NATIONAL NATIVE TITLE TRIBUNAL

***Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People,* [2008] NNTTA 38 (3 April 2008)**

Application No: **WF07/26**

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

- and -

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

Australian Manganese Pty Ltd (grantee party/Applicant)

- and -

The State of Western Australia (Government party)

- and -

David Stock and Others on behalf of the Nyiyaparli People (WC05/6) (native title party)

FUTURE ACT DETERMINATION

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 3 April 2008

Catchwords: Native title – future act – application for determination for the grant of mining lease – s 39 criteria considered – limited effect on enjoyment of registered native title rights and interests – worse case scenario rejected – no effect on sites of particular significance – no power to impose a condition for payment of compensation – bank guarantee condition not justified – Government party's regulatory regime and conditions a relevant consideration – determination that the act may be done without conditions.

Legislation: *Native Title Act* 1993 (Cth), ss 24MD, 25-44, 31, 35, 36(2), 38, 39, 109(3), 146(b), 150, 151
Mining Act 1978 (WA) ss 24, 82, 84, 85, 123
Aboriginal Affairs Planning Authority Act 1972 (WA), ss 23, 26-32, Part III
Aboriginal Heritage Act 1972 (WA) ss 5, 6, 17, 18, 57, 62
Land Administration Act 1997 (WA), Part 4

Cases:	*Evans v Western Australia* [1997] 741 FCA; (1997) 77 FCR 193
	Gulliver Productions Pty Ltd and Others v Western Desert Lands Aboriginal Corporation and Others [2005] NNTTA 88; (2005) 196 FLR 52
	Griffin Coal Mining Co Pty Ltd v Nyungar People [2005] NNTTA 100; (2005) 196 FLR 319
	Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner
	Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274
	Re Koara People [1996] NNTTA 31; (1996) 132 FLR 73
	Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia, NNTT WF03/2, [2003] NNTTA 82 (9 July 2003), Hon C J Sumner
	Victor Barunga and Others on behalf of the Dambimangari People/Western Australia/FMG Resources Pty Ltd, NNTT WO06/503 to WO06/507, [2007] NNTTA 82 (17 September 2007), Hon C J Sumner
	Western Australia v Evans & Ors [1999] NNTTA 231; (1999) 165 FLR 354
	Western Australia v Thomas [1996] NNTTA 30; (1996) 133 FLR 124
	Western Australia v Thomas [1999] NNTTA 99; (1999) 164 FLR 120
	Western Australia v Ward [2000] FCA 91; (2000) 99 FCR 316
	WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333
Counsel for the native title party:	Mr David Yarrow, Higgins Chambers, Brisbane
Representative of the native title party:	Mr Stephen Hegedus, Pilbara Native Title Service
Counsel for the Government party:	Mr Matthew Pudovskis, State Solicitor's Office
Representative of the Government party:	Ms Paola O'Neill, Department of Industry & Resources
Representative of the grantee party:	Mr Ken Green, Green Legal Pty Ltd

REASONS FOR FUTURE ACT DETERMINATION

Background

[1] On 1 March 2006, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) ('the Act') of a future act, namely the grant of mining lease M52/1034 ('the proposed lease') under the *Mining Act* 1978 (WA) to Australian Manganese Pty Ltd ('the grantee party').

[2] The proposed lease comprises 1000 hectares located 50 kilometres south-easterly of Newman in the Shire of Meekatharra and is 100 per cent overlapped by the registered claim of the Nyiyaparli People (WC05/6, registered from 29 November 2005).

[3] The proposed lease is a future act covered by s 26(1)(c)(i) of the Act and cannot be validly done unless the right to negotiate provisions of the Act are complied with (Part 2, Division 3, Subdivision P (ss 25-44)).

[4] The native title party in respect of these proceedings is Mr David Stock, Mr Gordon Yuline, Mr Raymond Drage, Mr Brian Samson, Mr Victor Parker and Mr Richard Yuline on behalf of the Nyiyaparli People (WC05/6).

[5] On 18 September 2007, being a date more than six months after the s 29 notice was given, the grantee party made an application pursuant to s 35 of the Act for a future act determination under s 38. The application was made on the basis that the negotiation parties had not been able to reach agreement within six months of the Government party giving notice of intention to do the act.

[6] The mining proposal submitted by the grantee party notes the proposed lease overlays its exploration licence E52/1630 and will be the site of an iron ore mine for its Robertson Range Iron Ore Project ('the project') currently comprising approximately 213.38 hectares of the lease area with a proposed lifespan of 10-12 years. The mining proposal notes that the project area is anticipated to include additional tenement applications being exploration licence E52/1901, general purpose lease G52/281 and three miscellaneous licences L52/103-105 (being for an accommodation camp, haul road and alternative camp respectively). Some of this infrastructure will be established outside the proposed lease area. It is proposed that ore will be transported via a new 60 kilometre haul road from the mine site to the BHP Billiton, Jimblebar siding and thence by rail to Port Hedland.

[7] In respect of the additional tenement applications and the underlying E52/1630, Tribunal records note that the native title party lodged an objection to the expedited procedure application in relation to E52/1630 on 6 February 2003 (WO03/100), which was withdrawn on 2 April 2004 as an agreement was reached with the grantee party. Exploration licence E52/1901 was notified under s 29 of the Act as attracting the expedited procedure and on 2 November 2007 the native title party lodged an objection to the expedited procedure application with the Tribunal (WO07/1247). At the time of this determination the native title party and grantee party are still attempting to negotiate the withdrawal of that objection by agreement. General purpose lease G52/281, miscellaneous licences L52/103 and L52/105 were notified by the Government party under s 29 of the Act on 13 February 2008, with G52/281 requiring compliance with the right to negotiate provisions. With respect to L52/103 and L52/105 the Government party gave notice that they attracted the expedited procedure. Miscellaneous licence L52/104 was notified by the Government party on 8 February 2008 under s 24MD of the Act and is not covered by the right to negotiate provisions presumably because it involves the creation of a right to mine for sole purpose of the construction of an infrastructure facility associated with mining. The native title party's procedural rights for this type of grant are covered by s 24MD(6A) and 24MD(6B) of the Act not the right to negotiate provisions. It is apparent from these facts that a number of other approvals are being sought in relation to the project and that the native title party and grantee party are negotiating to try to reach agreement.

[8] The native title party challenged the Tribunal's jurisdiction on the basis that the grantee party had not negotiated in good faith (ss 31(1)(b), 36(2)). This challenge was rejected and 'short form' reasons provided on 10 December 2007 ('good faith decision'). The parties were advised that because of time constraints the reasons for the good faith decision were provided in 'short form' but that more detailed reasons may be provided if considered necessary as part of the final determination or earlier if requested by the parties. No such request was made by the parties. The Tribunal's good faith decision applied well established legal principles, which are summarised in *Gulliver Productions Pty Ltd and Others v Western Desert Lands Aboriginal Corporation and Others* [2005] NNTTA 88; (2005) 196 FLR 52 at paras [8]-[20]. The reasons for the good faith decision are as follows:

> '[2] Section 29 notice was given by the Government party on 1 March 2006 of its intention to grant mining lease M52/1034 ('ML') to Australian Manganese Pty Ltd ('AM') over an area of 1,000 hectares, 50 kilometres south-easterly of Newman in the Shire of Meekathara. AM is a wholly owned subsidiary of FerrAus Ltd, whose Managing Director, Mr David Turvey was responsible for the negotiations.

[3] The area of the ML is entirely covered by the Nyiyaparli native title claim (WC05/6) ('NTP') and Reserve 41265 for the use and benefit of Aboriginal inhabitants. The Jigalong Community is also located in the Reserve area, some 20 kilometres to the north of the ML. The Jigalong Community Inc (or Jigalong Council) is the organisation that represents the Jigalong Community. Some members of the Jigalong Community (but not a majority) are also part of the Nyiyaparli native title claim group.

[4] The grant is sought as part of the Robertson Range iron ore project and is the conversion of an already existing exploration licence E52/1630.

[5] The s 35 future act determination application was made by AM on 18 September 2007.

[6] The NTP contends that AM (only) have not negotiated in good faith as required by s 31 of the *Native Title Act* 1993 (Cth) ('NTA') and that the Tribunal therefore has no jurisdiction to conduct an inquiry. Directions were made for the exchange of contentions and documentary evidence to enable this preliminary issue to be dealt with. All parties agreed that the decision could be made 'on the papers'.

[7] There has been a history of successful negotiations between the NTP, Jigalong and AM for a tripartite agreement covering the grant of E52/1630 and E52/1688 (dated 1 August 2005) during which time Pilbara Native Title Services (PNTS – the operating arm of Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (the native title representative body for the area)) acted for both the NTP and Jigalong.

[8] In relation to the ML, negotiations effectively began in April 2006. On 11 May 2006 PNTS provided a copy of its template 'PNTS Mining Compensation Agreement' to AM.

[9] From then until 30 April 2007 negotiations occurred between the NTP and AM which culminated in the preparation of a draft tripartite agreement (i.e. between AM, the NTP and Jigalong) which had been settled on behalf of the NTP by independent counsel and provided to AM. The negotiations also included discussions about whether PNTS could represent Jigalong. On 7 April 2006 PNTS gave a letter to Mr Brian Samson, then Chairperson of Jigalong Council (and also one of the applicants on the Nyiyaparli claim) inviting Jigalong to consider whether they wanted PNTS to represent them on certain conditions. On 10 May 2007 the PNTS committee decided that they were prepared to do this, which was conveyed to Jigalong on 17 May 2007.

[10] The draft tripartite agreement is a comprehensive document which the Tribunal is aware from its own knowledge covers many of the issues customarily included in mining agreements involving native title claimants. The negotiations led to changes to the original draft.

[11] AM provided funding to the NTP to assist in the negotiations and to engage the services of an economic consultant (Mr Murray Meaton) to act for the NTP and advise on the draft agreement and particularly its financial benefit provisions. The NTP sent Mr Meaton's financial assessment to AM on 3 July 2007. A revised tripartite agreement was sent by AM to the NTP on 23 July 2007. Negotiations continued after this date including a meeting of the Nyiyaparli Working Group on 17 August 2007 attended by AM. By this time the Jigalong representation had been resolved. The PNTS offer to represent Jigalong was not accepted and Mr Joe Proctor (Indigenous Energy Pty Ltd) had been appointed as their commercial advisor with a view to obtaining separate legal representation later on.

[12] At the meeting on 17 August 2007 Mr Proctor advised that Jigalong were not happy with the offer and subsequently proposed (on 17 August 2007) an alternative compensation package.

[13] Jigalong's proposal was not acceptable to AM and on 21 August 2007 AM, by letter to Jigalong and PNTS, made a revised benefit offer which increased the production based payment, provided for an upfront payment and guaranteed other benefits such as the engagement of an Aboriginal Liaison Manager, Training and Employment Officer, payment for a Coordinating Committee, training and community projects.

[14] After AM's letter of 21 August 2007, PNTS advised AM on 29 August 2007 that it was reviewing the offer and would be discussing it with Jigalong because of AM's desire for a tripartite agreement.

> [15] On 17 September 2007 Mr Proctor wrote to Mr David Turvey of FerrAus Ltd making a counter offer on behalf of Jigalong which was substantially more than that contained in AM's offer of 21 August 2007. Mr Proctor pointed out that during the negotiations which had occurred between AM and the NTP Jigalong had not had any formal representation from PNTS or any other advisors and whatever arrangements were negotiated between FerrAus (AM) and PNTS were between AM and the NTP only and in no way reflected Jigalong's position. He made the point that Jigalong was a separate entity, possessed different land title and had completely separate approval processes for exploration and mining activities.
>
> [16] Leaving aside the NTP's central challenge to good faith negotiations there is no doubt that AM made genuine and reasonable attempts to reach agreement with the NTP involving meetings, some funding for the negotiations and seeking of independent advice, correspondence, exchange of draft agreements and modification of its offers.
>
> [17] The central point in the NTP's challenge to good faith negotiations is that AM insisted on negotiating a tripartite agreement and were not prepared to negotiate a bipartite agreement between the NTP and AM only and as such adopted a rigid non-negotiable position in relation to this issue.
>
> [18] If this contention were supported by the facts then serious questions could be raised about whether AM had fulfilled its obligation to negotiate in good faith with the NTP. The obligation to negotiate in good faith under the NTA is with the NTP not Jigalong.
>
> [19] However, there is no factual basis, in my view, to make such a finding. There is no doubt that from the beginning of negotiations AM wanted, indeed strongly preferred, a tripartite agreement. Negotiations proceeded on this basis with the cooperation of PNTS acting on behalf of the NTP. The NTP was quite willing to enter into a tripartite agreement and at no time adopted as a negotiating position that they were only prepared to enter into a bipartite agreement between the NTP and AM or even preferred such an agreement. No communication to this effect was made to AM during the negotiations.
>
> [20] During the negotiations considerable time was devoted to whether PNTS would represent Jigalong. There was an issue whether PNTS were prepared to represent them and if so in what circumstances and whether Jigalong were prepared to accept representation by them. As explained above this issue was not resolved until late in the negotiations. While it is regrettable that this issue was not resolved earlier, failure to do so was not attributable to AM and not indicative of failure on its part to negotiate in good faith with the NTP, the only group to which the obligation to negotiate in good faith under the NTA extends.
>
> [21] There was some discussion after the s 35 application was lodged (i.e., at a time when it was known that the draft tripartite agreement was not acceptable to Jigalong) that suggested that AM would be prepared to enter into a bipartite agreement with the NTP but on modified terms in respect of financial benefits to take account that Jigalong would not be involved in such an agreement. Before this time the possibility of a bipartite agreement was not an issue because the parties to the good faith negotiations with the full knowledge and consent of the NTP were working toward a tripartite agreement.
>
> [22] The parties on whom the obligation to negotiate in good faith is imposed were at all material times proceeding on the basis that a tripartite agreement (including Jigalong) was acceptable to them and substantial progress had been made on reaching agreement. The fact that Jigalong subsequently found the draft tripartite agreement unacceptable does not adversely reflect on AM in its negotiations with the NTP. The issue is not whether AM negotiated in good faith with Jigalong as they have no status as a negotiation party under the NTA. In my view there is no basis for finding that there was failure to negotiate in good faith on AM's part with the NTP.'

[9] Following amendments to the original directions for the substantive inquiry, the Government party and grantee party lodged their statements of contentions and evidence on 21 December 2007 and the native title party lodged its statement of contentions on 4 February 2008 and its evidence in the form of signed witness statements from some of the native title claimant group on 8 February 2008.

[10] On 14 January 2008, at the request of the native title party and with agreement of the Government and grantee parties, I directed the appointment of a Tribunal mediation Member under s 150 of the Act to assist parties in resolving the matter by way of agreement. On 11 February 2008, the mediation Member terminated the s 150 assistance as parties reported that no agreement could be reached.

[11] At a Listing Hearing on 14 February 2008 the native title party and grantee party reported that no agreement could be reached in the timeframe required by the grantee party and agreed that the matter proceed to inquiry. In relation to the proposed mining lease and additional tenements within the project area which have not yet been granted, the native title party and grantee party reported they would continue negotiations over the project area and may seek Tribunal assistance under s 31(3) of the Act at a later date. All parties agreed that the matter could proceed 'on the papers' without further hearings, with the Government party and grantee party reserving the right to reply to the native title party's contentions by 21 February 2008, and the native title party reserving the right to respond to the reply. A hearing (if deemed necessary by the Tribunal) was listed for 6 March 2008. On 21 February the Government party lodged its further submissions. No reply was received from the grantee party. On 4 March 2008 the native title party lodged its submissions in reply to the further submissions of the Government party.

[12] On 6 March 2008 a hearing was held at which the parties confirmed the inquiry could proceed 'on the papers' with the native title party granted leave until Thursday 13 March 2008 to make application to re-open the Tribunal's good faith decision. The native title party's possible application to re-open the good faith issue arose out of uncertainty and potential misunderstanding of the status of the underlying land tenure during the negotiations. As explained below, the parties proceeded on the basis that the land had been vested in the Aboriginal Lands Trust whereas this was probably not correct. On 13 March 2008 the native title party advised that no application to re-open the good faith issue would be made.

[13] I am satisfied that this matter can be adequately determined 'on the papers' (s 151).

Status of Crown Reserve 41265

[14] It was common ground that the proposed lease is 100 per cent overlapped by Crown Reserve 41265 and that this is a Reserve created for the use and benefit of Aboriginal inhabitants. It was also common ground that the part of the Reserve where the proposed lease is located is not the subject of Part III of the *Aboriginal Affairs Planning Authority Act*

1972 (WA) which in practice prevents a mining company from entering the Reserve without the agreement of the relevant Aboriginal community. This is because access to Part III land cannot be gained without authorisation from the Minister for Indigenous Affairs who will in practice not grant it without such an agreement (see *Victor Barunga and Others on behalf of the Dambimangari People/Western Australia/FMG Resources Pty Ltd*, NNTT WO06/503 to WO06/507, [2007] NNTTA 82 (17 September 2007), Hon C J Sumner at [17], [19] for an explanation of these provisions and their relevance to whether the expedited procedure is attracted). The Government party initially contended (Statement of Contentions, 21 December 2007, para 20) that the Reserve had been vested in the Aboriginal Lands Trust ('ALT') and explained the consequence of such vesting:

> '20. The GVP says:
>
> (a) as to Reserve 41265, s24 of the Mining Act 1978 ("WA") provides that mining on reserve land requires the written consent of the Minister for State Development, who may refuse his consent or give his consent subject to such terms and conditions as specified in the consent;
>
> (b) before giving his consent the Minister must, pursuant to sub-ss 24(3) - 24(7) of the Mining Act, consult with and obtain either the concurrence or the recommendation of the Responsible Minister or the Responsible Minister and the body or person in which the control and management of the reserve is vested (in this case the ALT, which will in practice consult with local Aboriginal people);
>
> (c) s26 of the Mining Act provides for terms and conditions that may be imposed pursuant to s24 of the Mining Act by the Minister for State Development on the consent for mining; …'

Standard Condition (7) set out below which is to be imposed on the grant by the Government party recognises this obligation.

[15] During the filing of contentions and evidence it became apparent that the purported vesting of the land in the ALT may not have been valid because it had not been published in the Western Australian Government Gazette. If the Reserve were not vested in the ALT then the consultation process referred to above would not apply. Instead, the portion of the Reserve which overlaps the proposed lease would be an unmanaged reserve under Part 4 of the *Land Administration Act* 1997 (WA) and consultation with the Minister for Indigenous Affairs and any trustees would not be required. The consultation required to be carried out by the Minister for State Development in this situation (s 24(5)(b) of the *Mining Act*) is with the Minister for Planning and Infrastructure being the minister responsible for unmanaged reserves under the *Land Administration Act* 1997 (WA) and the local government (the Shire of Meekathara). There would be no necessary involvement of the Minister for Indigenous Affairs or the ALT or relevant Aboriginal community.

[16] At the hearing on 6 March 2008, the Government party reported that a new management order had been created vesting relevant parts of the previously unmanaged Reserve in the ALT. As a consequence the original contention of the Government party remains relevant. The management order and resulting gazettal will require the Minister for State Development to consult with and obtain a recommendation of the Minister for Indigenous Affairs and the ALT (but not necessarily their consent) before the Minister for State Development may give consent to the grant of the proposed lease (s 24(5) of the *Mining Act*). One of the functions of the ALT is to ensure that the use and management of the land accords with the wishes of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable (s 23(c) *Aboriginal Affairs Planning Authority Act* 1972 (WA)). The Tribunal's determination has been made on this understanding of the law.

The Government party's evidence and contentions

[17] The Government party's documentation notes that the area of the proposed lease has not been subject to mining activity and only recent exploration activity being 100 per cent overlapped by the grantee party's existing exploration licence E52/1630 and by a 'dead' exploration licence E52/336 granted in 1993 and surrendered in 2001.

[18] The documentation also notes there are no sites registered under the *Aboriginal Heritage Act* overlapping the proposed lease.

[19] 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 and such further conditions and endorsements that the Minister may at any time impose under s 84.

[20] The grant of the proposed lease will contain the following endorsements:

> '1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
> 2. This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of:
> - Uranium ore;
> - Iron Ore, unless specifically authorised under Section 111 of the Act
> 3. 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.'

[21] The standard conditions applicable to mining leases will be imposed:

> '1. Survey.
> 2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
> 3. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.
> 4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
> 5. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of 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 operation and separately stockpiled for replacement after backfilling and/or completion of operation.
> 6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DoIR for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.
> 7. The prior written consent of the Minister for State Development being obtained before commencing mining on Use and Benefit of Aboriginal Inhabitants Reserve 41265.'

[22] In addition, the following four supplementary conditions will be imposed by the Government party (Government party's Further Submissions lodged 14 February 2008). These were conditions which the Government party offered to place on the tenement during negotiations and which I am satisfied will still be imposed:

> '(i) 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 activities.
>
> (ii) If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 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 and cultural data), on the native title party.
>
> (iii) Where the grantee party submits a proposal to undertake developmental/productive mining or construction activity, the grantee party 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.
>
> (iv) Upon assignment of the mining lease the assignee shall be bound by these conditions.'

The grantee party's evidence

[23] The grantee party's project is in the Pilbara area of Western Australia which is an area of intensive iron ore exploration and production. Documentation provided by the grantee party includes the 2007 Annual Report of FerrAus Limited (of which the grantee party is a 100 per cent wholly owned subsidiary) and the Robertson Range Iron Ore Project Mining Proposal M52/1034 (Ecologia environment, December 2007). The documentation notes the

proposed mine site is located in the northern portion of the proposed lease area with an environmental footprint of approximately 213.38 hectares. The current proposed footprint includes an open cut pit to a depth of 100 metres (99.53 hectares), waste dumps (94 hectares), and other ancillary infrastructure including a crushing and screening plant, bore field, site facilities and haul road (19.85 hectares). The anticipated lifespan of the project is 10-12 years with a production target of 2 million tonnes per year from 2009 and a current resource estimate of 28.6 million tonnes at 58.6 per cent Fe. However further drilling exploration has indicated a potential increase to 80 - 100 million tonnes. (Annual Report pages 3, 7; Mining Proposal pages 13-18).

[24] In relation to the underlying exploration licence E52/1630 the 2007 Annual Report notes that the principal exploration activities over the 21,700 hectare licence for the reporting period included RC drilling campaigns of 104 holes for 7,957 metres, diamond drilling of 12 holes for 406 or 369 metres and gravity surveys of 50 x 100 metre stations over approximately 42 square kilometres (Annual Report pages 7-11 and 19). Mapping in the Annual Report and the Mining Proposal suggests that the drilling occurred over an area of approximately 250 hectares in the general vicinity of the proposed mine site (Annual Report page 10 and 11, Mining Proposal Figure 2.2). The report also notes that several new targets were identified from geological surveys less than one kilometre to the east of the proposed mine site (Annual Report page 7 and 10).

[25] The grantee party is also carrying out exploration (E52/1658) for the Davidson Creek project located some 20 kilometres to the north-west of the proposed mining lease. The grantee party's total budget for iron ore exploration and development for the 2008 financial is $17 million some of which will be for continuing expenditure on the Robertson Range Project.

[26] The grantee party, without objection from the native title party, tendered and relied on documents provided in relation to the good faith inquiry. These documents included a 'Deed of Agreement' entered into by the Jigalong Community Incorporated, Nyiyaparli native title party and the grantee party dated 1 August 2005 whereby objections to the expedited procedure in relation to exploration licences E52/1630 and E52/1658 were withdrawn by the native title party. E52/1658 is part of the Davidson Creek project. The agreement deals with access for mining exploration and covers the topics often dealt with in such agreements including protection of Aboriginal heritage by way of an Aboriginal Heritage Protocol which provides for the conduct of site surveys, access permits, control of liquor and guns, removal

of the grantee party's employees in certain circumstances, instruction in Aboriginal culture; environmental protection and rehabilitation; provision of certain information about the exploration program to the native title party by the grantee party; and some cash payments and potential community benefits such as employment. A draft of 23 July 2007 of the 'Mining Agreement' between the native title party, Jigalong community and the grantee party being negotiated in relation to the proposed mining lease was also in evidence.

The native title party's evidence

[27] The native title party submitted the witness statements of Mr Baker Lane and Mr Timmy Patterson dated 7 February 2008 signed by them in the presence of the native title party's legal representative Mr Stephen Hegedus and its senior Aboriginal liaison officer Mr John Parker. Messrs Hegedus and Parker are employees of the Pilbara Native Title Service, the Pilbara service arm of the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation which is the native title representative body for the Pilbara and Geraldton regions under the Act. The statements are as follows:

Baker Lane

'1. My name is Baker Lane.

2. I was born on the Canning Stock Route between Well 39 and Well 40 near Lake Tobin (sp). I don't know what year I was born, but I am older than Timmy Patterson.

3. My old people are from the desert, but I have been with the Nyiyaparli people all my life. They put me through culture and made me a man. Nyiyaparli people are my family now.

4. I lived at the Jigalong Community. I have lived there most of my life.

5. I know the Nyiyaparli law and culture. I can go the whole way through that country. People respect me and know that I am a senior law man.

6. Stephen Hegedus has shown me a map of the area where Mr Turvey is applying for a mining lease. I know that place. That place is called "Bringumurra".

7. The Nyiyaparli people used to live in that area, all mixed up. People would come from all over, from the desert and from Nyiyaparli country, to stay at that place. People were camped at that area when they grabbed me from nearby and made me into a man. That was a main camping area for us, and when I think back to that area I have to think happy thoughts.

8. That place is a hunting area. I go there all the time, so do lots of other Jigalong and Nyiyaparli people. We been using that area for a long time, long before any mining people came to that place.

9. We hunt Marlu (Kangaroo), Emu, Bududa (Turkey), gurrumarndu (Goanna), at that place. We still camp out at that place, anytime we want to.

10. We are worried if they put that mine there, they might disturb that camping area, and we wouldn't be able to camp there anymore, or to hunt. That would not be right.

11. I been at these before Christmas 2007 having a look around. I was out there more than one day, maybe one week. I camped out there. I had my car and my swag, with my wife and other family.

12. Stephen Hegedus has read me this written statement. It is true and correct. Stephen has written down what I said. I have never been to school. I am illiterate.'

Timmy Patterson

'1. My name is Timmy Patterson.

2. I was born in Jigalong and I have lived there my whole life.

3. I am a Nyiyaparli person, through my mother's side.

4. I was born 7 August 1950 in Jigalong, at Wadoomalu near the Robertson Ranges, on the Newman side of the Rabbit-Proof fence.

5. I know the Nyiyaparli law and culture from Roy Hill, all around Newman, and then out to Jigalong.

6. Stephen Hegedus has shown me a map of the area where Australian Manganese has an application for a mining lease. I know that area. We call that area "Bringuramurra".

7. That place "Bringuramurra" was a place where we would camp during school holidays when I was a child. We still pass through that area, and we still like to camp there from time to time. There is an old government well there, we call it "white well". The Nyiyaparli name for that well is "Ngardawallajarradya" .

8. We like to drive through that area to go hunting near Savoury Creek. That's where we hunt emu, kangaroo, goanna and turkey and collect other bush tucker like grinding seeds. When we go through that area we will stop all the way along, and hunt those things when we see them.

9. I last went through that area in January 2008 with Brian Samson. We went through there, looking at the country. That's part of our job, as caretakers for the country, to keep an eye on the country, to look out for that country.

10. Stephen Hegedus has read this statement to me and I agree that it is true and correct. These are the things that I have said to Stephen and he has written them down because I can only write English a little bit.'

[28] Mr John Parker provided the following signed statement dated 8 February 2008:

'1. My name is John Parker

2. I am employed by the Pilbara Native Title Service as a Senior Aboriginal Liaison Officer.

3. On 7 February 2008, I was in Newman with Stephen Hegedus. We had planned a trip to Jigalong Community. Unfortunately, the roads were impassable due to recent rains, fortunately, however many Jigalong residents were in Newman on survey business.

4. We spoke to Brian Samson, Billy Cadigan and Freddie Jeffries who are all Nyiyaparli people who live at Jigalong. We also spoke to Victor Parker, an applicant on Nyiyaparli claim who lives in Newman. After speaking to all of those people we decided that the best people to speak to about the place where Australian Manganese is mining were Timmy Patterson and Baker Lane.

5. Stephen Hegedus interviewed Timmy Patterson first.

6. Even though Timmy Patterson cannot read and write English very well, I was satisfied that the words Stephen wrote down were the same as what Timmy told us. Stephen read the statement back to Timmy and I am satisfied that Timmy understood and affirmed the statement.

7. Next we found Baker Lane. When we interviewed Baker, Timmy was nearby, so was Freddie Jeffries and a few other mob from Jigalong. Even though Baker Lane is illiterate, I was satisfied that the words Stephen wrote down were the same as what

> Baker told us. Stephen read the statement back Baker and I am satisfied that Baker understood and affirmed the statement.'

[29] Although not sworn affidavits, the statements provided by Mr Lane, Mr Patterson and Mr Parker are accepted by the Tribunal as evidence. The other parties did not object and I have taken into account that the Tribunal, in carrying out its functions, is not bound by technicalities, legal forms or rules of evidence (s 109(3)). The evidence is uncontested by the Government and grantee parties and I accept it. Mr Baker Lane is named in the native title party's claim application as a Jigalong person with rights and interests in the claim area. I accept both Mr Lane and Mr Patterson have authority to speak on behalf of the native title party for the area of the proposed lease.

Other evidence

[30] Mapping provided by the Tribunal's Geospatial unit confirms the proposed lease is 100 per cent overlapped by Reserve 41265 with no Aboriginal communities located within or adjacent to the proposed lease.

[31] Places of importance identified by Mr Patterson and Mr Lane in their statements and located on the Tribunal's map are as follows:-

- Savory Creek - approximately 35 kilometres south of the proposed lease
- White Well - approximately 15 kilometres northwest of the proposed lease
- Jigalong Aboriginal community - located approximately 20 kilometres north-northeast of the proposed lease
- Robertson Range - located approximately 18 kilometres northeast of the proposed lease

Legal Principles

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

- *Re Koara People* [1996] NNTTA 31; (1996) 132 FLR 73 (*'Koara 1'*);
- *Evans v Western Australia* [1997] 741 FCA; (1997) 77 FCR 193 (*'Evans'*). Federal Court, RD Nicholson J – an appeal from the Tribunal determination in *Koara 1*;

- *Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274 (‘*Koara 2’*) - Tribunal determination following the successful appeal in *Evans*;
- *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124 (‘*Waljen’*); and
- *WMC Resources v Evans* [1999] NNTTA 372; (1999) 163 FLR 333 (‘*WMC/Evans*’).

[33] Section 38 of the Act sets out the types of determination that can be made being a determination that the act must not be done or may be done with or without conditions. No condition can be imposed entitling a native title party to payments worked out by reference to the amount of profit made, income derived or things produced by the grantee party (s 38(2)).

[34] 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.'

[35] It is accepted by the parties that in making a determination the Tribunal is exercising a discretion which involves weighing the various effects and interests referred to in s 39 of the Act (some of which may be conflicting) on the basis of the facts established by the evidence before it. There is no statutory indication that any one effect or interests is to be afforded any greater right than the other (*Waljen* at 165-166). The native title party refers to the fact that the Tribunal has never determined that a mining lease may not be granted. The native title party says that there is no reason in law precluding the Tribunal from making such a determination and that the Tribunal must give due and genuine consideration to the possibility of making a determination that the act may not be done and to do otherwise would be to misunderstand the nature of the discretion to be exercised. The Tribunal agrees with this statement which is the basis upon which it has acted since the test cases of *Koara 1* and *Waljen*. 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.

[36] The native title party contends that the Tribunal should revisit its decisions in *WMC/Evans* on the basis that it has misunderstood the nature of the changes that took place to s 39 of the Act by the 1998 amendments. In that matter the Tribunal found (at p 339-341):

> 'Section 39(1)(a)(i) of the new Act inserted the words 'the enjoyment by the native title parties of their registered native title rights and interests' in lieu of 'any native title rights and interests' which appeared in the old Act. The Explanatory Memorandum to the new Act (para 20.55) states:
>
> > 'The Bill removes any implication that the arbitral body is required to make a finding in relation to the existence of native title rights and interests in a right to negotiate determination. The Bill makes it clear that the arbitral body is required to assess the effect of the proposed act on the enjoyment by native title parties of their determined or claimed native title rights and interests rather than any native title that may exist.'
>
> The Tribunal is limited in its inquiry to interests which have already been claimed, considered and accepted for registration and placed on the Register of Native Title Claims.

In *Western Australia v Thomas* (1996) 133 FLR 124 (at 166-167) [*Waljen*] the Tribunal described its task under the provisions of the old Act as follows:

> 'In our view it is not appropriate to establish any test which must be met before the Tribunal can take account of the effect of the act on any native title rights and interests. We will give weight to the effect of the proposed act on those rights and interests by reference to the evidence with respect to native title and the proposed act, without either assuming that there will be an effect just because certain rights and interests are claimed or establishing an evidentiary threshold test which must be met.
>
> It is clear that by giving the right to negotiate to claimants as well as holders of native title, the Act requires us to accept the possibility that each of the native title rights and interests described in the application exists. That does not mean that we can assume that all the native title rights and interests which are so described necessarily exist, and even less so, that they will be affected in a particular way. There may be some elements of native title claimed which could not be affected by the proposed act. There are number of different future acts to which the right to negotiate procedures apply. Further, native title 'is given its content by the traditional law acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. *Mabo v Queensland (No.2)* (1992) 175 CLR 1 per Brennan J at 42. See also definition of 'native title' in s.223. Clearly the content of native title can differ significantly from group to group depending on those traditional laws and customs. 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.
>
> The affidavit accompanying the application is evidence which can be considered, but if it is the only evidence, it is difficult to see how the Tribunal could make any sensible findings about the effects of the act on any of the native title rights and interests claimed therein. 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.'

The grantee and Government parties submitted that the amendment to s 31(1)(a)(i) did nothing more than ensure that the Tribunal's consideration of this factor was limited to the 'registered' native title rights and interests not as in the old Act 'any' native title rights and interests and that in all respects the approach in *Waljen* was still applicable. The amendment did not mean that the Tribunal was to assume the existence of whatever native title rights and interests were specified on the Register, it was argued.

The new Act (s 30(3)) defines 'registered native title rights and interests' for the purpose of the right to negotiate provisions as:

- the native title rights described in the entry on the National Native Title Register (s 30(3)(a)) (where there has been a determination of native title); or
- the native title rights described in the entry on the Register of Native Title Claims (s 30(3)(b)) (where there is no determination of native title, but only a claim which has been made and registered).

In my view Parliament intended to place determined and claimed native title on the same footing for the purposes of considering the effect of a future act on it. The two categories of native title are considered together both in the definition and in the Explanatory Memorandum. The fact that the new Act contains stricter criteria for the registration of claims supports this interpretation.

The Tribunal must assume for the purpose of this inquiry that the native title rights and interests which potentially could be effected are those set out in the Register of Native Title Claims and then consider evidence of what are the likely effects of the act on those registered native title rights and interests. The introduction of the word 'enjoyment' in s 39(1)(a)(i) must also be taken into account and implies that the Tribunal must make an assessment of the effect of the act on present usage and future amenity. The fact that the Tribunal must now look at the enjoyment of the native title rights and interests reinforces the point that evidence needs to be given of how those registered native title rights and interests (whether determined or only claimed) are exercised and enjoyed. A mere statement, contention or assertion that

> interests claimed will be effected without evidence of their current use and the potential impact on them will not suffice to enable the Tribunal to make findings on this point.
>
> I do not therefore support the native title party's submission that the Tribunal must look at the situation on a worst case scenario and assume that all registered native title rights and interests exist in full and are exercised or enjoyed equally on the whole of the claim area. The approach described above in *Waljen* is still applicable except that the Tribunal is required to assume the existence of the native title rights entered on the Register of Native Title Claims. It remains the case that:
>
> - the content of registered native title rights and interests may vary according to traditional law and custom and the question of the effect of a proposed act on a particular native title party's enjoyment is a matter of fact to be determined on the evidence in each case; and
> - there needs to be sufficient evidence to demonstrate which registered native title rights and interests will be affected and how those rights and interests will be affected.'

[37] The native title party submits that it is apparent from the Explanatory Memorandum that the intent of the 1998 amendment was to restrain the Tribunal from going on a fact finding exercise to determine the existence of native title. They say the Tribunal is not required to examine whether or not the native title party 'enjoys' their native title rights and interests. Rather the Tribunal's task is to examine the effect of the proposed act on the ability of the native title party to enjoy their registered native title rights and interests based on the potential which exists to exercise those rights and interests (Native Title Party's Statement of Contentions for Substantive Hearing filed on 4 February 2008 (paras 16-17)). This is another way of stating the worst case scenario argument dealt with in *WMC/Evans*.

[38] The problem with the native title party's argument is that it assumes that the Tribunal's approach in *WMC/Evans* was adopted because of the insertion of the words '*enjoyment … of native title rights and interests*' by the 1998 amendments. In fact, as is clear from the full passage of the Tribunal's reasons from *WMC/Evans* the Tribunal was merely confirming the approach adopted in the test cases of *Koara 1* and *Waljen*. The introduction of the word 'enjoyment' had the effect set out in the Explanatory Memorandum but was also confirmation of the approach adopted in *Koara 1* and *Waljen*. The applicable law on this issue is now well established, was not altered by Parliament in the 1998 amendments and has not been the subject of adverse consideration by the Federal Court.

[39] The Tribunal accepts the contentions of the Government and grantee parties that this approach is also consistent with the Full Federal Court's comments in *Western Australia v Ward* [2000] FCA 91; (2000) 99 FCR 316 (at 348, [104]); '*that the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land and activities on the land associated with traditional, social and cultural practices. … the common law applies to protect only the physical enjoyment of*

rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.'

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

[40] The following rights and interests have been registered in respect of the area of the proposed lease (designated Area A on the Register of Native Title Claims):

'(1) The right to possess, occupy, use and enjoy the area as against the whole world;

(2) A right to occupy the area;

(3) A right to use the area;

(4) A right to enjoy the area;

(5) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

(6) A right to control access of others to the area;

(7) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and

(8) A right to control the taking, use and enjoyment by others of the resources of the area.

(9) A right to hunt in the area;

(10) A right to fish in the area;

(11) A right to take fauna; and

(12) A right to take traditional resources, other than minerals and petroleum from the area.

(13) A right to be present on or within the area;

(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

(15) A right to invite and permit others to have access to and participate in or carry out activities in the area;

(16) A right of access to the area;

(17) A right to live within the area;

(18) A right to erect shelters upon or within the area;

(19) A right to camp upon or within the area;

(20) A right to move about the area;

(21) A right to engage in cultural activities within the area;

(22) A right to conduct and participate in ceremonies and meetings within the area;

(23) A right to visit, care for and maintain places of importance and protect them from physical harm;

(24) A right to take flora (including timber);

(25) A right to take soil;

(26) A right to take sand;

(27) A right to take stone and/or flint;

(28) A right to take clay;

(29) A right to take gravel;

(30) A right to take ochre;

(31) A right to take water;

(32) A right to manufacture traditional items from the resources of the area;

(33) A right to trade in the resources of the area; and

(34) A right to maintain, conserve and protect significant places and objects located within the area.'

[41] There is no evidence of any prior extinguishment of native title over any part of the proposed lease area and which would therefore be excluded from consideration. There is also no evidence of any prior interest (such as a pastoral lease) which would have partially extinguished any native title rights and interests. The capacity of the native title party to exercise their native title rights and interests does not appear to have been restricted by activities of other parties in the past or at present except possibly by exploration including the infrastructure established by the grantee party pursuant to E52/1630. The fact that the proposed mining lease area is over Reserve land dedicated for the use and benefit of Aboriginal inhabitants also confirms that the capacity of the native title party to exercise their native title rights has not been restricted to any great extent.

[42] There is also no dispute that at law the non-extinguishment principle applies to the grant of a mining lease. However, in practice, depending on the nature of proposed activity the grant of a mining lease could for all practical purposes mean that the native title party is unable to enjoy its native title rights and interests over the area where active mining is taking place. This is such a case. The grantee party's proposal is for an open cut mine initially in the northern part of the proposed lease area. The Government party's proposed supplementary condition (i) ameliorates this affect to some extent in that access to the balance of the mining lease area is not prohibited. However, I can safely find that over the area of mining activity and in the near vicinity the capacity to exercise native title rights and interests will in practice be substantially curtailed for the duration of the mining activity.

[43] The Tribunal's task is to examine the native title rights and interests which are enjoyed by the native title party over the relevant area and which would be affected in the way described by the mining proposal. I have before me some limited evidence from the native title party as to past and current exercise or enjoyment of native title rights and interests in the subject area. Both Mr Lane and Mr Patterson refer to the area of the proposed licence as "Bringumurra" and state that in the past the Nyiyaparli people used to live in the area, and that the general area around White Well is still used by members of the native title party with some frequency for camping, hunting, "to look out for that country" and travelling

through to access Savory Creek some 35 kilometres south of the tenement (Baker Lane statement paras 7, 8, 9, 11; Timmy Patterson statement paras 7, 8, 9). Mr Lane (para 7) describes past camping activities in the area of the mining lease and says that these continue to the present day. The Jigalong and Nyiparli people still hunt there (paras 8, 9). Mr Patterson camped as a child in an area described as extending to White Well (Ngardawallajarradya) some 15 kilometres from the mining lease area (para 7). I am satisfied that the activities referred to by Mr Lane and Mr Paterson are carried out in the area of the proposed lease but that they also occur over a wider area around the lease. These activities include looking out for country.

[44] The evidence provided by the native title party in respect of 39(1)(a)(i) is not very extensive or detailed and indicates that its native title rights and interests are enjoyed over a wider area beyond that of the proposed lease. I am satisfied that the enjoyment of a number of the native title party's native title rights and interests will be affected by the current proposed mining activities in the northern part of the proposed lease area and potentially in the balance of it if the planned exploration activities reveal an economic resource. The right to enjoy and use the area for the purposes of hunting and camping to the extent deposed to by Mr Lane and Mr Patterson will undoubtedly be affected. However, with respect to most of the other registered native title rights and interests there is no evidence of the manner in which they are currently exercised or enjoyed. The evidence does not suggest that the claimants live in the area as they once did but camp there from time to time. The right to make decisions about the proposed mining lease area (i.e. to look out for country) will also be curtailed during the course of mining operations. The limited enjoyment of native title rights and interests which occur in the vicinity of the proposed lease area will be adversely affected. Crown Reserve 41265 according to the Government party's supporting documentation, comprises some 257,830 hectares (or 2,578 square kilometres). Approximately 80 per cent of the Reserve is situated within the native title party's claim area which in turn comprises some 3,668,500 hectares (or 36,685 square kilometres). In the absence of specific evidence to the contrary, I can safely infer that the native title rights and interests which will be affected by the grant of M52/1034 are enjoyed over a much broader area then that of the lease itself. I do not consider that access to the areas around Savory Creek or White Well will be significantly impeded by the grant of this particular mining lease.

Section 39(1)(a)(ii) - way of life, culture and traditions

[45] There is insufficient evidence provided by the native title party about the way of life, culture and traditions practised within the area of the proposed lease to support a conclusion that the grant of the proposed lease will affect them except as already described in relation to s 39(1)(a)(i).

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

[46] There is no evidence of the effect of the proposed grant on this factor. The grantee party has contended that the effect on the development of the social, cultural and economic structures of the native title party, if any, would be beneficial rather than adverse as development may bring increased community facilities and employment opportunities that would otherwise not be available (Grantee party Statement of Contentions lodged 21 December 2007, para 8)

[47] The Tribunal has held that any positive effect of a future act can be taken into account (*Waljen* at 170). However, the development of the facilities and opportunities referred to by the grantee party, and whether the native title party would be in a position to take advantage of them, is speculative at this stage and the paucity of evidence in relation to any positive impact for the native title party means that this factor can only be given limited weight. The limited weight which can be given to it is based on the agreement that was being negotiated which contained provisions that could potentially benefit the native title party (employment, compensation etc). Although not finalised, the grantee party's approach to negotiation of the agreement demonstrates that it is mindful of the need to provide benefit to the local Aboriginal community and native title party members.

Section 39(1)(a)(iv) - freedom of access - freedom to carry out rites/ceremonies

[48] There is some evidence of ceremonies being carried out in the past in the general area of the proposed lease (Lane at para 7) but no evidence that rites, ceremonies or other activities of traditional cultural significance except those referred to above are currently carried out. In practical terms access to the area of actual mining will be restricted. However, the grant of a mining lease does not confer exclusive possession of the area on the grantee party and continuing access to some extent at least will be preserved by the Government party's supplementary condition (i).

Section 39(1)(a)(v) - sites of particular significance

[49] There are no Aboriginal sites recorded on the Department of Indigenous Affairs ('DIA') Site Register for the purposes of the *Aboriginal Heritage Act* 1972 (WA) on the proposed lease area. I accept that the Sites Register is not an exhaustive list of all Aboriginal sites and that other sites might exist and be affected by activities on the proposed lease. However there is no evidence provided by the native title party identifying other sites in the area of the proposed lease.

[50] The evidence of Mr Lane (para 7) suggests that the area he describes as Bringumurra or places within it may be an area or site of particular significance (i.e. of special or more than ordinary significance) to the native title party in accordance with their traditions. However, the extent of the area is not clear. It seems from Mr Patterson's evidence (para 7) that Bringumurra includes White Well (Ngardawallajarradya) which is some 15 kilometres to the north-west of the proposed lease area. It is within the Bringumurra area that Mr Lane says people were camping when he was taken for initiation but no clear evidence that a ceremony or law ground exists within it or more particularly in the area of the proposed lease area. The evidence falls short of establishing the Bringumurra area generally as one of particular significance to the native title party in accordance with their traditions but it is possible that there is a site which was used in the past for initiation ceremony which exists in a broader area which encompasses the proposed mining lease area. Whether the site actually exists on the proposed lease area cannot be ascertained on the state of the evidence. While there is evidence of camping and hunting from time to time this on its own does not establish the area to be one of more than ordinary significance to the native title party. On the evidence a finding of the possible existence of a site or sites of the relevant kind is all that can be made.

[51] The evidence also established that considerable exploration activity has already occurred on the proposed lease area pursuant to E52/1630. The agreement relating to this exploration licence contained provisions for site surveys. Despite this there is no evidence that any sites of particular significance have been identified on the proposed lease area or have been disturbed by exploration activity.

[52] The Tribunal has on numerous occasions considered the protective provisions of the *Aboriginal Heritage Act* 1972 (WA). Pursuant to s 146(b) of the Act I adopt the Tribunal's findings in *Waljen* on this topic (at 209-211). I also adopt the findings of the Tribunal in

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner at [31]–[38], [40]-[41]. The *Aboriginal Heritage Act* provides for the protection and preservation of a wide range of Aboriginal sites (s 5) and objects (s 6). It is an offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site (whether on the Register or not) (s 17) without authorisation (s 18), and that offence is punishable by fine or imprisonment or both. The penalty (s 57) for an individual who commits an offence is $20,000 and infringement for 9 months for a first offence and for a second and subsequent offence the penalty is $40,000 and imprisonment for two years. There are higher penalties for bodies corporate. If Ministerial consent under s 18 of the *Aboriginal Heritage Act* is sought to disturb a site, the Aboriginal Cultural Material Committee ('ACMC') requires the applicant to outline the nature and extent of consultation with key Indigenous stakeholder groups (which includes native title parties), outline strategies to minimise impacts on sites and complete a declaration that it has read and understood any heritage survey report tendered in support of the application. Applications will not be considered by the ACMC until sufficient information has been submitted by the applicant.

[53] It is a defence to a prosecution under the *Aboriginal Heritage Act* if the person charged can prove that he or she did not know and could not reasonably be expected to have known, that the place was a site covered by it (s 62). This defence would not be available to the grantee party because some evidence has been provided by the native title party of the possible existence of sites of particular significance. The Department of Industry and Resources sends to grantees of mining leases a document entitled '*Guidelines for Consultation with Indigenous People by Mineral and Petroleum Explorers*' (updated in July 2004) which outlines relevant legislation and contains detailed guidelines about consultation with Aboriginal people about sites. The standard endorsement on mining leases also draws the grantee party's attention to the *Aboriginal Heritage Act* 1972 (WA). Furthermore, supplementary condition (ii) to be imposed by the Government party (para [22] above) requires the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes and supplementary condition (iii) requires notice of any s 18 application to be given to the native title party. The native title party would be in a position to inform the grantee party of any areas of concern to it and to make submissions to the ACMC.

[54] I have no reason to believe that the grantee party will not comply with its obligations under the *Aboriginal Heritage Act*. The Deed of Agreement entered into for E52/1630 and E52/1658 and the agreement which was being negotiated between the native title party and grantee party contained detailed provisions for the conduct of a site survey which had been agreed to by the grantee party indicating that it is aware of its responsibilities. In summary, in making my determination I have taken into account that there is no firm evidence of any site of particular significance to the native title party on or in the close vicinity of the proposed mining lease area which might be affected by the grant and that the grantee party will comply with the *Aboriginal Heritage Act*, thus minimising the likelihood of such interference should further inquiries establish that relevant sites exist.

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

[55] The evidence of any interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the area of land the subject of the proposed lease can be gleaned from the Mining Agreement which was being negotiated between the native title party and grantee party. The negotiations took place over a period of some months and substantial agreement had been reached on a number of matters. The agreement was comprehensive and dealt with many of the issues which the Tribunal is aware are customarily found in mining agreements of this kind, viz – environmental protection, a cultural heritage management plan including provision and payment by the grantee party for site surveys, a coordinating committee comprising representatives of the grantee party, native title party and Jigalong community to facilitate consultation between them, employment, training and business opportunities and plan, cross cultural education, control of liquor and guns, removal of employees in certain circumstances. The draft agreement also provided for benefit payments to be made to a charitable trust nominated by the native title party and Jigalong community. Although there was no final agreement the grantee party had offered percentage payments based on the production value of iron ore or iron ore products or a percentage of the value of royalties paid to the Government party in the case of other minerals. Mr Murray Meaton of Economic Consulting Services was engaged by the native title party to assess the financial benefits package offered. He considered that over the 10 year life of the mine the total value of the package, based on value of production, was between $4.25 million and $5.45 million. He also recommended a payment of $100,000 on signing the agreement which it appears was agreed to by the grantee party. As already

indicated, negotiations then broke down principally because the Jigalong community were not satisfied with the compensation package (see good faith decision).

[56] It is quite clear that the native title party is not opposed to mining as such but only wishes it to proceed if a satisfactory agreement can be reached. This view is expressed in the native title party's contentions (4 February 2008):

> '10 It is clear that there is a genuine Australian public interest in Aboriginal Communities, be they Native Title groups or residential communities such as the Jigalong Aboriginal Community, aspiring to and achieving self-determination in relation to the management of their traditional lands or homelands. In this situation, both the Nyiyaparli people and the members of the Jigalong Community have evinced a strong preference that this project not proceed until the GP has developed with them a sustainable and respectful working relationship, given effect by the terms of a mutually beneficial agreement. In circumstances where agreement has been close to being reached, and the NTP has indicated a strong preference for the act to not proceed without such agreement it is reasonable for the Tribunal to consider making a determination that the act must not be done in the interests of promoting the NTP's rights and aspirations toward self-determination.'

[57] This submission from the native title party that the Tribunal should make a determination that the act may not be done solely because no agreement has been reached is tantamount to suggesting that they have a veto over the proposal. This is clearly not the law. The policy objectives explained by the Prime Minister the Hon Paul Keating, (Second reading speech on the Native Title Bill 1993, Hansard, House of Representatives, 16 November 1993 p 2877) include that the right to negotiate procedures did not involve the exercise of a veto by native title parties. As explained, the Tribunal may make a determination that the future act not be done based on the evidence and a consideration of and balancing of the factors in s 39 of the Act. However, it would be an improper exercise of its power to make such a determination solely on the basis that an agreement satisfactory to the native title party had not been reached and that this adversely affected their aspirations to self-determination. Although no veto is involved I have taken into account that there is the capacity, as already explained, for the native title party to have its interests considered by way of submission to the ALT, Minister for Indigenous Affairs and Minister for State Development.

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

[58] I adopt the Tribunal's findings in *Waljen* at 215-216 on the significance of the mining industry to Western Australia. I am satisfied that mining currently proposed will be of considerable economic significance to Australia (export income) and Western Australia (royalties). The mine has a lifespan of 10-12 years as currently proposed which could be

increased depending on the results of further exploration. I can infer that there will be some benefit to the local economy in and around Newman and the Pilbara in general. The extent to which mining will be of benefit to Aboriginal people who live in the area is less clear. If the agreement had been concluded there would have been provision for benefits of various kinds. However, while I think there is some prospect that the parties will reach agreement I cannot specifically take into account the benefits that would be provided to the native title party by it. I have taken into account that there may be some economic benefits to the local Aboriginal community which is part of the general community.

Section 39(1)(e) - public interest

[59] I am satisfied that the public interest is served by the development of a mine of this size and potential economic significance.

Section 39(1)(f) - any other relevant matter

[60] Pursuant to s 146(b) of the Act I adopt the findings in relation to the environmental protection regime in Western Australia.

- *Waljen* (at 212-214) from the heading '(iii) Section 39(1)(a)(vi)' up to the heading 'Evidence'; and

- *Koara 2* (at 24-27) commencing with the words 'Under the *Environmental Protection Act* 1986 (WA)' and concluding with 'other than the Murrin Murrin project'.

[61] The environmental controls imposed by the Government party can be taken into account under this heading because they may assist to ameliorate the effect of the future act on some of the factors in s 39(1)(a). The Project Mining Proposal prepared by Ecologia deals with some environmental issues such as vegetation and flora and fauna and managing environmental impact, including rehabilitation. The Government party's environmental protection regime, conditions to be imposed and the grantee party's intentions are of some relevance. Rehabilitation of the proposed lease area will help to preserve the capacity of the native title party in future to exercise their native title rights and interests.

[62] Furthermore, as explained, supplementary condition (iii) which requires the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity will enable the native title party to raise any concerns with the grantee party. I am satisfied that any amendment to the grantee

party's proposal which increased the footprint of the activity would be covered by this condition.

Condition relating to 'compensation'

[63] With respect to compensation the native title party contends (Contentions of 4 February 2008):

> '21 If a determination is made that the act may be done, the Tribunal should attach a condition to the doing of the act that compensation should be payable to the NTP. The compensation payable should be an amount that the Tribunal considers fair and reasonable in the circumstances. It is suggested that an amount that is fair and reasonable in the circumstances is an annual payment equivalent to one percent of the market capitalization of the GP. The NTP contends that a condition of this kind is not contrary to section 38(2) of the NTA, as it is an assessment that takes into account the true value of the land in question. Of course, in making such an assessment, the Tribunal would need to 'lift the corporate veil' to properly assess the nature of any subsidiaries or parent companies and ensure that the assessable market capitalization was that related to the holding of the lease in question, and not to projects or other activities of the GP that were not related to the rights and interests of the NTP.'

[64] The Tribunal has on a number of occasions considered at length the issue of conditions relating to compensation. I commend the following material to the native title party's representatives and other persons representing native title parties in negotiations about the grant of mining tenements and any subsequent future act inquiry:

- *Waljen* at 177-205;
- *Western Australia v Evans & Ors* [1999] NNTTA 231; (1999) 165 FLR 354 (at 364-373, [24]-[42] and cases cited therein (at para [25]) including *Western Australia v Thomas* [1999] NNTTA 99; (1999) 164 FLR 120 (*Anaconda 1*));
- *Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia*, NNTT WF03/2, [2003] NNTTA 82 (9 July 2003), Hon C J Sumner at [58]-[60], [98];
- *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100; (2005) 196 FLR 319 at [37]-[38]; and
- C J Sumner, Deputy President, NNTT, 'Getting the most out of the future act process'. Paper presented to the AIATSIS 2007 Native Title Conference, Cairns, 7 June 2007, pp. 36-43 (www.nntt.gov.au).

[65] It is not necessary to repeat the analysis contained in this material, suffice it to say that the native title party contentions on compensation are wrong at law and propose a course of action not open to the Tribunal in these proceedings.

[66] In summary:

- the Tribunal has no power to make a determination containing a condition for the payment of compensation to a native title party.
- the Tribunal is specifically precluded from making a determination with a condition that royalty type payments be made (s 38(2)) (although the parties can voluntarily enter into such an agreement if justified on the evidence (s 33(1))).
- the Tribunal, if justified on the evidence, can impose a condition which requires the grantee party to secure a specified amount of money by a bank guarantee in favour of the Registrar of the Tribunal (s 41(3)). (The bank guarantee condition provision was inserted by the 2007 amendments to the Act in lieu of a provision which provided for an amount to be paid into trust by a grantee party.)
- monies secured by a bank guarantee are dealt with in accordance with s 52 depending on whether or not a determination of native title or a determination of compensation is made.
- A determination of compensation under the Act can only be made by a Court following a determination that native title exists.
- in Western Australia, whether compensation is determined under the Act or by direct operation of the *Mining Act* the underlying principle is the freehold equivalence test which entitles a native title party to compensation if it is available to holders of freehold title and which is assessed according to the principles applicable to them. In Western Australia this means s 123 of the *Mining Act* which provides**:**
    - minerals are the property of the Crown and that no compensation is payable:
        - for permitting entry on the land for mining purposes;
        - in respect of the value of any mineral;
        - by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or

- in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms (s 123(1).

▪ the owner and occupier are 'entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining' (s 123(2)).

▪ the amount payable under s 123(2) may include compensation for:

(a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
(b) damage to the natural surface of the land or any part of the land;
(c) severance of the land or any part of the land from other land of, or used by, that person;
(d) any loss or restriction of a right of way or other easement or right;
(e) the loss of, or damage to, improvements;
(f) social disruption;
…
(h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining, and where the use for mining purposes of aircraft over or in the vicinity of any land (whether or not private land) occasions damage that damage shall be deemed to have been occasioned by an entry on the land thereby affected (s 123(4)).

[67] It is quite clear that the existing state of the law does not permit a condition to be imposed by the Tribunal for payment to be made for compensation based on the market capitalisation of the grantee party (or as has been previously argued based on expenditure on mining operations – *Anaconda 1* at 86-90) as such an amount would bear no relationship to the criteria in s 123 of the *Mining Act*.

[68] In my view no bank guarantee condition is justified in this case. While the Tribunal is not obliged to determine such an amount by reference to what ultimately might be awarded by way of compensation, neither would it be prudent to simply pluck a figure out of thin air. Apart from the condition referred to above the native title party has not advanced any argument for a bank guarantee condition nor the basis on which an amount could be assessed, based on the native title rights and interests which will be affected. As the material referred

to above makes clear there is virtually no judicial authority on the assessment of compensation for the impairment of native title rights and interests by mining which might provide some guidance. I am also influenced by the fact that there is nothing to suggest that the grantee party's financial situation is such that the bank guarantee is needed as a bond or security and the native title party's right to claim compensation through the Federal Court for any loss, diminution, impairment or other effect of the grant of the proposed lease on their native title rights and interests are not affected by this determination.

Are any conditions justified?

[69] The native title party requests that the Tribunal impose:

> '22(4) Any other conditions relating to notifications, assignment, regulatory or legislative requirements or any other thing that the Tribunal sees fit to make in the interest of ensuring that the doing of the act does not add further to the "progressive…dispossession of [the NTP] of their lands. See the Preamble to the Native Title Act 1993 (Cth).'

[70] In my view the evidence does not justify the imposition of conditions. In *WMC/Evans* the Tribunal imposed certain conditions in circumstances where there was little evidence of the exercise or enjoyment of native title rights and interests or sites of significance on the relevant mining lease area. These conditions were substantially the same as those now to be imposed by the Government party's supplementary conditions. If the Government party was not going to impose them I would have made conditions to a similar effect. I also consider the protection of sites to be adequately covered by the general law on the evidence in this case. The grantee party will need to advise the native title party of any development activity it proposes and the native title party will have the capacity to make submissions to the Environmental Officer, Department of Industry & Resources or the Environmental Protection Authority depending on the level of environmental assessment to be carried out. They will also be consulted by the ALT and be able to make submissions to the Minister for Indigenous Affairs which would need to be considered by the Minister for State Development before granting approval to mine.

Conclusion

[71] In weighing the various factors which the Tribunal is required to take into account I have had regard to the fact that the current enjoyment of some of the registered native title rights and interests will be curtailed during mining but that on the evidence provided this will not be a significant impact. Further, there is insufficient evidence to say that areas or sites of

particular significance will be interfered with by the proposed mining activity. I am satisfied that economic benefits will flow from the mine but that the extent of these flowing to the native title party in the absence of agreement with the grantee party is not clear.

[72] Importantly the native title party is not opposed to mining. It had almost reached a comprehensive agreement with the grantee party which would have provided considerable financial benefits to them. Failure to conclude agreement was not because of any action from the grantee party but because the Jigalong community (principally) and the native title party, decided the benefit package was inadequate. While the native title party does not have a veto over the proposal it will have the opportunity to make submissions on aspects of the project involving environmental issues and heritage protection. Given the Government party's regulatory regime and conditions it intends to impose I am satisfied that no conditions need to be imposed.

Determination

[73] The determination of the Tribunal is that the act, namely the grant of Mining Lease M52/1034 to Australian Manganese Pty Ltd, may be done.

Hon C J Sumner
Deputy President
3 April 2008