survey, the second map shows that ethnographic surveys have been conducted over the entire area of the proposed lease and that no sites have been recorded within the proposed lease. Both maps indicate sites approximately 500 metres north of proposed lease and in close proximity to the north-western boundary; however, these areas are already subject to mining leases held by the grantee party.

[45] Given that the native title party has not provided evidence of any areas or sites of particular significance within the proposed lease and the surrounding areas, and having regard to the protective effect of the AHA, I am unable to conclude that the proposed lease will have a significant effect on areas or sites of particular significance to the native title party in accordance with its traditions.

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

[46] The Government party states that the native title party has not provided it with any evidence in relation to its interests, proposals, opinions and wishes concerning the management, use and control of the land and waters within the proposed lease other then the statements made in its submission to the Government party (at paragraph 48). The native title party has not provided the Tribunal with any material in relation to those matters. The grantee party states that it is unaware as to any interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the area the subject of the proposed lease (at paragraph 10.1). The grantee party also notes that the only reply it received in response to its endeavours to negotiate with the native title party in accordance with s 31(1)(b) was a copy of a letter dated 5 June 2012 sent by Ms Tavelli on behalf of Mss Sandy and Allen to the other members of the native title applicant (at paragraph 10.2). Significantly, the letter states that Ms Tavelli's clients consider that the agreement proposed by the grantee party 'adequately addresses the relevant concerns of the Yindjibarndi People' and should be accepted.

[47] The statements made in Ms Tavelli's letter and the s 31(1)(a) submissions illustrate the divisions within the native title party applicant and among the claim group as a whole. It is clear that there are differences of opinion within the claim group regarding the management, use and control of the land and waters within the proposed lease, though I note that the s 31(1)(a) submissions state that '[t]he named representatives instruct that, *in the absence of a freely negotiated agreement in which they give their informed consent to the proposed grant*, they will be prevented from carrying out their religious obligations' (emphasis added). As such, in the absence of any further evidence regarding the native title party's interests, proposals, opinions and wishes, I have not given significant weight to these matters.

Section 39(1)(c) - economics and other significance

[48] The Government party contends (at paragraph 49) that the grant of the proposed lease will be 'of great economic significance to the nation and the State' and is also likely to benefit the local economy 'in and around the Pilbara in general,' citing *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 ('*Australian Manganese*') at [58].

[49] The grantee party notes that the proposed lease is connected with its Solomon Project and contends that the grant of the proposed lease, as a component of that project, will assist:

- the local economy, by:
    - allowing the improvement management and use or development of a local resource and minerals; and
    - engaging local or proximate communities to provide services to the grantee party's project;
- the State:
    - indirectly by way of such improved management and use or development of the land; and
    - directly by payment of royalties in accordance with the *Mining Act*; and
- the nation, by:
    - the earning of foreign capital from the sale of iron ore; and
    - by contribution to the national tax base.

[50] In *FMG Pilbara 2011*, the Tribunal found (at [111]) that the Solomon Project:

> is a project of economic significance, which will benefit the State and the Nation, and that some positive economic effect may be experienced by the local economy including by local Aboriginal people and in particular the Yindjibarndi.

[51] According to FMG's Annual Report for the year ending 30 June 2011, the total Solomon Hub mineral resources were estimated as of 30 June 2011 at 3,070mt with an average iron grade of approximately 57 per cent Fe (GP8 at 12). Although FMG's recent ASX announcement (GP10) indicates that the company has had to defer aspects of the Solomon Project in response to the current volatility in the iron ore market, the announcement underlines FMG's ongoing commitment to developing the Firetail deposit, which it expects to come online in the March quarter 2013. Accordingly, I adopt the Tribunal's findings in *FMG Pilbara 2011* in relation to the economic significance of the proposed lease.

Section 39(1)(e) – public interest

[52] The Government party contends (at paragraph 50) that the public interest will be served by the development of a mine on the proposed lease 'due to the economic benefits that will accrue at a local, State and national level' and cites *Evans v Western Australia* (1997) 77 FCR 193 at 215 and *Australian Manganese* at [59] in support of that contention. The grantee party also contends (at paragraph 12.1) that there is a 'strong public interest' in determining that the act may be done in that it will allow 'the management and use or development of a local resource.'

[53] I adopt the findings of the Tribunal in *Waljen* at [215]-[216] on matters relating to public interest to the effect that the Tribunal accepts that the mining industry is of considerable economic significance to Western Australia and Australia and I conclude that the public interest is served by the grant of the proposed lease.

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

[54] The Government party submits that the effect of the grant of the proposed lease on the environment may be a relevant factor, citing *WMC/Evans* at [81]. It submits that any impact on the environment will be regulated and minimised by the limitations on the rights conferred imposed by the *Mining Act* and mining regulations, including conditions deemed to apply by s 82 of the *Mining Act*, by the extra conditions and endorsements proposed, and the State and Federal regulatory regime with respect to environmental protection and the protection of Aboriginal heritage. In the absence of specific evidence regarding the environmental impact of the proposed lease, I adopt the findings of *Waljen* at [212]-[214] relating to the effect of mining leases granted under the *Mining Act* on the natural environment, and to *Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd* (1998) 163 FLR 274 at [53]-[62] regarding the provisions of the *Environmental Protection Act 1986* (WA).

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

[55] As noted previously, the area of the proposed lease is unallocated Crown land. Other than the underlying exploration licence and the miscellaneous licence, which pursuant to s 238 are subject to the non-extinguishment principal, there are no other non-native title rights and interests in the area subject to the proposed lease.

Conditions

[56] As discussed above, the Tribunal wrote to parties on 15 October 2012 notifying them that, if I determined that the proposed lease may be done, I would consider imposing a further four conditions in addition to the endorsements and conditions intended to be imposed by the Government party. The four conditions are set out above at [13]. Subsequently, several members of the native title party wrote to the Tribunal asking that it impose an extra condition that would allow them to access the area of the proposed lease for the purpose of recording any sites and associated ceremonies. The authors of the letter asked that they be given 'a couple of months' to record the sites and requested that they be permitted to do so in private. Though not expressly stated in the letter, the effect of such a condition would be to prohibit either the grant of the proposed lease or any activities carried out under the proposed lease until such time as the sites and ceremonies have been recorded.

[57] The authors of the letter seek to have the extra condition imposed for two reasons. First, the authors argue that the first of the conditions proposed by the Tribunal will permit the grantee party to exclude from the area of the proposed licence any heritage consultants engaged by persons claiming to hold native title to the area. Second, the authors submit that the grant of the proposed licence will mean that any sites in the area will be destroyed. Accordingly, the authors contend that, if the proposed licence is granted, they will therefore be deprived of the opportunity to record the sites and associated ceremonies.

[58] In its response to the proposed condition, the grantee party states that the first condition does not relate to heritage consultants and does not provide a basis for excluding them from the proposed lease. However, the grantee party notes that rights of exclusion may already arise under other statutes or by reason of other mining tenure that currently exists over the area of the proposed lease, such as L47/363, the dimensions of which are identical to the proposed lease. The Government party also submits that the ability of the native title party and its heritage consultants to access the area will be no less than it already is, referring to L47/363 and to E47/1334, which covers the same area. Regardless of the question of access, the grantee party argues that the native title party will not in any event be denied the opportunity to record sites, as the grantee party regularly commissions heritage surveys within the claim area. In this respect, the grantee party refers to the archaeological and ethnographic surveys already carried out in the area. Furthermore, the grantee party submits that it is reasonable to suggest that any site within the proposed licence will not be affected

without the grantee party first obtaining ministerial consent under s 18 of the AHA, in which case the relevant site will be fully recorded in accordance with the requirements of the Aboriginal Cultural Materials Committee. Similarly, the Government party argues that the protective provisions of the AHA will ensure that any sites are identified and that any affect on them will be minimised.

[59] The grantee party also submits that the protective effect of the AHA will be reinforced by its Ground Disturbance Permit Procedure and Cultural Heritage Management Plan. Relevantly, the Ground Disturbance Permit Procedure provides for the completion of an internal heritage review prior to the commencement of ground-disturbing activities in order to:

- Ensure that all heritage approvals and compliance conditions under relevant legislation, heritage agreements, and land access agreements are in place;
- Ensure [the activity] is wholly within areas that have been heritage surveyed for the specific purpose;
- Identify whether a heritage survey is required;
- Ensure that access to the [activity] area is defined;
- Evaluate the proximity and scope of works and assess the potential direct or indirect impact on in situ Heritage sites or exclusion zones;
- Check that approvals (e.g. s18 under the Aboriginal Heritage Act) are in place;
- Any other applicable items.

[60] In light of these policies, I am satisfied that the grantee party has suitable measures in place to ensure that relevant sites are identified and that any potential interference is managed in accordance with the requirements of the AHA. I also accept the Government party's submission that the grantee party is now on notice of the existence of unregistered sites within the proposed lease and will take appropriate steps to avoid or minimise interference with those sites. If the grantee party's activities do have the potential to cause interference with any sites in the area, I accept that the grantee party will comply with the procedures set out in s 18 of the AHA, which will ensure that the sites are properly recorded. Accordingly, I am not satisfied that the proposed condition is required. Nor am I satisfied that, if I were to impose a condition in the terms sought by the authors of the letter, the recording of sites and ceremonies would be completed within the timeframe indicated.

[61] I also reject the authors' criticisms about the first of the conditions proposed by the Tribunal. The condition is intended to ensure that members of the native title party may continue to access the area subject to the rights of the grantee party to carry on exploration or mining operations and any safety or security requirements arising from those operations. The condition does not provide any basis on which the grantee party is entitled to exclude any other person from entering the proposed lease. Therefore, I see no reason why I should not impose the condition along with the others proposed.

Conclusion

[62] The task of the Tribunal in an inquiry such as this is to thoroughly analyse the evidence and submissions before it in relation to the criteria set out in s 39 of the NTA. The Tribunal may also refer to evidence in any other proceedings before the Tribunal (s 146). The Tribunal, in carrying out its functions, is not bound by technicalities, legal forms, or the rules of evidence (s 109(3) of the NTA). It must also be fair, just, economical, informal and prompt (s 109(1) of the NTA), and it may take into account the cultural and customary concerns of Aboriginal and Torres Strait Islanders, but not so as to prejudice unduly any party to the proceedings (s 109(2) of the NTA). In this matter, no evidence has been presented by members of the native title party and, given the Tribunal's findings in *FMG Pilbara 2011*, it would be inappropriate to rely on evidence previously submitted to the Tribunal in relation to the area in which the proposed lease is situated.

[63] Having considered the available evidence against each of the criteria in s 39, I have concluded that the act may be done subject to the conditions and endorsements proposed by the Government party and listed at [21] above, subject to the necessary technical amendment to draft condition 9.

Determination

[64] The determination of the Tribunal is that the act, being the grant of mining lease M47/1453 to FMG Pilbara Pty Ltd, may be done subject to the conditions and endorsements proposed by the Government party listed in document GVP2 and set out at [21] above, with the exception of draft condition 9, for which the following should be substituted:

- If the lessee gives a notice to the Aboriginal Cultural Material Committee (ACMC) under s 18 of the *Aboriginal Heritage Act 1972 (WA)* it shall at the same time serve a copy of that notice, together with copies of all documents submitted

by the lessee to the ACMC in support of the application (exclusive of sensitive commercial and cultural data), on the native title party.

Daniel O'Dea
Member
19 December 2012