Reported at (1996) 132 FLR 73

NATIONAL NATIVE TITLE TRIBUNAL

***Western Australia/Koara People/Sons of Gwalia Ltd.; Mount Edon Gold Mines (Aust) Ltd; DJ & RM Cottee & PJ Townsend,* [1996] NNTTA 31 (23 July 1996)**

Application Nos: WF96/1
WF96/5 & WF96/11

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

- and -

IN THE MATTER of an Inquiry into an Application for Determinations

Inquiry Into Applications For Determinations Pursuant To Section 35 Of The *Native Title Act* 1993

State of Western Australia

- and -

Koara People
(native title party)

- and -

Sons of Gwalia Ltd.
Mount Edon Gold Mines (Aust) Ltd
DJ & RM Cottee & PJ Townsend
(grantee parties)

Tribunal: The Hon Paul Seaman QC, Deputy President, Ms Diane Smith and Mr Michael McDaniel
Place: Perth
Date: 23 July 1996

Catchwords: Native title application for determination that mining lease may be granted no party bears a burden of proof Tribunal only makes findings of fact based upon logically probative material mining lease authorising both exploration and mining immaterial that mining may never occur relevant consideration is the effect of mining if it does occur.

Native Title Act 1993 (Cth) ss 35, 38(1), 39(1), 238(8)

Mining Act 1978 (WA) ss 75, 49, 67, 75(7)

McDonald v Director General of Social Security (1984) 1 FCR 354 at 356 and

Minister for Immigration & Ethnic Affairs v Pochi (1980) 44 FLR 41 at 68 applied.

Native title application for determination that mining lease may be granted determination subject to conditions condition as to payment of compensation must apply principles or criteria contained in mining legislation no power to adjourn assessment of compensation to a date subsequent to the determination no power to impose condition that parties subsequently arbitrate the question of compensation.

Native Title Act 1993 (Cth) s 51(3)

Mining Act 1978 (WA) s 123

Racecourse Cooperation Sugar Association Ltd v Attorney-General (Q) (1979) 142 CLR 460 at 481

Allingham v Minister of Agriculture & Fisheries [1948] 1 KB 780 at 781 applied

Native title application for determination that mining lease may be granted power to impose conditions includes those which require supervision power not limited to conditions which are capable of enforcement as contracts conditions of determination may involve the payment of money which is not by way of other compensation.

Native Title Act 1993 (Cth) ss 38(1)(c), 39, 41(1)

Native title application for determination that mining lease may be granted criteria for determination effect on sites of particular significance to native title parties native title parties not obliged to provide grantee party with all site information at own cost method of site clearance to have regard to native title parties wishes in relation to control of their lands.

Native Title Act 1993 (Cth) s 39(1)(a)(v)

Norvill v Chapman 133 ALR 226 at 254, distinguished.

Native title application for determination that mining lease may be granted criteria for determination effect on natural environment environment to be considered both from Aboriginal and broader community perspective.

Native Title Act 1993 (Cth) s 39(1)(a)(vi)

Native title application for determination that mining lease may be granted criteria for determination economic or other significance of mining lease each mining lease to be considered on its own merits.

Native Title Act 1993 (Cth) s 39(1)(b)

Native title application for determination that mining lease may be granted criteria for determination public interest in grant of mining lease includes public interest in protection of native title and public interest in the continuity of exploration and mining.

Native Title Act 1993 (Cth) s39(1)(e)

Native title application for determination that mining lease may be granted criteria for determination any other relevant matter relevant that native title party is able to pursue a subsequent application for compensation relevant that grantee party had made expenditure on prospecting or exploration licences before 1992 which gave them the right to a mining lease.

Native Title Act 1993 (Cth), s39(1)(f)

Legislation: *Native Title Act* 1993 (Cth) ss 35, 38(1), 38(1)(c), 39, 39(1), 39(1)(a)(v), 39(1)(a)(vi), 39(1)(b), 39(1)(e), 39(1)(f), 41(1), 51(3), 238(8)
Mining Act 1978 (WA) ss 49, 67, 75(7), 123

Cases: Allingham -v- Minister of Agriculture and Fisheries [1948] 1 KB 780 applied
Mabo v Queensland (No 2) (1992) 175 CLR 1,
McDonald v Director General of Social Security (1984) 1 FCR 354 applied
Minister for Immigration & Ethnic Affairs v Pochi (1980) 44 FLR 41 applied
North Ganalanja Aboriginal Corporation v Queensland (1996) 135 ALR 225
Norvill v Chapman 133 ALR 226 distinguished
Racecourse Co-operative Sugar Association Ltd -v- Attorney-General (Q) (1979) 142 CLR 460 applied
Bull v Attorney General (NSW) (1913) 17 CLR 370
Hot Holdings Pty Ltd v Creasy (1996) 134 ALR 469

Official determination follows

NATIONAL NATIVE TITLE TRIBUNAL

INQUIRY INTO APPLICATIONS FOR DETERMINATIONS PURSUANT TO SECTION 35 OF THE *NATIVE TITLE ACT* 1993

Applications: WF96/1, WF96/5 & WF96/11

IN THE MATTER of the *Native Title Act* 1993

- and -

IN THE MATTER of an Inquiry into Applications for Determinations

- and -

IN THE MATTER of the Koara People

Tribunal: The Honourable Paul Seaman QC, Deputy President, Ms Diane Smith and Mr Michael McDaniel

Place: Perth

Date: 23 July 1996

DETERMINATIONS

On 21 June 1996 we published our reasons for the determinations which we propose to make in this inquiry that all the mining leases with which it is concerned may be granted subject to certain conditions.

We found the facts as to sites on the evidence as it then stood but outlined conditions which, among other things, afford the native title party the opportunity to conduct a site clearance survey on each of the proposed mining leases.

Since publishing those reasons we have heard Counsel for all parties as to the precise form which they submit the conditions should take.

We only mention one matter which arose in the course of those submissions. Counsel for the grantee parties submitted that we should impose a condition to the effect that the native title party should be excluded from prospecting and exploring and taking minerals from the land concerned. We consider such a condition to be superfluous in the light of the provisions of s238 of the *Native Title Act* 1993.

We annexe the reasons published by us on 21 June 1996 as part of this determination.

We determine that the following mining leases may be granted to the following grantee parties upon the following conditions 1-9. A reference to a mining lease in the conditions is a reference to any one of those mining leases, and a reference to a native title claim is a reference to the relevant native title determination application referred to in the reasons.

SCHEDULE

Mining Lease	**Grantee Party**
37/491 and 37/492	Sons of Gwalia Ltd
37/493, 37/494, 37/495 and 37/496	Mount Edon Gold Mines (Aust) Ltd
36/341	DJ & RM Cottee & PJ Townsend

CONDITIONS

1. Any right of the native title party 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 exploration or mining operations.

2.1 The grantee party shall give the native title party written notice of the grant of the mining lease.

2.2 If within one month of that notice the native title party do not give the grantee party a written notice of concern about sites then the grantee party may exercise all the rights given by the mining lease over the whole of the tenement.

2.3 If the native title party give a written notice of concern about sites to the grantee party, neither exploration nor mining shall take place on the tenement until a period of 2 months has expired from the time that the grantee party delivers to the native title party two sets of suitable topographical maps showing the tenement and the area surrounding it.

2.4 Within two months of the delivery of the maps the native title party shall conduct a site survey and clearance on the tenement and return one set of the maps to the grantee party with the boundaries of any sites within the tenement accurately marked on them.

2.5 The grantee party will pay the reasonable expenses of the native title party in conducting the site survey and clearance.

2.6 Without the prior written permission of the native title party the grantee party shall not copy such maps or disclose to others any information provided by the native title party about sites. The grantee party shall only use the marked maps and such information for purposes reasonably connected with mining on the tenement. The native title party shall be the owner of any copyright in the markings made by or on behalf of the native title party on the maps and at the expiration of the mining lease such maps shall be returned to the native title party. Without the written consent of the grantee party the native title party shall not disclose to others the grantee party's confidential information relating to its activities pursuant to the mining lease.

2.7 If requested upon reasonable notice before or in the course of the site survey and clearance the grantee party will meet with the native title party on the tenement to identify the tenement boundaries on the ground.

2.8 If requested upon reasonable notice at the conclusion of the site survey and clearance the native title party will meet with the grantee party on the tenement to identify the boundaries of any sites on the ground.

2.9 No exploration or mining shall be carried out by the grantee party within the site boundaries marked by the native title party on the maps except in accordance with written consent of the native title party or pursuant to s18 of the *Aboriginal Heritage Act* 1972 (WA).

2.10 If the grantee party gives a notice to the Aboriginal Cultural Material Committee under s18 of the *Aboriginal Heritage Act* 1972 (WA) it shall at the same time serve a copy of that notice on the native title party.

2.11 Within 14 days of receipt of a copy of any notice given to the Aboriginal Cultural Material Committee under s18 of the *Aboriginal Heritage Act* 1972 (WA), the native title party will inform the grantee party in writing if they wish to engage in consultation concerning the proposed use of the land. If so informed, the grantee party will promptly supply details of the proposed use and meet with the native title party to explain it.

3.1 Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental or 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.

3.2 Upon receipt of a mining proposal under condition 3.1 the native title party will within 21 days inform the grantee party in writing if they wish to engage in negotiations concerning the proposed mining operations. If the grantee party is so informed, the negotiation process described in conditions 3.4, 3.5 and 3.6 must be undertaken prior to the grantee party commencing activities pursuant to any written approval given by the State Mining Engineer.

3.3 At the time of informing the grantee party that the native title party wish to engage in such negotiations the native title party must nominate a day or days within the following 21 days for a meeting ("first meeting") to be attended by

the native title party and the grantee party to discuss the proposed mining operations, and also nominate a place for the first meeting within reasonable proximity to the land the subject of the mining lease.

3.4 At the first meeting the grantee party will explain key aspects of the mining operations including:

the extent of the area of the land proposed to be mined;
the nature of the mining operations;
the extent to which the ground will be disturbed and the environment affected;
the likely duration of the mining operation and the likely number of persons to be engaged at any one time; and
the proposals for rehabilitation of the land;

and the native title party will describe any concerns regarding the proposed mining operations including the effect upon:

any native title rights and interest;
their way of life, culture and traditions;
their social, cultural and economic structures;
their access to any parts of the land including access to carry out ceremonies or other activities of cultural significance in accordance with their traditions;
any area or site on the land of particular significance to the native title party in accordance with their traditions; and
the natural environment of the land or waters concerned.

3.5 In the negotiation process the native title party may also raise any other issues they consider relevant to the mining proposal including possible community and economic benefits for the native title party.

3.6 The negotiation period shall not be less than 3 months and shall include at least three further meetings and the native title party and grantee party must negotiate in good faith concerning the matters referred to in conditions 3.4 and 3.5.

3.7 Any matters agreed during the course of the negotiation process must be recorded in writing and signed on behalf of the native title party and grantee party.

4. Upon any assignment of the mining lease the assignee and the native title party shall be bound to each other by these conditions.

5. These conditions apply only to that part of the tenement which remains subject to the native title claim or to any determination that the claimed native title exists.

6.1 For the purpose of these conditions, the registered native title claimant (from time to time) is authorised to give or receive any notice.

6.2 Notices under these conditions may be given by delivery, post or facsimile and each party shall nominate a postal address and facsimile address for that purpose.

6.3 Any party may by notice in writing change its addresses or facsimile numbers.

6.4 A notice is taken to be received in the case of a posted document, on the second business day after posting and in the case of a facsimile on the first business day after transmission.

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

8. The Government party shall make conditions 1, 2.10, 3.1 and 4 conditions of the mining lease.

9. For the purpose of these conditions the following terms have the following meanings;

"mining operations" has the meaning given in the *Mining Act* 1978 (WA);

"native title party" means the persons named as registered native title claimants in the native title claim and any person on whose behalf the native title claim is made or determined.

"registered native title claimant" means the first named registered native title claimant under the native title claim or the first named person identified as a native title holder in any determination made under the native title claim.

Reference to a "site" imports the meaning given by s39(1)(a)(v) of the *Native Title Act*.

"to assign" means to sell, assign, transfer, convey, part with possession of, grant any power of attorney over, create any legal or beneficial interest in, or otherwise dispose of; and "assignment", and "assignee" have corresponding meanings.

"Exploration" means all modes of searching for or evaluating deposits of minerals and includes such operations and works as are necessary for that purpose including, without limitation:

(a) entering and re-entering the area with such agents, employees, vehicles, vessels, machinery and equipment as may be necessary for the proper and efficient exploration for minerals;
(b) digging pits, trenches and holes, and sinking bores and tunnels in, on or under the area or ascertaining the quality, quantity or extent of ore and other material by drilling or other methods;
(c) the sampling, excavation, extraction and removal for analysis and testing of an amount of ore, material or other substance reasonably necessary to determine its mineral bearing quality as not to exceed the limit prescribed under the *Mining Act* 1978 (WA) or in such greater amount as the Minister and the native title party may in any case approve in writing;
(d) taking or diverting water from any natural spring, lake, pool or stream situated on or flowing through the area and to sink a well or bore on the area and take water therefrom and to use the water so taken or diverted for domestic use and for any purpose in connection with exploring for minerals on the area; and
(e) conducting a geological, geophysical, geochemical, magnetic or other survey.

"Tenement" means the area of the mining lease.

"Mining" includes without limitation fossicking, prospecting and exploring for minerals and things that may be mined, extracting petroleum or gas from the land or from the bed or sub-soil under water, quarrying and mining operations.

The Honourable Paul Seaman QC
Presiding Member

23 July 1996

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Introduction

These are our reasons for determinations in respect of three applications by the State of Western Australia (the Government party) for determinations by the Tribunal pursuant to s35 of the *Native Title Act* 1993 (Cth) in relation to the proposed grant of a number of mining leases in the Eastern Goldfields of Western Australia.

Application number WF96/1 relates to the proposed grant of two mining leases to Sons of Gwalia Limited, application number WF96/5 relates to the proposed grant of four mining leases to Mt Edon Gold Mines (Aust) Ltd and application number WF96/11 relates to the proposed grant of a mining lease to Messrs D J and R M Cottee and P J Townsend. Unless it is necessary to differentiate between them we shall refer to those parties as the grantee parties.

Mr Ted Coomanoo Evans (the native title party) has registered two native title applications on behalf of the Koara people on the Register of Native Title Claims which cover the whole of the area of the proposed mining leases.

All parties were represented by Counsel and it was agreed that the applications should be heard together since the legal issues and much of the evidence was common to all three applications.

Application WF96/1

This application relates to two proposed mining leases. The area of proposed mining lease ML37/491 is 703 hectares situated on pastoral leases 10 kilometres north-east from Tarmoola Townsite in the Shire of Leonora. The greater part of it was subject to former pastoral leases which contained reservations in favour of Aboriginal people. In the past it has been the subject of mineral claims and an exploration licence. The grantee party applied for the mining lease pursuant to s67 of the *Mining Act* 1978 (WA) as a conversion of Exploration Licence 37/239.

About $80,000 has been expended by the grantee party on exploratory work on the area of the Exploration Licence and future work would consist of gridding, rotary air blast drilling and, depending on the results, reverse cycle drilling.

The area of proposed mining lease ML37/492 is 399 hectares situated 8 kilometres north-east from Tarmoola Townsite. A small part of the area is on a current pastoral lease. The application for this mining lease is made under s49 of the *Mining Act* as a conversion of prospecting licences 37/3808 and 37/3809.

About $40,000 has been expended by the grantee party on exploratory work in the area of the two Prospecting Licences and future work would consist of gridding, rotary air blast drilling and depending on the results, reverse cycle drilling.

Both proposed leases are within the native title party's registered native title determination application WC95/22, and also within the area of a former pastoral lease which was granted in 1933. Prior to 30 December 1932 various legislative schedules provided for access by Aboriginal people to unenclosed or unimproved parts of pastoral leases to seek sustenance in their accustomed manner.

The provision immediately prior to 30 December 1932 was "a full right to the Aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed but otherwise unimproved part of the said demised premises for the purpose of seeking their sustenance therefrom in their accustomed manner".

Pastoral leases granted between 30 December 1932 and 20 January 1935 contained no reservations of access to Aboriginal people, but on 21 January 1935 s106(2) of the *Land Act* 1933 came into operation, providing as follows:

> "Aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner".

In the general area of ML37/491 there are 10 sites registered under the *Aboriginal Heritage Act* 1972 (WA) and in the general area of ML37/492 there are 3. None of them appear to be on the tenements.

Application WF96/5

This application relates to the proposal to grant mining leases 37/493 to 37/496 50 kilometres south-east of Leinster in the Shire of Leonora on current pastoral leases. They are all the subject of the native title party's registered native title determination application WC95/42.

ML37/493, ML37/494 and most of ML37/495 are on the Weebo Pastoral Lease which was granted on 17 September 1980.

The area of the proposed mining leases ML37/493, ML37/494 and ML37/495 are respectively 1000 hectares, 988 hectares and 976 hectares. Most of the area was covered in the past by mineral claims, and all the proposed leases are within current Exploration Licence 37/183. The applications by the grantee party for these tenements

are made pursuant to s67 of the *Mining Act* 1978 (WA) as conversions of that Exploration Licence.

The grantee party has expended approximately $350,000 in exploring in the area of the Exploration Licence and future work on the proposed leases would involve drilling programmes. If ore were recovered from a mining operation it would be likely to be trucked to a treatment plant 35km away.

The area of proposed Mining Lease 37/496 is 281 hectares all of which was formerly the subject of prospecting licences or mineral claims. It is within the area of current Prospecting Licences 37/3823 and 37/3853 and the application by the grantee party for this tenement is made under s49 of the *Mining Act* as a conversion of those prospecting licences.

The grantee party has expended approximately $70,000 in exploring in the area of the Prospecting Licences and further work is required to evaluate its potential. If ore were recovered from a mining operation it would be likely to be trucked to a treatment plant 8km away.

Personnel are expected to report to management if other people are seen on the grantee party's tenements and no Aboriginal people have been seen in any of the areas involved.

In the general area of ML37/493 there are 17 sites registered under the *Aboriginal Heritage Act*, none of which appear to be on the tenements. There are no registered sites in the general area of ML37/494, ML37/495 and ML37/496.

Application WF96/11

This application relates to proposed Mining Lease 36/341 over an area of 121.4 hectares 10 kilometres north-west of Leinster. It is subject to the native title party's registered native title determination application WC95/42. All of the area has been covered in the past by gold mining licences or prospecting licences. It is congruent with Prospecting Licence 36/1116 and the application by the grantee parties was made under s49 of the *Mining Act* as a conversion of that prospecting licence. The whole area is within a current pastoral lease. In the general area of ML36/341 there are 3 sites registered under the *Aboriginal Heritage Act* which do not appear to be on the tenements.

The grantee parties have expended between $75000 and $80000 in exploring the tenement but they have now made an arrangement with a mining company which will expend up to $240,000 over the period of a year in a three-stage exploration programme. The first stage will involve the taking of soil samples over 4 or 5 days and

if the results were encouraging then rotary air blast drilling would be conducted over a period of 7 to 10 days, the drill being mounted on the back of a truck. If those results were successful a programme of reverse circulation drilling would take place using a larger drill over a period of 2 or 3 weeks. If the exploration programme was successful it is likely that an open cut mine would be developed which could require other areas for waste dumps and buildings to house machinery.

Mr R M Cottee has lived and worked close to the land concerned for many years and has never seen an Aboriginal person on it.

Sections 38 & 39 of the Native Title Act

Our jurisdiction under Subdivision B of Division 3 of the Act arises because the proposed grants of these mining leases involve the creation of rights to mine by the Government party, and are permissible future acts within the meaning of s26(2)(a) which refers to the creation of a right to mine, whether by the grant of a mining lease or otherwise. "Mine" includes exploration and prospecting: (s253).

The grants would be invalid if the Government party had not given notice of its intention to make them pursuant to s29 of the Act so bringing into operation the normal negotiation procedures provided for by s31 which is as follows:

> 31(1) Except where the notice includes a statement that the Government party considers the act attracts the expedited procedure, the Government party must:

a) give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
b) negotiate in good faith with the native title parties and the grantee parties with a view to obtaining the agreement of the native title parties to:
(i) the doing of the act; or
(ii) the doing of the act subject to conditions to be complied with by any of the parties.

> 31(2) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement.

The Government party has applied in accordance with s35 for determinations by the Tribunal pursuant to s38, stating in each of its applications that the negotiation parties have not been able to reach agreement on the doing of the proposed acts.

No negotiation party requested the Tribunal to mediate among the parties to assist in obtaining their agreement pursuant to s31(2).

Section 38(1) of the Act requires the Tribunal to 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.

By s38(2) it may not determine a condition entitling native title parties to payments worked out by reference to any grantee party's profit, income or production.

The criteria for making determinations are contained in s39(1) which is as follows:

39(1) In making its determination, the arbitral body must take into account the following:

(a) the effect of the proposed act on:
(i) any native title rights and interests; and
(ii) the way of life, culture and traditions of any of the native title 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 lands or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands 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; and
(vi) the natural environment of the land or waters concerned;

(b) any assessment of the effect of the proposed act on the natural environment of the land or waters concerned:

(i) made by a court or tribunal; or
(ii) made, or commissioned, by the Crown in any capacity or by a statutory authority;

(c) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands or waters concerned;

(d) the economic or other significance of the proposed act to Australia and to the State or Territory concerned;

(e) any public interest in the proposed act proceeding;

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

The Tribunal must take all reasonable steps to make the determination within 4 months from the making of the application if the act is the grant of a licence to prospect or explore and otherwise within 6 months: s36.

In the national interest or in the interest of a State or Territory, the Commonwealth Minister may declare that the determination is overruled or declare that it is overruled subject to conditions to be complied with by any of the parties: s42(2).

Statutory construction

The Prime Minister described this future regime in the following way in the Second Reading Speech, the Bill then being relevantly in the same terms as the Act.

> "Generally, governments may make grants over native title land only if those grants could be made over freehold title.
>
> This test is founded directly on a principle of non-discrimination. A government may not make a freehold or leasehold grant to somebody else over your or my freehold. If our title is to be extinguished, a government must acquire it and only for the purpose set down in compulsory acquisition legislation, and you or I must be given the protection involved. By contrast, a mining grant can generally be made over your or my freehold. It will be exactly the same for native title.
>
> This is a clear, fair test which land managers in all jurisdictions can use. It does not mean that native title will amount to the equivalent of freehold in all cases. Where native title has been established, or where there is a registered claimant in the federal or state systems, the bill provides a process of negotiation and, if necessary, determination by the tribunal on whether a proposed grant should proceed. The relevant minister will be able to override tribunal decisions in the state or national interest. This emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land. But it is also squarely in line with any principle of fair play. It is not a veto.
>
> The time frames set for notification, negotiation and arbitration are tight but fair. Provision is made for expedited processes where a particular grant would not involve major disturbance to land or interference with the life of Aboriginal communities. Moreover, classes of grant can be excluded from the negotiation process altogether where they would have minimal effect on any native title. Certain prospecting and exploration permits would be likely to fall within this category.
>
> Where native title has not yet been determined, governments will be able to ascertain whether there is a credible native title interest in land over which they wish to make a grant. Also, for example, a mining company operating on what has been assumed to be vacant crown land will be able to seek a determination whether native title exits. Normal compulsory acquisition procedures, including a right to compensation, will apply to native title land. This means that governments can acquire land from native titleholders, just as they can from other land-holders, for public purposes such as infrastructure development. The integrity of the land

> management system will thus be maintained. But we insist this be achieved in a way which respects the profound Aboriginal connection to the land and provides appropriate protections."

Later in the speech the Prime Minister also said:

> "Industry gains a very great deal from this bill because it imposes clear, statutory rules for land use where the Mabo decision left uncertainty. The bill does not lock land away. On the contrary, as I have explained, we are not setting up complicated barriers to mining exploration or operations."

In our view the passages from the Second Reading Speech to which we have referred indicate that the relevant provisions of Subdivision B are to be construed so that, so far as is possible, the Act will operate in harmony with the existing State and Territory regimes of land management including mining legislation. They are also to be construed on the basis that Aboriginal people, whether native title holders or native title claimants, have a right to be asked about actions affecting their land but are not given a veto over exploration and mining operations.

In North Ganalanja Aboriginal Corporation -v- Queensland (1996) 135 ALR 225 Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ commented as follows at 234:

> "Unless the Act is read with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued...."

Kirby J said at 266:

> "...Whilst the Act must be construed in accordance with its terms, it would be wrong for this court, or any court or tribunal in the land, to construe it narrowly or to sanction procedures which would have the effect of undermining, or frustrating, its operation as the parliament envisaged."

We consider that we should give a beneficial construction to provisions which are designed to protect native title or which otherwise reflect other Aboriginal interests and concerns so as to give the fullest relief which the fair meaning of the language of the Act will allow: Bull -v- Attorney-General (NSW) (1913) 17 CLR 370 at 384.

In our view the Tribunal's duty in making a determination requires a weighing of the various effects and interests referred to in s39 in accordance with the circumstances before it and we see no statutory indication that any one effect or interest is to be afforded any greater weight than any other. The researches of Counsel have not revealed any authority on the meaning of somewhat similar provisions contained in

s20(15) of the *Pitjantjatjara Land Rights Act* 1981 (SA) or in s44(8)(a) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

We accept the submission of Counsel for the Government party that the scheme of Subdivision B shows no intention to distinguish between the grant of rights by the issue of a mining lease and the exercise of those rights and that the effect of the proposed act referred to in s39(1)(a) is the combined effect of the grant of a right to mine and the exercise by a grantee party of the rights to mine under it.

By s75(1) of the Act any of the negotiation parties may make the application for a determination and it was common ground that no party bore any kind of burden of proof in this hearing, it being accepted that the answer to questions of that sort is likely to be found in considerations of natural justice or common sense and not in technical rules developed by the Courts: McDonald -v- Director General of Social Security (1984) 1 FCR 354 at 356.

We also accept the submission of Counsel for the Government party and the grantee parties that the Tribunal should only make findings of fact based upon logically probative material: Minister for Immigration & Ethnic Affairs -v- Pochi (1980) 44 FLR 41 at 68 per Deane J.

The right to negotiate was described in the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ in North Ganalanja Aboriginal Corporation -v- Queensland, supra at 235 as follows:

> "Thus, once an application for determination is accepted, the Act maintains the status quo as between the registered native title claimant on the one hand and the government and those having proprietary interests or seeking rights to mine on the other, unless the parties negotiate and agree on the resolution of their respective claims or a competent authority makes a binding decision.
>
> It is erroneous to regard the registered native title claimant's rights to negotiate as a windfall accretion to the bundle of those rights for which the claimant seeks recognition by the application."

At page 236 their Honours said:

> "...The Act simply preserves the status quo pending determination of an accepted application claiming native title in land subject to the procedures referred to.
>
> ...To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims...."

In our view the applications now before us are part of the process for the preservation of the status quo pending an approved determination of native title and in the light of the above passages we consider that Counsel for the Government party was correct to submit that we should not determine whether or not native title had been extinguished by the various pastoral leases to which we referred when describing the present and past tenure of the land concerned.

He submitted that we should look for evidentiary material consistent with the existence of native title and for evidentiary material as to the effect of the proposed act upon it. We think it is undesirable for us to say more on the topic than that, in this case, there is sufficient material both as to the existence of the claimed native title and as to the effect of the proposed mining leases upon it to give us jurisdiction to exercise our powers under s38 of the Act.

The Mining Act 1978 (WA)

In Western Australia mining leases are not only applied for where a mineable ore body has been identified as a result of prospecting or exploration activities but also at the expiry of the term of a prospecting or exploration licence when there is sufficient encouragement to convert to a mining lease to continue exploration. It can be seen therefore that a Western Australian mining lease is not what its name suggests. The grant of a mining lease under the *Mining Act* 1978 (WA) is the creation of a single right to mine for the purposes of the *Native Title Act* but for the purposes of the *Mining Act* it is the creation of two sets of rights with very different consequences. The first are rights to explore over more limited areas than apply to exploration licences and at higher rentals and with more onerous expenditure conditions than apply to either exploration licences or prospecting licences. The second are rights to carry out actual mining operations.

All these mining leases are applied for as conversions of either prospecting or exploration licences so as to enable the grantee parties to continue exploration with a right, but not an obligation, to carry out actual mining operations if continued exploration proves successful.

The interrelationship between prospecting licences and exploration licences on the one hand and mining leases on the other is as follows. The prospecting licences with which we are concerned remain in force for a period of two years with a possibility of extension for a further two years (s45) and the principal right which they confer is the

right to prospect for minerals. The maximum area of a prospecting licence is 200 hectares: s40.

An exploration licence is in force for a period of five years, the Minister having power to grant extensions of the term for further periods in exceptional circumstances: s61. Not less than half the area of an exploration licence is surrendered at the end of the third year and not less than half of the balance of the area is surrendered at the end of the fourth year: s65. The principal right which it confers is to explore for minerals. Its maximum area is 70 blocks each of 2.8 square kilometres.

When either an exploration licence or a prospecting licence expires the land which is subject to the licence shall not be marked out or applied for as a prospecting licence or an exploration licence by or on behalf of the person who was the holder immediately prior to the date of expiry within three months from that date: s45(2): s69.

However it does not follow that the area will be thrown open to other would-be prospectors or explorers if the holders of exploration or prospecting licences have not identified an ore body to be mined during the life of their tenements. This is because the holders of prospecting licences or exploration licences have a right to apply for, and to have granted, pursuant to s75 of the *Mining Act* one or more mining leases or one or more general purpose leases or both in respect of any part or parts of the land the subject of their licences which continue in force until the applications are determined: s49: s67.

An application for a mining lease is heard in open Court by the Warden who makes a report to the Minister recommending the grant or refusal of the lease. The Minister may grant or refuse it as he thinks fit. In the case of an application for a mining lease under s49 or s67 he is required to grant to the holder one or more mining leases or one or more general purpose leases or both in respect of any part or parts of the land the subject of the prospecting licence or exploration licence as the case requires and on such terms and conditions as he considers reasonable: s75(7).

The annual rental per hectare for a prospecting licence is $1.50 with a requirement for a minimum expenditure per hectare per annum of $40, and the annual rental per hectare for an exploration licence is 28 with a requirement for a minimum annual expenditure per hectare of $3.21. However the annual rental per hectare for a mining lease is $10 and the minimum annual expenditure is $100 per hectare.

The area of one mining lease may not exceed 10 square kilometres (s73)and any person may be granted more than one mining lease: s72. It is in force for 21 years with a right

of renewal for a further 21 years. Thereafter the Minister may renew it for further terms, but so that no additional term exceeds a period of 21 years: s78.

By s8 of the *Mining Act* "Mine" as a verb is defined as "includes any manner or method of mining operations" and "Mining operations" means "any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not and includes -

(a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral;
(b) operations by means of which salt or other evaporites may be harvested;
(c) operations by means of which mineral is recovered from the sea or a natural water supply; and
(d) the doing of all lawful acts incident or conducive to any such operations or purposes".

The same section defines "Mining" to include fossicking, prospecting and exploring for minerals and mining operations.

Section 85 of the *Mining Act* provides:

> 85(1)Subject to this Act, a mining lease authorises the lessee thereof and his agents and employees on his behalf to —

(a) work and mine the land in respect of which the lease was granted for any minerals;
(b) take and remove from the land any minerals and dispose of them;
(c) take and divert subject to the *Rights in Water and Irrigation Act* 1914, or any Act amending or replacing the relevant provisions of that Act, water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes, and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with mining for minerals on the land; and
(d) do all acts and things that are necessary to effectually carry out mining operations in, on or under the land.

> 85(2)Subject to this Act, the lessee of a mining lease —

(a) is entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and
(b) owns all minerals lawfully mined from the land under the mining lease.

> 85(3)The rights conferred by this section are exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted.

Mining conditions

A mining lease is granted subject to a condition that, among other things, the lessee shall be liable to have the lease forfeited if he is in breach of any of the covenants or conditions thereof: s82(1)(g).

Conditions and endorsements standardly imposed by the Minister on the grant of mining leases are as follows:

ENDORSEMENTS

The lessee's attention is drawn to the provisions of the *Aboriginal Heritage Act* 1972.

CONDITIONS

Survey.

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

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 District Mining Engineer. Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the District Mining Engineer.

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 the exploration program.

Unless the written approval of the District Mining Engineer is first obtained, the use of 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.

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

(i) the grant of the lease; or
(ii) registration of a transfer introducing a new lease;

advise, by certified mail, the holder of any underlying pastoral lease details of the grant or transfer.

No developmental or productive mining or construction activity being commenced until the tenement holder has submitted a plan of the proposed operations and measures to safeguard the environment to the State Mining Engineer for assessment; and until his written approval has been obtained.

The Government party's evidence is that the effect of the latter condition is that prior to the commencement of any new mining project the proponent must have written

approval to proceed from the State Mining Engineer, and to obtain the approval the proponent is required to submit a development proposal to the Regional Mining Engineer. That proposal is commonly referred to as a Notice of Intent and while the actual format and content of each Notice will vary according to the nature of the project, the Department of Minerals and Energy's "Guidelines for Mining Project Approval in Western Australia" lists the type of information which should be in the Notice including a detailed summary and list of commitments which will be available for public search, a very detailed description of the project, proposals for environmental impact and management, and social impacts specific to Aboriginal sites, non-Aboriginal heritage and other land users.

On the grant of the mining lease and at lodgement of a Notice of Intent each of the grantee parties will receive a document entitled "Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers". We shall refer to it in more detail later.

The difficulty arising from the nature of the mining lease

It can be seen that a Western Australian mining lease gives miners rights and authorities over a long term which affords them great flexibility of exploration together with the security that if an ore body is found as a result of their exploration efforts they have the right to carry out the actual mining operations.

It may seem strange as a matter of first impression that a miner can explore an area of land for 21 years with a right of renewal for a further 21 years without any obligation to undertake any actual mining operations at any stage but it seems that the mining lease is tailored to create the greatest possible incentive for miners to explore for minerals by giving them long-term access to land with a guarantee that they will have the right to undertake actual mining operations at any time throughout the term of the lease should the exploration prove successful.

The effect in law of the grant of a mining lease on native title rights and interests is that they continue to exist, but will have no effect in relation to the lease while it is in force: s238(8).

A number of consequences flow from the nature of Western Australian mining leases.

First in this case from the time when the normal negotiating procedures commenced the parties were left to negotiate without any real opportunity to consider the most important effects of the proposed grants, namely the impact of actual mining operations.

Secondly when an application is made for a determination in relation to the proposed act there are obvious difficulties for the Tribunal in applying the criteria in s39 to an actual mining operation which may never occur and about which little or nothing is presently known.

Thirdly the grantee parties are unable to give any worthwhile evidence about the nature and extent of the mining operations which might eventually be conducted with the result that the native title party cannot respond with any specific evidence about the effects of actual mining operations, or the interests, proposals, opinions or wishes of the Koara people in relation to the management, use or control of the land concerned.

Fourthly the Government party has difficulty in assessing its future liability for compensation in the event that it decides to grant the lease should the Tribunal's determination be that the act may be done.

Fifthly it is difficult for the Tribunal to give full consideration to the native title party's right to be asked about actions affecting his land and to achieve respect for his connection to the land by providing appropriate protection.

The result is that the Tribunal is placed in the position of weighing the criteria set out in s39 at the least logical stage of the process of exploration and mining.

Counsel for the Government party sought to meet some of these difficulties by submitting that in exercising our discretion we should have regard to the fact that it is unlikely that exploration on any of these mining leases will result in actual mining operations. The submission was supported by evidence by the Government party that 19,960 square kilometres of the State are the subject of mining leases but only 506 square kilometres are in fact mined.

The statistics would afford no comfort to a native title party whose land was ultimately affected by an actual mining operation. The authority to conduct mining operations will be possessed by the grantee parties upon the grant of the mining leases and our concern must be with the effect which the actual mining operations will have if the authority to conduct them is exercised.

The question whether it is or is not likely that the grantee parties will conduct actual mining operations on any of these tenements seems to us irrelevant.

A proposal for a formula to overcome the difficulty

The Government party's further attempt to deal with the difficulties to which we have referred is contained in a detailed written submission that a determination could be

made under s38(1)(c) that the proposed act be done on condition that compensation be paid other than pursuant to Division 5 and that its assessment could be deferred or adjourned to the later and more logical time of the lodging of a Notice of Intent.

Its concern is to know the maximum amount of compensation which could be payable in respect of the grant of these tenements before it decides to grant them. By virtue of s23(5)(b)(ii) of the Act the State will be obliged pay the compensation because there is no law of the State within the meaning of s23(5)(b)(i) which imposes the liability on the grantee parties.

It was submitted that the Tribunal should determine that the mining leases be granted on condition that the assessment of compensation be adjourned for determination by the Tribunal at the time within 30 days of the lodgment by the grantee party of its Notice of Intent and that the compensation to be assessed should not exceed a sum calculated pursuant to a formula: $A = (B x C) x (D x E), where:-

A is the amount to be paid into trust in accordance with s41(3) of the *Native Title Act*,

B is the area of land to be used for "mining purposes" as defined in the *Mining Act* ("the Mining Land") as determined by Department of Minerals and Energy based upon the information contained in the Notice of Intent expressed as a percentage of the total land area of the mining lease within the native title claim area,

C is the total land area of the mining lease within the native title claim area,

D is the value of the Mining Land as valued by the Valuer-General on the basis that the Mining Land is freehold land, and

E is the figure expressed as a percentage in respect of the extent to which the actual nature of the native title rights of the native title party over the tenement land equate to freehold as determined by the National Native Title Tribunal based upon evidence.

It was submitted that the value of the land should be determined by the Valuer-General on the basis of the land being freehold because the valuation or acquisition based upon an assumption of fee simple is the maximum compensation that can ever be ordered.

A body empowered to determine a value or fix a price might be able to perform its function by laying down some objective standard which could be applied certainly and mechanically by another (Racecourse Co-operative Sugar Association Ltd -v- Attorney-General (Q) (1979) 142 CLR 460), but in our view there is no analogy between valuation and price-fixing and the function performed by the Tribunal when it imposes a condition under s38 requiring the payment of compensation having regard to the wide

range of criteria in s39. Furthermore the functions of the Valuer-General, the Department of Minerals and Energy and the Tribunal which are proposed in the submission go far beyond the certain and mechanical application of an objective standard.

Quite apart from the question of our power to make a determination of that sort, there is, in our view no foundation for the proposition that a valuation based upon the assumption of fee simple acquisition of an area of land is the maximum sum which could ever be determined by way of compensation to native title holders for any loss, diminution, impairment or other effect of the proposed act on their native title rights and interests.

One can readily envisage that the assumed freehold value of a small area of vacant crown land in a remote location could be much less than compensation properly awarded to a native title party applying the principles or criteria set out in s123 of the *Mining Act*.

Furthermore we regard any attempt to make a comparison by way of percentage between the incidents of a particular native title and the incidents of a freehold title as artificial and arbitrary.

Can compensation be ordered other than pursuant to Division 5?

We deal next with the submission that we have power to determine that compensation shall be paid other than in accordance with Division 5 and to adjourn it for assessment by the Tribunal at some later stage.

As the proposed grant of these mining leases relate to onshore places, are not low impact future acts as defined by the Act, satisfy the similar compensable interest test which is defined by s240 and are not compensated by a law mentioned in that section, the native title holders are entitled to compensation for the act in accordance with Division 5: s23(4)(b).

Division 2 of the Act deals with past acts and native title, Division 3 deals with future acts and native title and Division 4 deals principally with compensation under the *Racial Discrimination Act* 1975 (Cth). Compensation payable under Division 2, 3 or 4 in relation to an act is only payable in accordance with Division 5: s48.

Section 51 of the *Native Title Act* relevantly provides:

> 51(1) Subject to subsection (3), the entitlement to compensation under Division 2, 3 or 4 is an entitlement on just terms

> to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.....
>
> (3) If:
>
> (a) the act is not the acquisition under a Compulsory Acquisition Act of all or any of the native title rights and interests; and
>
> (b) the similar compensable interest test is satisfied in relation to the act;
>
> the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines "similar compensable interest test").

Section 240 of the Act provides:

> 240 The **"similar compensable interest test"** is satisfied in relation to a past act or a future act if:
>
> (a) the native title concerned relates to an onshore place; and
>
> (b) the compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned.

In our view the effect of these provisions in the circumstances before us is that any compensation which might be involved must be determined applying the principles or criteria set out in s123 of the *Mining Act* 1978 (WA).

Section 123 relevantly provides:

> 123(1) On and after the coming into operation of the *Mining Amendment Act* 1985, in so far as the mineral is by virtue of section 9 the property of the Crown or the mining is authorised under this Act no compensation shall be payable in any case, and no claim lies for compensation, whether under this Act or otherwise -

a) in consideration of permitting entry on to any land for mining purposes;
b) in respect of the value of any mineral which is or may be in, on or under the surface of any land;
c) by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or
d) in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms.

> (2) Subject to this section and to sections 124 and 125, the owner and occupier of any land where mining takes place 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, whether or not lawfully carried out in accordance with this Act, and a person mining thereon is liable to pay compensation in accordance with this Act for any such loss or damage, or likely loss or damage, resulting from any act or omission on his part or on the part of his agents, sub-contractors or employees or otherwise occasioned with his authority....
>
> (4) Subject to subsection (1) and subsection (7) and taking into account the matters referred to in section 124 and section 125, the amount payable under subsection (2) to which an owner or occupier may be found to be entitled 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;
g) in the case of private land that is land under cultivation, any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding, the failure on the part of a person concerned in the mining to observe the same laws or requirements in relation to that land as regards the spread of weeds, pests, disease, fire or erosion, or as to soil conservation practices, as are observed by the owner or occupier of that land; and
h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining....

A determination of the compensation may only be made in accordance with s50 and an application may be made to the Registrar under Part 3 for a determination of the compensation: s50(2).

By s61 an application under s50(2) for a determination of compensation may be made by a person or persons claiming to be entitled to the compensation either alone or with others.

Section 13(2) of the Act provides relevantly that if the Federal Court is making a determination of compensation in accordance with Division 5 and an approved determination of native title has not previously been made the Court must also make a

current determination of native title as at the time at which the determination of compensation is being made.

Hence an application which proceeds by way of s61 involves a determination of native title and the Court will be satisfied that the claimant is a native title holder before the award is made. However the only applications before us are three future act determination applications made by the Government party pursuant to s75 of the Act.

Section 38(1)(c) provides that a determination can be made that the act may be done subject to conditions to be complied with by any of the parties and makes no mention of compensation but s41 provides:

> 41(1) Subject to this section:
>
> (a) a determination by the arbitral body; or
> (b) an agreement, a copy of which is given to the arbitral body under section 34;
>
> that the proposed act may be done subject to conditions being complied with by the parties has effect, if the act is done, as if the conditions were terms of a contract among the negotiation parties. The effect is in addition to any other effect that the agreement or determination may have apart from this subsection.
>
> 41(2) Where a native title party is a registered native title claimant, any other person (except a registered native title claimant) with whom the claimant claimed to hold the native title concerned is taken to be a negotiation party for the purposes only of subsection (1).
>
> 41(3) Subject to subsection (4), in the case of a determination by the arbitral body, if the conditions require the Government party or any grantee party to pay compensation to any native title party, the compensation is held in trust, in accordance with the regulations, until it is paid in accordance with section 52.
>
> 41(4) Subsection (3) does not apply if the determination by the arbitral body is:
>
> (a) a determination of compensation in accordance with Division 5; or
> (b) a determination of compensation on just terms for an acquisition of native title rights and interests under a Compulsory Acquisition Act.

Section 52 contains detailed provisions dealing with compensation held in trust and it is sufficient for present purposes to observe that it is repaid if there is an approved determination that there is no native title or if the future act is no longer to be done: s52(1) and (2).

In our view s41(3) deals with the compensation ordered to be paid in trust to any native title party at a stage when he or she is only a registered native title claimant and s41(4)(a) deals with a determination for the payment of compensation in accordance with Division 5 at a stage when the native title holders have been determined.

Subdivision B is in Division 3 and therefore compensation payable pursuant to a condition of a determination that an act may be done is only payable in accordance with Division 5. In our view when s48 speaks of compensation being payable in accordance with Division 5 it refers to the principles by which it is to be determined being, in these applications, the principles or criteria referred to in s51(3), which are those contained in s123 of the *Mining Act*.

It seems to us that s50 deals with a different subject matter, namely an application for an approved determination of native title referred to in s13(2) and s13(3)(a), the compensation again being determined by the application of the principles or criteria referred to in s51(3).

In our view we have no power to determine that compensation shall be paid other than in accordance with Division 5 and to adjourn it for assessment by the Tribunal at some later stage.

Can the Tribunal impose further conditions at the mining stage?

We have considered whether or not it is within our power to determine that the mining leases should be granted on conditions which deal with the exploration phase with a further condition that the matters be returned to the Tribunal to impose further conditions when a Notice of Intent is received by the Department of Minerals and Energy.

If we have such a power it would overcome the difficulties of prediction to some extent in that the Tribunal would be able to apply the criteria in s39 to an actual mining proposal, but it would have no power at that stage to determine that actual mining should not proceed. The result would, however, produce greater harmony between the operations of Subdivision B and the *Mining Act*.

However the Government party would be obliged to decide whether or not it would grant the leases and the grantee parties would be obliged to decide whether or not to take them up and carry out exploration without knowing what conditions might be imposed by the Tribunal to govern actual mining.

Because the grantee parties have applied for these leases for the purpose of further exploration it is highly unlikely that any of them would lodge a Notice of Intent within two months of the Tribunal's determination.

Within 2 months after the making of the determination the Commonwealth Minister has the power to make a declaration in the national interest or the interest of the State overruling the determination or overruling the determination subject to conditions to be complied with by any of the parties. Those interests will most frequently arise when an actual mining project is under consideration and if the Tribunal had power to introduce further conditions into its determination at a later stage, the Commonwealth Minister would be deprived of the power to overrule them.

The Subdivision speaks throughout of a single act of determination which the Tribunal must take all reasonable steps to make within 6 months after the application is made. After holding the inquiry the Tribunal must make a determination about the matters covered by the inquiry which states any findings of fact on which it is based: s162. Being a determination in relation to a right to negotiate application it is binding and conclusive: s165.

Reluctantly we have come to the view that the statutory intention is that the Tribunal shall hold one inquiry only followed within 6 months after the application by one determination which is complete in itself, stating the facts upon which it is based and the conditions to which it is subject. It follows that we consider that there is no power to resume the inquiry or impose a further set of conditions after the determination has been made.

Can the Tribunal require arbitration at the mining stage?

Having come to that conclusion we then considered whether it was within our power to make a determination that the act be done subject to conditions dealing with the exploration phase with the further condition that at the stage that actual mining operations are to occur the negotiation parties will then submit to an arbitration to determine the conditions upon which mining would proceed. That is a course which the negotiation parties could follow by agreement but if they did so the Tribunal could not make a determination: s37.

It would no doubt be possible to frame the condition on a basis which would select some appropriate person as arbitrator and oblige him or her to operate in a way similar to the Tribunal's way of operating pursuant to s109 and to apply the criteria in s39 in making the award. It would be possible to provide that the negotiating parties would

not be liable to each other for legal costs in the arbitration but otherwise the costs of the arbitration would have to be provided for.

The result of requiring the negotiation parties to proceed by way of arbitration would be that a central part of the Tribunal's determinative function would have been undertaken by an arbitrator who would not have taken the oath or affirmation of office provided for by s116 of the *Native Title Act* and would not have the statutory obligations pursuant to s109(2) of the Act. The President would be deprived of the power to allocate members to particular cases pursuant to s123(1)(c) and s124(2) of the Act.

The parties would be deprived of an appeal as of right on a question of law under s169 of the *Native Title Act*. There would be an appeal by leave of the Court on any question of law arising out of the award: s38(2) and (4) of the *Commercial Arbitration Act* 1985 (WA).

In our view the imposition of a condition of a determination to the effect that the question of the conditions upon which actual mining operations would occur should be referred to an arbitrator is outside the scope and purpose of the Act. We consider that on its proper construction it confers discretionary power on the Tribunal and on no other body or person to make determinations about the effect of rights to mine on native title: see Racecourse Co-operative Sugar Association Ltd -v- Attorney-General, supra, at 481. In our opinion the parties are entitled to the decision of the Tribunal and no one else on that matter: see Allingham -v- Minister of Agriculture and Fisheries [1948] 1 KB 780 at 781. It follows that we consider that we have no power to give an arbitrator the authority to make such a decision.

The power to impose conditions

A number of submissions were made as to the limits of the Tribunal's power to impose conditions pursuant to s38(1)(c) of the Act.

Counsel for the Government party submitted that by analogy to the reluctance of courts to order specific performance of complex agreements because of their inability to supervise performance the Tribunal should not impose complex conditions which would require ongoing supervision. In our view the Tribunal's powers are not confined to determining conditions which are capable of specific performance as contracts and in any event regard should be had to the power of the courts to fashion remedies suited to this novel statutory context

He further submitted, as did Counsel for the grantee parties, that because s41(1) of the Act provides that a determination has effect as if its conditions were terms of a contract between the negotiation parties it follows that the only conditions which should be imposed are those capable of enforcement as contracts. However s41(1) also provides that that effect is in addition to any other effect that the determination may have and we do not accept that the power of the Tribunal is limited in that way.

The submission of Counsel for the native title party was that the Tribunal could and should impose a condition that through the life of each tenement and any extension of the same the lessee should pay to the Minister for Mines annually each 30 June a sum equivalent to 5% of the gross amount expended in respect of mining operations on and connected with the tenement, being a sum which the Minister would pay to the native title parties. He submitted that this was a payment which should be made as an appropriate recognition of the native title party's property rights in the land concerned.

The rights which the native title party claims can be categorised as proprietary interests in the land concerned (Mabo -v- Queensland (No 2) 175 CLR 1 at 51) and, as we have said, we take into account the effect upon the claimed native title rights and interests of the exercise of any of the authorities and rights which the mining leases confer on the grantee parties. Whether or not a condition requiring a payment of 5% of expenditure would be prohibited by s38(2)(c) of the Act as a payment worked out by reference to any things produced it would in our view be a payment in respect of loss, diminution, impairment or other effect on the native title rights and interests resulting from the grant of the mining leases which must be determined applying the principles or criteria set out in s123 of the *Mining Act*: s51(1) and (3) of the *Native Title Act.*

In any event in our opinion there is nothing in the circumstances of these applications to indicate that we should assess any compensation at this stage. In our view that question should be dealt with by a separate application at a later stage.

Counsel for the Government party and the grantee parties submitted that the only power to impose a condition involving a payment of money is by way of a condition requiring a party to pay compensation to the native title party.

It seems to us, having regard to the beneficial nature of the provisions with which we are concerned that, quite apart from its power to assess compensation for loss, diminution or impairment of native title in accordance with s51(3)(b) and to impose a condition requiring its payment in accordance with s41(3) or (4), the Tribunal may impose a condition which involves the payment of money by a party if it considers it

appropriate to do so in the course of applying the criteria in s39 to particular circumstances.

In our view, subject to the limitation contained in s38(2), s38(1)(c) of the Act gives the Tribunal a very wide discretion to make a determination that an act may be done subject to conditions to be complied with by any of the parties. It must be exercised by reference to the criteria set forth in s39 and is controlled by the subject matter, scope and purpose of the Act: see Hot Holdings Pty Ltd -v- Creasy (1996) 134 ALR 469 at 484.

Without seeking to define the boundaries of the power we consider that it would support the imposition of conditions involving the payment of money when the Tribunal considers that to be necessary to give effective protection to the native title rights and interests and other matters of Aboriginal concern referred to in s39. A simple example of the exercise of the power would be the imposition of a condition that a particular party shall bear the costs of a site survey.

Counsel for the Government party then submitted that if the determined conditions were of such a nature that they were not capable of producing certainty and finality, then the Tribunal would not have made a valid determination. We do not think that such a proposition should be dealt with on a hypothetical basis. However in our opinion if a determination is made that rights to mine may be granted subject to conditions then the conditions should be so expressed that whenever they come into operation during the life of the tenement they clearly inform the negotiating parties of their respective obligations.

Counsel for the Government party further submitted that regimes of highly complex conditions were unfair and uncertain. We do not accept that submission. If circumstances arise which require the imposition of highly complex conditions then we are of the view that the Tribunal has power to include them in its determination.

He then submitted that it was not the role of the arbitral body to write a contract which the parties were unwilling to make. It seems to us that a determination that an act may be done subject to conditions to be complied with by any of the parties must inevitably have the effect of imposing on the parties an arrangement which they were unwilling to make consensually and we reject the submission.

Counsel for the grantee parties submitted that if the Tribunal came to the conclusion that a proposed act might be done subject to conditions, then procedural fairness required that the grantee parties should be heard as to the precise terms of the proposed

conditions before they were finalised. Whether or not there is such a requirement (which we do not decide), we indicated in the course of the argument that if we came to the conclusion that a determination should be made that the acts be done upon conditions to be complied with by any of the parties we would publish our reasons for coming to that conclusion, and would give a broad indication of the conditions we would require and then hear the parties further and probably invite them to confer together before reconvening to determine the precise conditions to be imposed. That is not a course which we would necessarily follow on other occasions.

Section 39(1)(a)(v) - Sites

Counsel for the Government party, supported by Counsel for the grantee parties, submitted that at this stage the native title party should provide the grantee parties at his own cost with all relevant information about areas or sites of particular significance and areas in which for any reason exploration or mining should not proceed. It was further submitted that as a mining lease can be no greater than 1,000 hectares in area the task should not be difficult. We observe that in practice the task may not be confined to an area of 1000 hectares because proposed mining leases ML37/493, ML37/494 and ML37/495 constitute one continuous area of 2,964 hectares.

Furthermore Counsel for the grantee parties relied upon passages in the reasons of Burchett J in Norvill -v- Chapman 133 ALR 226 at 254 where his Honour said that Aboriginal people wishing to avail themselves of remedies provided by the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) must do so on the law's terms, and submitted that the native title party has to say now what he is concerned about if he wants the law to protect it.

The submission articulates the need of the grantee parties to know where they may not explore or mine because of the presence of areas or sites of significance, but we think it overlooks important considerations of how that knowledge is to be acquired and transmitted by the native title party.

As we have said we consider that the provisions of s39 referrable to native title rights and interests and the concerns of native title parties require a beneficial construction and we think that in many circumstances the acceptance of the grantee parties' submission would impose unfair burdens on Aboriginal people having regard to their economic circumstances.

In our view in the circumstances of this case acceptance of the submission would undermine and frustrate the purposes of s39 which reflect the rights of Aboriginal people to be asked about activities on their land.

That question seems to us to involve considerations as to the release of knowledge in a way which conforms with native title rights and interests, accords with the way of life, culture and traditions of native title parties, the development of their social and cultural structures and certainly involves their interests, proposals, opinions or wishes in relation to the control of their lands.

In our view the Tribunal's function involves wider considerations than those which arise under heritage protection legislation and we do not see any support for the submission in the provisions of Subdivision B.

Counsel for the Government party further submitted that we should determine that the tenements may be granted without imposing conditions relating to protection of areas or sites of particular significance because the endorsement and the Guidelines to which we have referred afford sufficient protection. He submitted that the Tribunal should assume that the grantee parties will comply with the law. The submission of Counsel for the native title party was that the *Aboriginal Heritage Act* provides inadequate protection to the Koara people.

The document "Guidelines for Aboriginal Consultation by Mineral and Petroleum Explorers" contains a reasonable statement of the provisions of the *Aboriginal Heritage Act*. In particular there is reference to s5(b) which includes within the definition of "Aboriginal site" "any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent", to s17 which provides amongst other things that any person who excavates, destroys, damages, conceals or in any way alters an Aboriginal site commits an offence unless he is acting with the authorisation of the Registrar under s16 or the consent of the Minister under s18 of the Act, and to s62 of that Act which provides:

> "In proceedings for an offence against this Act it is a defence for the person charged to prove that he did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which this Act applies."

The document gives a number of reasons why consultation with Aboriginal interests should be sought, including the reason that some Aboriginal people are the traditional owners and/or custodians of sites or places which are of religious significance to

Aboriginal people. It says that in exploration of Crown land the consultation process is required prior to the commencement of exploration work but can await granting of title.

It gives detailed advice about which Aboriginal people should be consulted, and there are detailed suggestions about how the consultation should proceed.

Three main types of strategy to ensure that sites of importance to Aboriginal people are not disturbed by exploration work are mentioned, being site avoidance, work area clearance and site identification. There is a recommendation for ongoing consultation.

Section 38 requires the Registrar so far as is practical to maintain a register of places and objects to which the Act applies, but the Act protects Aboriginal sites whether their existence has been recorded or not.

Section 18 provides a mechanism for gaining the consent of the Minister where the owner of any land wishes to use it for a purpose which without Ministerial consent would be likely to breach s17. The holder of any mining tenement is included in the definition of "the owner of any land".

Section 28 of the Act establishes an advisory body by the name of the Aboriginal Cultural Material Committee.

It advises the Minister on any question referred to the Committee and generally on any matter related to the objects and purposes of the Act: s39(1)(e).

When the owner of any land gives a notice pursuant to s18 that he requires to use the land for a purpose which would be likely to result in a breach of s17 the Aboriginal Cultural Material Committee shall form an opinion as to whether or not there is any Aboriginal site on the land, evaluate its importance and significance and submit the notice to the Minister together with its recommendation as to whether or not the Minister should consent to the use.

The Minister shall consider its recommendation and having regard to the general interest of the community shall either consent or decline consent. If the owner of the land is aggrieved by the decision made by the Minister he or she may appeal to the Supreme Court: s18(5).

Criticisms of the *Aboriginal Heritage Act* are that the penalties are inadequate, and that s18 does not require consultation with native title parties before the Minister makes a decision nor do the native title parties have any right of appeal against it.

We must have regard to the native title rights and interests involved, the way of life, culture and traditions of the Koara people, the development of their social and cultural structures and their interests, proposals, opinions or wishes in relation to the control of their lands in determining whether or not we should impose any condition in relation to the protection of areas or sites of particular significance to the native title parties in accordance with their traditions.

We will in due course refer in detail to the evidence adduced on behalf of the native title party, but in our view it justifies the concerns of the Koara people that the *Aboriginal Heritage Act* does not afford them justice and supports the imposition of conditions which will control the method of site clearance, and which will provide for the expenses of the native title party so as to enable the Koara people to participate fully in that activity.

Section 39(1)(a)(vi) - Natural Environment

Counsel for the Government party submitted that this provision requires the arbitral body to take into account the effect of the proposed act on the natural environment as affecting both the native title party and the broader community. We accept that we are concerned with the environmental effect of the proposed act viewed both from an Aboriginal perspective and from the perspective of the broader community.

There was evidence from an officer of the Department of Minerals and Energy about the administrative procedures laid down for the environmental management of mining proposals. Any environmental commitments made in the Notice of Intent become conditions of the mining lease and an unconditional performance bond is required to secure compliance. Further conditions require a brief annual report outlining mine site environmental management and the *Mining Regulations* give environmental officers of the Department authority to enforce environmental requirements.

Counsel for the Government party submitted that the exercise by the Minister for Mines of his powers pursuant to s84 of the *Mining Act* would be adequate to protect the environment in these cases.

It is not necessary to make any detailed analysis of the nature and effect of the Department's environmental procedures to determine their adequacy because there is very limited evidence before us about the environments involved. The tenements are all on current pastoral leases and the evidence reveals that there are kangaroos, emus and goanna and other fauna to be hunted and emu eggs and flora to be gathered. They lie in an area running from Norseman to Wiluna in which mining and exploration have been

intense over the last 100 years. We see nothing in the material before us which would justify a condition directed to the protection of the natural environment

Section 39(1)(d) - Economic or other significance

The circumstances of these applications require us to consider what is meant by "the economic or other significance of the proposed act" in s39(1)(d) and whether or not those words have a more confined meaning than "any public interest in the proposed act proceeding" in s39(1)(e). There is in our view no material before us to support a conclusion that the grant of any one of these mining leases has any great significance in its own right but Counsel for the Government party submitted that we should have regard to its significance as a necessary part of ongoing exploration activities which are essential to the health of the mining industry and hence of significance to the economy. The submission of Counsel for the native title party is to the contrary. Although the point is a narrow one we think the ordinary meaning of the words "significance of the proposed act" in s39(1)(d) require us to consider the proposed acts upon their own merits. We are of the view that the individual economic or other significance of each of the proposed grants to Australia or to Western Australia is so small as to be of little account in making our determinations.

However there is evidence of the public interest in the making of the proposed grants to which we now turn.

Section 39(1)(e) - Public Interest

In our view s39(1)(e) is a broader provision than s39(1)(d) and requires us to take into account the public interest in the protection of native title and also evidence of the public interest in the continuity of exploration and mining.

There is evidence from the Government party of the significance of the grant of these tenements as a necessary part of ongoing exploration activities which are essential to the health of the mining industry and hence of significance to the economy. Western Australia is one of the world's leading mineral resource provinces and is a major producer of minerals on a national and international basis. Mineral exploration and production are a key part of the Western Australian economy, and a major contributor to Western Australian and Australian export income and to the State and Federal Government revenue. The mining industry generates significant employment in other sectors of the Western Australian economy. Its future depends upon the discovery of new reserves to replace those currently being extracted.

Although we have given very little account to the economic or other significance of the proposed grants under s39(1)(d), we regard the evidence of public interest in the proposed mining leases proceeding as a matter which we should take into account pursuant to s39(1)(e).

Section 39(1)(f) - Any Other Relevant Matter

If we consider any other matter relevant we must take it into account. It seems to us that a matter can only be relevant if it falls within the subject matter, scope and purpose of the Act. We consider that it is relevant that the native title party is able to pursue an application for compensation under s61. We also regard it as relevant that the grantee parties all had either prospecting licences or exploration licences before 1992 and made expenditures on exploration in a context in which the *Mining Act* gave them rights to the grant of mining leases.

The native title party's evidence

The Koara people are descended from the Aboriginal people who inhabited the land concerned at the time of European contact and had exclusive use of it. Their traditional law is part of Western Desert law. They live in Leonora and throughout the Western Desert region and all the proposed mining leases are within their traditional country.

They have always enjoyed unrestricted access to pastoral leases and some Koara people have worked on pastoral stations. They use the areas concerned for hunting, gathering, camping, using the resources of the land and teaching their traditions, knowledge of country and language to the younger generation.

They are concerned with maintaining access to and use of the land for these traditional purposes. Knowledge of language remains strong and there are active speakers. Knowledge about sites and dreamings continues to be passed on and the right to speak about these remains subject to the sanctions of Western Desert law. Certain areas of site-related knowledge remain restricted.

Although they have always had a desire to have a say over what happens on their land they have had none in the past in relation to activities around Leonora which have affected their life.

In the past mining operations have affected sites in their vicinity because the mining operations have altered the landscape. The Koara people are concerned that future mines will change the landscape and affect areas of significance in the vicinity. They have experienced the destruction of one of their significant sites by a mining company

despite assurances that it would be protected and they are not satisfied that the *Aboriginal Heritage Act* affords them justice.

They feel they have a right to have a say over mining operations and other activities on the land which have affected their life and feel the need for their elders to give consent for all activities on the land.

Exploration activities may affect seasonal hunting and gathering and the Koara people would like consultative arrangements to avoid that possibility and to ensure that their interests are not affected.

The most important matter which worries them is the protection of sites in the area of the proposed tenements. They would like a strategy for consultation between the grantee parties and themselves that ensures site clearance and protection during exploration and mining and also ensures their ongoing freedom of access. They would also like to be able to further negotiate over matters of concern at the mining stage and the flow-on of possible economic benefits.

Mining operations in the area have not so far produced any real benefits for the Koara people and one of them has produced a considerable amount of dust.

It is difficult to say by reference to a map whether a mining tenement affects a site and usually it is necessary to visit the area to be sure. It may be necessary to involve a number of Koara people in the visit.

The Koara people have responsibilities in relation to sites stretching out into other communities in the Western Desert. There is no traditional basis for giving authority for the destruction of a site. However there are Koara people in Leonora who are able to give a clearance for activities that do not impact on sites. The Koara people do not have the financial resources to enable them to participate in a liaison committee which would visit the ground concerned.

There are areas or sites of particular significance in the vicinity of mining leases 37/492, 37/493, 37/494, 37/495 and 36/341 and either within or near to mining lease 37/491.

Conclusion

As we have said we see no statutory indication that any one effect or interest referred to in s39 is to be afforded any greater weight than another and the outcome of any application of this sort must therefore turn upon its own particular facts. Whenever we have referred in these reasons to evidence before us we accept it as the fact.

Giving a beneficial construction to the provisions of s39 which are designed to protect native title or otherwise reflect Aboriginal interests and concerns, and in the context of the whole of the evidence, we have given weight to the significance to the Koara people of access to the land concerned, their right to be asked about activities upon it, their economic interests in it and their desire to obtain some sort of benefit in the event that actual mining operations occur.

We bear in mind that the native title party's position is that he is not opposed to mining but he is concerned about the protection of the rights and interests of the Koara people in the event that it occurs.

We also bear in mind the fact that the provisions of the Subdivision are not intended to produce a veto in relation to mining activities and that there is a public interest in the grant of mining leases and the ongoing development of the mining industry in the State.

These hearings are part of a procedure designed to preserve the status quo pending an approved determination of native title and we consider that questions of compensation, limited as they are by the *Mining Act,* can be dealt with separately at that stage.

We have referred in detail to the difficulty achieving harmony between the provisions of the *Native Title Act* and the *Mining Act* because of the nature of a West Australian mining lease.

There may well be circumstances in which the Tribunal's inability to impose further conditions at the stage of the Notice of Intent would lead to a determination that a mining lease must not be granted when, if the process of normal negotiation had led to a fruitful result, an agreement between the negotiating parties could have permitted the grant to be made.

However we do not think that the circumstances before us lead to the conclusion that the mining leases must not be granted, and we consider that a determination should be made that the mining leases may be granted on conditions which give some consideration to Aboriginal concerns and interests at the stage when actual mining operations are contemplated.

We are quite satisfied that a determination in the circumstances of this case that the mining leases should be granted without conditions would have the effect of frustrating the operation of the Subdivision in the manner which the Parliament envisaged.

Outline of conditions

Our determination will be that each of the mining leases may be granted subject to conditions. We do not at this stage attempt to define their final terms, but on the publication of these reasons we will discuss with Counsel the terms upon which we shall require them to exchange written submissions and confer before we hear them further on the precise terms to be included in our determination.

Conditions which we will impose must provide for:

> the freedom of the Koara people to access and use the land concerned subject to provisions to avoid interference with the grantee parties' activities, and to ensure safety.

As to areas or sites of particular significance we will impose conditions which provide that:

> the native title party notifies the grantee parties of any concerns relating to sites within a set period;
> if no notice is given within that period there are to be no restrictions on exploration and mining within the tenements;
> if the notice is given there shall be no exploration until a site survey and clearance has been conducted;
> the native title party is to conduct the site survey and clearance within a set period upon maps to be provided by the grantee party and returned by the native title party with sites accurately located within a set period;
> if required, the parties will meet on the ground to clarify boundaries;
> there be no exploration or mining on the areas located by the native title party in relation to sites;
> the confidentiality of the native title party's site information is secured;
> that copyright in the marked map remains with the native title party with the right of the grantee parties to use it for the purposes of the mining lease;
> the fair and reasonable actual costs of the native title party in relation to the initial site clearance should be borne by the grantee parties.

Because of the importance of ensuring that the native title party is asked about activities on the land concerned we require conditions that ensure that he is fully informed about exploration and actual mining operations before they take place.

We will require conditions which provide that:

> the Notice of Intent, excluding sensitive commercial data, should be provided to the native title party by the Government party within a set period;
>
> the native title party is to notify the grantee parties within a set period of his desire to commence good faith negotiations towards an agreement over matters of concern to the native title party arising out of the proposed mining operations. These should

not be limited to considerations raised by s39 of the Act and should include possible socio-economic benefits to the native title party in respect of the mining operations;

the negotiation process be carried out within a set period and that mining operations should not proceed until the negotiation process has been completed.

We shall require a condition which ensures that all the other conditions we impose are binding upon any assignee or transferee of a mining lease.