Reported at (1998) 163 FLR 274

NATIONAL NATIVE TITLE TRIBUNAL

Minister for Mines, State of Western Australia/Ted Coomanoo Evans on behalf of the Koara People/Sons of Gwalia Limited (WF 96/1);Tarmoola Australia Pty Ltd (formerly Mount Edon Gold Mines (Aust) Ltd (WF 96/5));DJ & RM Cottee & PJ Townsend (WF 96/11), **[1998] NNTTA 5 (19 June 1998)**

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

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

- and -

IN THE MATTER of a Future Act Determination Application

Minister for Mines, State of Western Australia (Government party)
- and -
Ted Coomanoo Evans on behalf of the Koara People (Native title party)
- and -
Sons of Gwalia Limited (WF 96/1)
Tarmoola Australia Pty Ltd (formerly Mount Edon Gold Mines (Aust) Ltd (WF 96/5))
DJ & RM Cottee & PJ Townsend (WF 96/11) (Grantee parties)

REASONS FOR DETERMINATION

Tribunal: The Hon C J Sumner, Ms Diane Smith and Mr Michael McDaniel
Place: Perth
Date: 19 June 1998

Catchwords: Native title - future act - applications for determinations for the grant of mining leases - applications remitted following Federal Court appeal - unavailability of Member - Tribunal reconstituted - further evidence received - whole of original determinations and conditions reconsidered. Propositions relating to future act determination inquiries and to conditions - types of conditions that may be imposed - determination and conditions controlled by the subject matter, scope and purpose of the *Native Title Act* - conditions must possess reasonable certainty of meaning and application - conditions not to leave outstanding issues unresolved by providing for further negotiations - condition relating to negotiated compensation not imposed. The criteria in s 39 *Native Title Act* - whether s 39 criteria can be applied where no productive mining intended - 'worst case scenario' approach

not applicable - consideration of weight to be given to criteria. Mining leases may be granted subject to conditions - conditions to take account of exploration and possibility of productive mining. Conditions imposed relating to - access - information - protection of sites of particular significance - socio-economic impact assessment - environmental protection - employment and training - cultural awareness - liaison committee - assignment of lease - some conditions made conditions of the mining lease.

Legislation: *Aboriginal Heritage Act* 1972 (WA), s 18
Environmental Protection Act 1986 (WA)
Mining Act 1978 (WA) ss 78, 82, 85, 123
Native Title Act 1993 (Cth) ss 38, 39

Cases: *Dann v Western Australia* (1997) 144 ALR 1

Ted Coomanoo Evans v Western Australia, Federal Court, unreported, Nicholson J, 8 August 1997

Re Koara People (1996) 132 FLR 73

Western Australia v Thomas & Ors (1996) 133 FLR 124

Western Australia/Strickland (Maduwongga) & Ors, NNTT, WF97/4, Hon C J Sumner, 20 February 1998

REASONS FOR DETERMINATION

1. INTRODUCTION

The State of Western Australia ('the Government Party') made the following applications for determinations by the Tribunal pursuant to s 35 of the *Native Title Act* 1993 (Cth) ('the Act') in relation to the proposed grants of mining leases in the Eastern Goldfields of Western Australia north of Leonora:

- WF96/1 in relation to the proposed grant of 2 mining leases (M37/491 and M37/492 - respectively situated 10 and 8 kilometres north-east from Tarmoola townsite in the Shire of Leonora) to the Sons of Gwalia Limited;
- WF96/5 in relation to the grant of 4 mining leases (M37/493 to M37/496 - situated 50 kilometres south-east from Leinster in the Shire of Leonora) to Mount Edon Gold Mines (Aust) Ltd (now Tarmoola Australia Pty Ltd); and
- WF96/11 in relation to the grant of a mining lease (M36/341 - situated 10 kilometres north-west from Leinster) to DJ & RM Cottee & PJ Townsend.

Ted Coomanoo Evans, on behalf of the Koara people ('the native title party'), is a registered native title claimant over the whole of the areas of the proposed mining leases by virtue of registered native title claim WC95/22 over M37/491 and M37/492 and registered native title claim WC95/42 over M37/493 to M37/496 and M36/341, both of which were lodged in response to the Government party's s 29 notice of intention to grant the mining leases, and were targetted to cover the areas of those leases.

On 23 July 1996, the Tribunal constituted by the Hon Paul Seaman QC, Deputy President, Ms Diane Smith and Mr Michael McDaniel ('the Seaman panel') determined that the leases may be granted to the grantee parties upon certain conditions (*Re Koara People* (1996) 132 FLR 73 (*'Koara No 1'*)) ('the original determinations').

The original determinations of the Tribunal were the subject of an appeal to the Federal Court pursuant to s 169(1) of the Act. The Court allowed the appeal upon certain grounds and remitted the matter to the Tribunal (*Ted Coomanoo Evans v Western Australia*, Federal Court, unreported, Nicholson J, 8 August 1997 ('*Evans*')). Due to the unavailability of the Hon Paul Seaman QC, the President of the Tribunal directed that the Tribunal be reconstituted by the present members pursuant to s 125 of the Act. Section 125(5) provides that where the Tribunal is reconstituted, it may have regard to any record of the proceedings of the inquiry made by the Tribunal as previously constituted.

What follows are our reasons for determinations in relation to the above applications taking into account the original transcript and exhibits of the proceedings of, and submissions to, the inquiry made by the previously constituted Tribunal. The Federal Court order remitted the matter to the Tribunal 'to be heard and decided again in accordance with the law with or without the hearing of further evidence as the Tribunal shall decide.' Further evidence was allowed to be adduced by the native title party and the Government party (the grantee party declined to adduce further evidence). Given the test case nature of the case and importance of the conditions found to be invalid, the Tribunal permitted the parties to make submissions which went beyond the issues raised in the appeal, and reconsidered the whole of its original determinations.

The Tribunal does not repeat all the findings of fact in the original determinations and they are adopted in these reasons. Where necessary to assist in understanding, some of the findings of fact are repeated. Draft conditions prepared by the Tribunal were provided to the parties for comment on two occasions and further submissions were sought from the parties on a condition relating to a socio-economic impact assessment.

The Government party was represented by Mr Stephen Wright of the Crown Solicitor's Office, the native title party by Mr Michael Rynne of the Goldfields Land Council and the grantee parties by Mr Chris Stevenson of Mallesons Stephen Jacques.

2. BACKGROUND

(a) The nature of Western Australian mining leases

The rights given by the grant of a mining lease are provided for in s 85 of the *Mining Act* 1978 (WA) which states:

> '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.
>
> (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.

(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.'

Section 78 of the *Mining Act* provides that a mining lease is granted for 21 years and is renewable as of right for a further 21 years and thereafter at the discretion of the Minister.

Section 82(1)(g) of the *Mining Act* provides, amongst other things, that a mining lease is granted subject to a condition that the lessee shall be liable to have the lease forfeited if he or she is in breach of any of its covenants or conditions.

Conditions and endorsements which are usually imposed by the State Minister on the grant of a mining lease and which it is intended will be imposed in these cases 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 last condition reveals an important feature of most Western Australian mining leases, including the future acts the subject of these determinations; namely, that they are initially used for further exploration and that where productive mining is proposed the lessee must submit a plan of the proposed operations (called a Notice of Intent ('NOI')) to the State Mining Engineer and obtain his or her approval.

The original determination (*Koara No 1* at 86) referred to evidence that 19,960 square kilometres of Western Australia are the subject of mining leases, but only 506 square kilometres are in fact mined. In *WA v Thomas & Ors* (1996) 133 FLR 124 at 214-216 ('*Waljen*'), the Tribunal made findings on the number and type of mining leases in Western Australia which we adopt for this inquiry. As at the end of 1995, there were 5,030 mining leases in force in Western Australia and 200 operating mines. In the 10 years from 1986 to 1995, 8,286 mining leases were granted, 2,143 NOI proposals were received, including 108 NOI greenfields (new) proposals. It is clear from these figures that most mining leases are not used for productive mining and only a small proportion (on average less than 11 per year) relate to greenfields proposals.

(b) The original determinations

After looking at the nature of the Western Australian mining lease and the difficulties associated with not knowing whether productive mining would ever take place under the lease, the Seaman panel determined that the acts could be done subject to the following conditions ('the original 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.

On appeal, the Federal Court found amongst other things that the Tribunal had erred in law in its original determinations on two accounts:

(i) in concluding that it had no power to determine that compensation, as a condition imposed pursuant to a determination that the act could be done, be paid other than in accordance with Division 5 of Part 2 of the Act ('Division 5') (*Evans* at 4-16); and

(ii) in imposing conditions which, because they left outstanding issues between the parties unresolved, were an invalid exercise of power under the Act (*Evans* at 22-27). In particular, original conditions 3.1 to 3.7 were found to have been wrongly imposed.

3. THE LAW

The centrally relevant statutory provisions are ss 38 and 39 of the Act.

'**Kinds of determination**

Kinds of determination

38.(1) Except where section 37 applies, the arbitral body must make one of the following determinations:

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

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

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

Profit-sharing conditions not to be determined

(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or

(b) any income derived; or

(c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

Criteria for making determinations

Criteria

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.

Laws protecting sites of significance etc. not affected

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

General propositions

This matter and *Waljen* were treated as test cases by the Tribunal and the parties. In both matters the Tribunal attempted to enunciate propositions applicable to future act determination inquiries. They are not all repeated here, but taking into account the Federal Court judgment in *Evans* the following are important to our reconsideration of this matter. (See also *Western Australia/Strickland (Maduwongga) & Ors*, NNTT, WF/97/4, Hon C J Sumner, 20 February 1998.)

(1) The Tribunal 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 (*Koara No 1* at 80; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 614-615, 653 ('*North Ganalanja*')).

(2) The provisions of the Act which accord the right to negotiate to registered native title claimants as well as determined holders of native title are designed to maintain the status quo between the claimants on the one hand, and the Government and those having proprietary interests or seeking rights to mine on the other, pending a determination of native title (*North Ganalanja* at 616).

(3) In making a determination under s 38 the Tribunal must have regard to the matters listed in s 39 (*Waljen* at 165). The task involves weighing the various criteria by giving proper consideration to them on the basis of the logically probative evidence before the Tribunal (*Waljen* at 158, 162). A determination is then reached by application of the law to facts found by the Tribunal. The Act does not direct that greater weight be given to some criteria over others. The weight to be given will depend on the evidence (*Waljen* at 165).

(4) The Act attempts to strike a balance between the protection of native title rights and interests and the interests of the broader community. The legislation was enacted with the knowledge of the importance of the mining industry, and the right to negotiate provisions were intended to deal with the ongoing grant of mining titles (*Waljen* at 149, 150). Native title holders have a right to be asked about actions affecting their land, but are not given a veto (*Koara No 1* at 80).

(5) While the Tribunal may conduct its own enquiries, as a matter of general practice it will not where the parties are represented before the Tribunal (*Waljen* at 162). The primary responsibility for presenting evidence ordinarily lies with the parties (*Waljen* at 162). There is no onus of proof on any of the parties although parties will produce evidence to support their contentions, especially when the facts are peculiarly within their own knowledge (*Waljen* at 162).

General propositions relating to conditions

(6) Subject to s 38(2), s 38(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 out in s 39 and is controlled by the subject matter, scope and purpose of the Act (*Hot Holdings Pty Ltd v Creasy* (1996) 134 ALR 469 at 484; *Koara No 1* at 93).

(7) The parties to a future act matter may negotiate an agreement including a condition giving to the native title parties payments, whether worked out by reference to:

(a) the amount of profits made; or

(b) any income derived; or

(c) any things produced;

by any grantee party (as a result of doing anything in relation to the land or waters concerned after the act is done) (s 33), or otherwise *(Evans* at 14).

(8) Where no agreement is reached and it falls to the arbitral body to make a determination, s 38(2) expressly precludes that body determining a condition in the nature of those listed in s 33. By implication, conditions may thus be imposed entitling the native title parties to payments not worked out by reference to those matters listed in s 33 and s 38(2) (*Evans* at 14).

(9) The Tribunal may impose conditions involving the payment of money when the Tribunal considers it necessary to give effective protection to the native title rights and interests and other matters of concern to the native title parties referred to in s 39. For example, the imposition of a condition that a particular party shall bear the costs of a site survey (*Koara No 1* at 94). If monetary payments made as a condition of a determination are properly characterised as negotiated compensation under the Act, then they must be paid into trust (see below) (s 41(3)).

(10) The Tribunal cannot impose a condition whose effect is to confer on the Tribunal jurisdiction to conduct a second inquiry and impose further conditions at a later stage (*Evans* at 16-18). Three reasons were given by the Federal Court for this conclusion (*Evans* at 18) :

(i) A condition that the Tribunal may conduct a second inquiry at a time after the act was done, and impose further conditions would purport to confer upon the Tribunal the power to conduct an inquiry at any time after the act was done. The Act limits the Tribunal's role to a determination before the act is done. The Act speaks throughout of a single inquiry into a proposed act and a single determination.

(ii) To hold a second inquiry and impose further conditions would deny the Government party and the grantee party the option of choosing not to do the act, because they were already subject to those conditions (s 41(1)).

(iii) A two stage procedure may deny the power of the Commonwealth Minister to over-rule the determination and therefore the conditions (s 42).

(11) The Tribunal cannot impose a condition to the effect that the question of the conditions upon which the actual future mining operations would occur should be referred to an arbitrator (*Evans* at 18-22, 26). The Federal Court concluded that the 'determination of "the conditions upon which mining would proceed" ... is simply too wide to constitute a permissible delegation' *(Evans* at 22).

(12) Conditions must possess reasonable certainty of meaning and application (*Television Corporation Limited v The Commonwealth* (1963) 109 CLR 59 at 70 per *Kitto J; Evans* at 23, 25).

(13) Conditions as a matter of law must be consistent with the Act and relevant to its purpose. As a guide to the relevancy of conditions, s 39 of the Act is indicative (*Evans* at 22, 25).

(14) The purpose of s 38 is to have the arbitral body finally determine the issues where negotiations between the parties have failed to do so. It is inherent in s 38 that the arbitral body not leave the outstanding issues between the parties unresolved (*Evans* at 26). Based on this principle the Federal Court in *Evans* regarded conditions 3.1 to 3.7 of the original determination which together required the native title and grantee parties to negotiate further about proposed mining operations, to be an invalid exercise of power (*Evans* at 27).

The Federal Court did not elaborate on what other types of conditions might be invalid on the basis of this principle. It is our view that the proposition must be applied in the context of the proposed act. Not everything may be known about the proposed mining operations even when there is an actual proposal to mine. In this case it is not even known whether or not mining will take place. We regard this proposition as relating to issues which have already arisen between the parties. There may be other potential issues which have not yet arisen and which may not arise until productive mining occurs, which it is obviously not possible for the Tribunal to resolve, but which can be anticipated by the imposition of appropriate conditions that are certain in meaning and operation and do not involve an impermissible delegation of the Tribunal's functions under s 38 of the Act (see below).

A condition relating to compensation

There are two types of compensation referred to in the Act:

(i) final determinations of compensation for acts affecting native title which are dealt with in Part 2, Division 5 (ss 48-54) and Part 3 of the Act (s 61 provides for the making of native title and compensation determination applications) and which can only be made following a determination of native title (s 13(2)); and

(ii) 'negotiated compensation' which is compensation imposed as a condition of a determination made pursuant to s 38(1)(c), which must be held in trust (s 41(3)) until paid out in accordance with s 52 and which can be made in relation to both determined holders and registered claimants of native title.

Section 52 provides for negotiated compensation to be paid as follows:

> If a determination is made that there is no native title over the relevant area or the Government party no longer proposes to do the act, the negotiated compensation is repaid.
> If a determination is made that native title exists over the area, the native title holders may accept the amount of negotiated compensation in full settlement of their compensation entitlement or opt to have a determination made in relation to compensation.
> If a determination is made that a native title holder is entitled to compensation either:
>
> (i) the negotiated compensation is paid to the native title holder, where the amount of negotiated compensation is the same as the determined compensation; or
>
> (ii) the negotiated compensation is topped up by the Government party to the determined amount, where the amount of negotiated compensation is less than the determined amount; or
>
> (iii) the negotiated compensation is repaid to the extent that the determined amount is less than the negotiated compensation.
>
> If a determination is made that a native title holder is not entitled to compensation, the negotiated compensation is repaid.
> In some circumstances the negotiated compensation may be paid according to a direction of the Federal Court.

The Seaman panel in its original determination found that it had no power to determine that compensation (that is, negotiated compensation imposed as a condition of a determination pursuant to s 38(1)(c)) shall be paid other than in accordance with Division 5 of the Act. The effect of this decision was that any condition imposed by the Tribunal pursuant to s

38(1)(c) would have been determined by the principles or criteria referred to in s 51(3), which because of the operation of the 'similar compensable interest test' in s 240, means the principles and criteria in s 123 of the *Mining Act* (s 23(4) of the Act).

The Federal Court in *Evans* (at 16) found that the Seaman panel had erred in law in deciding that the Tribunal had no power to determine that compensation be paid other than in accordance with Division 5. The Federal Court accepted the submissions of all of the parties on appeal on this point that 'the Tribunal fell into error in failing to appreciate or accept there is a distinction to be drawn between (1) a determination pursuant to s 38 of the Act which, properly understood, includes the imposition of a condition which has the effect that the native title parties are to be entitled to compensation and (2) a determination of the compensation payable pursuant to Div 5 (ss 48 to 54) of the Act' (*Evans* at 12).

The conclusion from the Federal Court decision in *Evans* is that the Tribunal has the power to impose a condition pursuant to s 38(1)(c) requiring the payment of negotiated compensation to the native title party which does not have to be calculated by reference to the criteria in Division 5. It is also clear that imposing or declining to impose a condition relating to negotiated compensation does not preclude the native title party making a claim for compensation in accordance with Division 5 in the future.

For reasons which appear below we have decided that this is not an appropriate case in which to impose such a condition. It is therefore not necessary to consider the criteria by which it would be calculated. A number of possible approaches have been foreshadowed. The native title party argued that the Federal Court's decision in *Evans* meant that a condition for negotiated compensation could be imposed by reference to expenditure on mining operations; or loss, diminution, impairment or other effect on native title rights and interests; or by applying all or any of the priciples or criteria in s 123 of the *Mining Act*; or by any other criteria consistent with the provisions of the Act (that is, that did not involve a payment of the type prohibited by s 38(1)(c)). The Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, who intervened in the Federal Court appeal, was of the view that the negotiated compensation payments were in the nature of a security or bond and therefore of a different character to compensation payable under Division 5 (*Evans* at 13). In the Tribunal determination of *Western Australia/Strickland (Maduwongga) and Ors*, NNTT WF97/4, Hon C J Sumner, 20 February 1998 (at 16), the Tribunal expressed the view that it was entitled (but not obliged) when calculating the amount of negotiated compensation to have regard to the 'similar compensable interest test' and therefore in a case such as this the criteria in s 123 of the *Mining Act*.

4. THE FACTS

Section 39(1)(a)(i) - native title rights and interests; s 39(1)(a)(ii) - way of life, culture and traditions; s 39(1)(a)(iii) - the development of social, cultural and economic structures; s 39(1)(a)(iv) - freedom of access/ceremonies and other activities of cultural significance; s 39(1)(a)(v) - sites of particular significance.
Section 39(1)(c) - interests, proposals, opinions or wishes of the native title party.

The Seaman panel's findings in respect of these matters were as follows *(Koara No 1* at 98-99):

> **'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 interest 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 37492, 37/493, 37/494, 37/495 and 36/341 and either within or near to mining lease 37/491.'

These findings were largely based on evidence given by Mr Kado Muir, an Aboriginal anthropologist who was born at Leonora, who has been initiated under Aboriginal Law and has close connection with the Koara people. His evidence was endorsed by the registered native title claimant, Ted Coomanoo Evans.

The Tribunal makes the following more specific findings from the evidence presented to the Seaman panel. The Sons of Gwalia Mine and other mining activities at Leonora have affected the quality of life of Aboriginal people, but they have had no say in relation to them. Originally, the Sons of Gwalia Mine was mostly underground but since the 1980s has involved the digging of a large hole and a large dump next to it, which has affected Koara country and in particular the landscape of Mt Leonora and Mt Malcolm. Mt Leonora has traditional significance to the Koara people through the Dingo Dreaming which is an important story for the whole area around Leonora.

The native title party is worried about mining on the tenements which may adversely affect the landscape in the vicinity of them, particularly where the land contains sites, stories and Dreaming or Tjukurrpa. This worry and concern can occur even though the mining does not directly interfere with a site. Changes to the topography, landscape and atmosphere caused by a mine, can adversely affect appreciation of and participation in the Dreaming, even though the mine may not directly interfere with, or destroy, a site. At Mt Keith the mine has affected Aboriginal people's appreciation of the Dreaming and stories in the vicinity of it. The noise from the mine has destroyed their perception of the water snake travelling between the springs located in nearby hills. Further, the dust and other disturbance created by the mine adversely affects their appreciation of the Dreaming in the hills. Mr Muir expressed concern that what happened at the Sons of Gwalia mine in Leonora and the mine at Mt Keith should not happen if mining were to occur on the current tenements.

The Harbour Lights Mine near Leonora has also had an affect on Aboriginal people. The mine operates over what was an Aboriginal Reserve where previously there was a site and Law ground. After negotiations, the community was shifted to a village in Leonora and some compensation paid to enable the mine to proceed. The site was associated with a puppy from the Dingo Dreaming, and contrary to an undertaking which was given by the mining company, the site was interfered with. After complaint, the white quartz outcrop which made up this site was rebuilt in another location, which was the best result that could be achieved by the Aboriginal community. Aboriginal people now regard that site as just a pile

of rocks put there by the mining company. That site is 'just not a real site' when elders show it to young male initiates.

Exploration as well as mining can interfere with traditional hunting and gathering activities which include hunting emu, kangaroos and goannas and the gathering of emu eggs.

The native title party is concerned to ensure that in addition to protection of sites through a site survey there is ongoing consultation during both exploration and mining to minimise other adverse affects on their rights and interests such as access to hunting, obtaining bush tucker, the affect on the emu breeding cycle and the collecting of emu eggs for sustenance and as an economic resource. It considers that compensation should be paid to Koara people for taking the land away from them for at least forty-two years.

The native title party would prefer that a large mine was not developed in the area of M37/493 (WF 96/5) but if mining goes ahead sites should not be affected and there should be real benefits that flow to Aboriginal people.

The main economic base in Leonora for Aboriginal people is the CDEP (Community Development Employment Project) based on community use of funds equivalent to unemployment benefits. Very few benefits of mining have flowed to the Aboriginal community.

The native title party supported the establishment of a liaison committee to ensure that 'the agreement' is carried out. When referring to exploration, Mr Muir said that there should be a consultation protocol or strategy between community and miners, to ensure that the native title party's interests are not affected.

Additional evidence - Mr Kado Muir

Mr Muir gave further evidence to the reconstituted Tribunal in which he confirmed the findings referred to above that Koara life, culture and traditions involve regular hunting and gathering bush tucker for food, medicinal purposes and the making of artefacts. Koara Law which is similar to that of the Western Desert people generally still operates, for instance, in the Dreaming, stories, kinship systems and the way that animals are cooked.

Mr Muir gave further evidence of the Dreaming (Tjukurrpa) and Dreaming tracks common in the Western Desert and in the area of the Koara native title claim. Mr Muir stated that the Dreaming sets a blueprint for how people behave, it governs their life, who they are and how

they interact. The Dreaming to Aboriginal people is the past, present and future. It involves spiritual or mythological beings who may be people or animals. There are a lot of Dreaming beings in the Leonora area. If something happens to a site or story line from mining or exploration, it is a major responsibility on Aboriginal people who have a responsibility for that site under Aboriginal Law. Stories and Dreamings identify people with country and give them responsibilities for that country. If those sites are damaged or destroyed there may be repercussions to individuals who are supposed to have responsibility for the site; for example, sorcery and other punishments.

Mr Muir gave confidential evidence of the details of the Dreaming in relation to the Leonora area and the area covered particularly by the mining leases in WF96/1 and WF96/5. The Tribunal ordered, pursuant to s 155 of the Act that the evidence not be disclosed to the public and no transcript was made of it. Notes taken by counsel of the evidence will be handed to the Tribunal for disposal at the conclusion of the proceedings.

The following findings of fact are made without revealing the details of the confidential evidence, except where it had previously been disclosed at the original hearing. There are a number of Dreaming stories associated with the Leonora area which pass through Koara country to the north and beyond, including in the vicinity of the mining leases in WF96/1 and WF96/5. Aboriginal sites are not isolated places, but are connected with others through Dreaming stories. People view these places as a cultural whole - the effect on one site causes effects on other sites along the same Dreaming track. A break in this connection affects the integrity of the site. The native title party is worried about how exploration and mining will affect the cultural landscape, particularly given the major cultural features in Leonora which have been destroyed in the past. They are concerned that mining will create major disturbance to the cultural landscape and features, particularly those which exist in the vicinity of the tenements in WF96/1 and WF96/5. If the Dreaming is disrupted there may be serious repercussions and persons who have permitted it may be held responsible under Aboriginal Law. The Dreaming and related songs, dance and ritual are important for socialisation of children into Koara Law.

Mr Muir identified a site of particular significance to the native title party on M37/493 (WF96/5). The creeks which run across or in the vicinity of M37/493, M37/494 and M37/495 (WF96/5) relate to Dreaming stories and tracks and have cultural significance as well as environmental significance for hunting. Marshall Pool is to the west of these tenements and still frequented by Aboriginal people for hunting, water, camping and the exercise of other native title rights. Mr Muir is concerned that mining could have an adverse

environmental impact on this area. The names of Dreaming sites are handed down to other people and they become responsible for the care of those sites.

The Koara people have had experiences with mining which they fear eventually will destroy the songlines of the Dreaming. In the past they have not generally been consulted by the mining companies. There is currently activity near M37/491 and M37/492 (WF96/1) which the Koara people are upset and concerned about. People feel affected and upset personally by intrusions on their land caused by exploration and mining.

The Koara people are not opposed to mining, but in order to form a view about it they want to know what is proposed; have a say over what happens on the land; ensure sites are protected; and be able to share in the benefits.

Additional Evidence - Mr Darryl Pearce

Mr Pearce is an Aboriginal person with considerable experience in negotiating on behalf of Aboriginal people about mining. From his discussions with the registered native title claimant, Ted Coomanoo Evans and his son Richard and family, Mr Pearce formed the opinion that the concerns of the Koara people about mining were similar to many of those of Aboriginal people generally.

He confirmed the evidence given by Mr Muir about the potential impact of mining on Aboriginal people's appreciation of and participation in the Dreaming. Aboriginal people worry about mining and where consent has been given to a mine with a major impact on the landscape, without full knowledge, there is a feeling of responsibility for having let down the rest of the community. It is important for Aboriginal people to know what is proposed about the type and scope of a mine, so that a proper assessment can be made of its impact and the question of compensation considered. Under Aboriginal traditional Law, compensation can be used to compensate both people whose lives have been directly affected, and others to whom obligations are owed for the Dreaming and stories that are affected.

The Government party and grantee party submitted that the Tribunal should largely disregard the evidence of Mr Pearce. We do not agree. In our view his evidence, combined with that of Mr Muir, supports a finding that mining can have a significant adverse affect on Aboriginal communities and particularly those with responsibility for country where the mining occurs. The country around the tenements in WF96/1 and WF96/5 in particular is of significance to, and the responsibility of, the Koara people. Mr Pearce's evidence also supports a finding that it is consistent with Aboriginal law that there should be consultation

and discussion about a mining proposal between miners and the Aboriginal people directly responsible for the relevant area and that knowledge of what is proposed enables consideration to be given to it by the Aboriginal people concerned according to their traditional procedures. This consideration includes the appropriate allocation of compensation if mining goes ahead.

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

WF96/1 : There are 10 sites registered under the *Aboriginal Heritage Act* 1972 (WA) in the general area of M37/491 and 3 sites in the general area of M37/492.

WF96/5 : There are 18 sites registered under the *Aboriginal Heritage Act* 1972 (WA) in the general area of M37/493 and M37/494, 1 site in the general area of M37/495 and 2 sites in the general area of M37/496.

WF96/11 : There are 3 sites registered under the *Aboriginal Heritage Act* 1972 (WA) in the general area of M36/341.

In each case the registered sites do not appear to be on the actual tenements. In providing the evidence relating to registered sites, the Aboriginal Affairs Department made it clear that sites that have not yet been entered on the Register may exist. This was confirmed by the native title party's evidence.

In his original evidence Mr Muir expressed the opinion that there were more sites than those registered in the vicinity of the tenements. He pointed to further sites and Dreaming stories near or on the tenements in WF96/1 and WF96/5. In his original evidence he referred to a Dingo Dreaming in the vicinity of M37/492 (WF96/1) and confirmed the significance to the native title party of the Sandy Soak and Mulla Soak registered sites.

He said that mining leases M37/493, M37/494 and M37/495 (WF96/5) were the tenements that worried the native title party the most. He confirmed the significance of the Katampul registered sites which are in the vicinity of M37/493 and M37/494. He identified Marshall Pool which lies to the west of these tenements as a site of traditional significance to the native title party and Turtle and Porcupine Dreaming sites in the same vicinity.

With respect to WF96/11, the 3 sites in this vicinity were all archaeological sites with an open access and significance code. Mr Muir also identified another site - Big Water Hole

(Matarr) in the vicinity of the tenement, but did not consider that there would be any interaction between the activities on the mining lease and the waterhole.

Mr Muir's additional restricted evidence elaborated on his original evidence in relation to sites. It confirmed the importance to the native title party of sites and Dreaming stories particularly in relation to the tenements in WF96/1 and WF96/5. He stated that areas such as hills and wash-out areas of creeks form part of a cultural landscape which is difficult to define strictly as (sites) under the *Aboriginal Heritage Act* but are nevertheless regarded as very important larger areas.

The Tribunal finds that the sites registered under the *Aboriginal Heritage Act* in WF96/1 and WF96/5 are sites of particular significance to the native title party in accordance with their traditions and that there are likely to be other such sites on, or in the vicinity of, the mining tenements in WF96/1 and WF96/5.

Section 39(1)(a)(vi) - natural environment

The Seaman panel concluded that it was not necessary to make a detailed analysis of the nature and effect of the environmental procedures of the Department of Minerals and Energy ('the DME') because there was very limited evidence about the environment involved. It referred to the evidence of hunting and gathering described above and that the tenements were all on current pastoral leases in a general area where mining and exploration had been intense over the last 100 years (*Koara No 1* at 97).

The Government party produced further evidence of the environmental protection procedures operating in Western Australia in the form of an affidavit from Colin Jeffrey Murray, an Assistant Director (Environmental Impact Assessment) at the Department of Environmental Protection ('the DEP'). The evidence was provided in support of the Government party's contention that the social impact of mining operations on the Koara people could be examined as part of the general environmental assessment of a project.

Under the *Environmental Protection Act* 1986 (WA) an independent statutory authority, the Environmental Protection Authority ('the EPA'), is given responsibility for protecting the environment. It works in close cooperation with the DEP which in practice does most of the EPA's administrative work. There are three ways under the *Environmental Protection Act* in which proposals may come to be assessed by the EPA (s 38). They are:

(i) Referral by a decision-making authority, proponent or any other person where a proposal appears likely to have a significant effect on the environment. A decision-making authority must refer such a proposal and the proponent or any other person may do so. A decision-making authority is any public authority empowered by law or by agreement with the State to make a decision in respect of a proposal. The DME is a decision-making authority in respect of mining proposals.

(ii) Referral by the Minister for the Environment if it appears to the Minister that there is a public concern about the likely effect of the proposal.

(iii) Request by the EPA for a decision-making authority or a proponent to refer a proposal to the EPA where it considers that a proposal is likely to have a significant effect on the environment. In practice the EPA often receives informal notice for proposal from a decision-making authority, a proponent or members of the public. Request for referral following informal notice is the most common way in which proposals come to be formally assessed by the EPA.

Following referral to the EPA, advice is obtained from the DEP and the EPA makes a decision about the environmental assessment of the proposal (s 40). The EPA may decide that the proposal should, or should not, be assessed. The EPA may decide that no assessment or advice about the proposal is necessary. Without a formal assessment it may also conduct an informal review and provide advice which can be made public on request to assist the proponent and relevant decision-making authority to ensure the environment is safeguarded.

The EPA may also decide that a formal review and assessment is necessary and, if so, this may be carried out at three different levels depending on the importance of the project and the significance of its impact on the environment. These three levels are a Consultative Environmental Review (CER), a Public Environmental Review (PER) and an Environmental Review and Management Program (ERMP) each of which involves a process of public review of the proposal. The EPA may also, with the approval of the Minister for the Environment, conduct its own public enquiry.

The EPA also uses s 16(e) of the *Environmental Protection Act* to give advice to the Minister where a proposal, as defined in that Act, is contemplated but not actually in existence. This advice does not commit the EPA to recommending approval of a subsequent firm proposal, but enables it to advise generally whether development in a particular area is environmentally acceptable and to identify issues that will need to be addressed. Any subsequent proposal

that will have a significant effect on the environment still needs to be referred to the EPA for assessment.

The EPA may only choose no assessment or informal assessment if it considers that the potential environmental impact of a proposal is not significant. Otherwise it must choose one of the levels of formal assessment. In the case of a CER, PER or ERMP, the proponent prepares a public report in accordance with the guidelines prepared by the DEP (on behalf of the EPA) which also checks that the proponent has addressed all relevant issues. Following release of the report, the EPA receives public comments which are provided to the proponent who is required to prepare a written reply to them which is later published at the same time as the EPA's report to the Minister. On behalf of the EPA the DEP prepares a report, including recommendations which are considered by the EPA and sent to the Minister for the Environment. The Minister for the Environment will publish the EPA report and decide whether the proposal may be implemented, or implemented subject to specified conditions or procedures. In practice, in relation to mining, this decision has always been made with the agreement of the Minister for Mines.

The *Environmental Protection Act* contains appeal procedures. Any person may appeal to the Minister in respect of the EPA's decision not to assess a proposal or as to the level of assessment. Any person may appeal to the Minister in respect to the content of or the recommendations in the EPA's report. A proponent may appeal to the Minister against the Minister's decision to impose conditions or procedures.

The EPA has entered into a Memorandum of Understanding ('MOU') with the DME which governs the environmental impact assessment process between them. Under the MOU all proposed grants of *Mining Act* tenements on 'environmentally sensitive land' (which are specified in the MOU and include, for instance, proposals within a declared occupied townsite or within 2 kilometres of it; proposals within or less than 2 kilometres from the boundary of a national park, marine park or conservation reserve; proposals located within a declared water supply catchment area; and proposals involving the extraction from an open pit or underground operation in excess of two million tonnes of ore per annum) are automatically referred by DME to EPA for environmental assessment, whether or not the proposal appears likely to have a significant effect on the environment. On referral, the EPA will then determine the level of assessment, be it formal or informal, as set out above.

In addition to automatic referral by DME to the EPA in the case of environmentally sensitive land, all NOIs are 'notified' to the DEP by the DME. Initially this is in the form of a weekly

list of all NOIs. The DEP may seek further information about the NOI and provide advice to DME on the environmental protection aspects of the proposals which in practice the DME accepts by imposing conditions upon the approval of mining operations. If the DEP considers that any environmental impact identified in an NOI may be significant, it may request that the proposal be formally referred to the EPA for assessment after negotiation with the DME. Where mining proposals are not referred to the EPA, environmental issues are dealt with by the DME and may involve the imposition of conditions on the mining lease. The MOU acknowledges that the EPA does not abrogate its responsibility for environmental assessment and may request that any proposal be referred to it for assessment.

As a result of the Supreme Court case *Western Australia Incorporated v Environmental Protection Authority : ex parte Coastal Waters Alliance* (1996) 90 LGERA 136, the EPA in its report to the Minister cannot consider economic or commercial issues unrelated to the biophysical environment and cannot give policy advice about balancing economic and environment issues. These matters are for the Minister alone to consider, but the EPA may recommend to the Minister that he/she make enquiries about those matters.

The Government party's current approach to social impact assessment is explained in the following paragraphs from Mr Murray's affidavit which the Tribunal accepts:

> **'Social impact assessment**
>
> 24. There is no formal "social impact assessment" ("SIA") process as part of the State's environmental protection regime, though social impact forms part of the environmental impact assessment process under the *Environmental Protection Act* as outlined below.
>
> 25. There is no single accepted definition of SIA, and I understand the term to mean a comprehensive assessment of the direct and indirect costs and benefits to people resulting from a proposed activity. An SIA usually identifies and documents all of the ways in which a proposed activity will affect individuals and communities, including matters such as financial impact, quality of life etc, and identifies ways in which the social impact can be managed, including matters such as compensation, changes to the proposal etc.
>
> 26. The State used to have a Social Impact Unit as part of the Department of Resources Development which considered social impact on a "whole of Government" approach, but that was disbanded some time ago.
>
> 27. The EPA traditionally did not give a great deal of consideration to social impact. However there has been a change in the EPA's practice following the *Coastal Waters* Supreme Court case and an appeal under the *Environmental Protection Act* in respect of the Murrin Murrin Nickel project, both in 1996.
>
> 28. The EPA'S understanding of the *Environmental Protection Act* is now that, where a proposal has a direct effect upon the biophysical environment (that is, plants, animals,

landscape, water etc.), then the EPA can consider how those effects impact upon the social environment.

29. In particular, the EPA takes the view that the effect of a proposal on the social or cultural life of Aboriginal people is a relevant environmental factor to be taken into account in its review process provided the effect arises from a direct effect on the proposal on the biophysical environment. For example, in the context of an NOI and how that will impact upon Aboriginal people, the EPA would not consider whether the mine will provide employment opportunities or other economic benefits to the Aboriginal people because that does not relate to an effect upon the biophysical environment. However the Minister could consider such an issue. The EPA would consider whether the mine will affect local fauna which the Aboriginal people hunt, and it would consider the impact of the mine on the level and quality of water in a rock pool which was of spiritual significance to the Aboriginal people.
30. The EPA could come to the conclusion, and recommend to the Minister, that a proposal is environmentally unacceptable because of its likely impact upon Aboriginal people, including for example because of the impact upon areas or sites of spiritual significance.
31. The Murrin Murrin Nickel project was the first time that the EPA had to deal with issues particular to Aboriginal people. Prior to that, any such issues were usually referred to the Aboriginal Affairs Department for them to consider and deal with. In the Murrin Murrin case, following the appeal under the *Environmental Protection Act*, the Minister imposed a condition that the proponent consult with the affected Aboriginal people about the development of the project, including the detailed design and construction of the mine.
32. Aboriginal heritage and culture will now be considered as part of every assessment carried out by DEP and EPA. The current practice of the DEP and EPA is to encourage proponents to provide it in advance with archaeological and ethnographic survey information indicating potential sites of significance or areas of interest to aboriginal people in the area the subject of a proposal. This is a requirement set out in guidelines prepared by the EPA for the CER, PER and ERMP processes.
33. The EPA considers that it has an obligation to consider these types of interests notwithstanding the operation of the *Aboriginal Heritage Act* 1972 (WA) and the *Native Title Act* 1993 (Cth). That is, its obligation to assess environmental factors, including Aboriginal social and cultural issues, is not affected by an incidental protection of these interests under other legislation.
34. At the date of swearing this affidavit, I am not aware of any proposal referred or notified to the EPA/DEP by DME having required detailed consideration of Aboriginal social or cultural issues, other than the Murrin Murrin project.'

The additional evidence provided by Mr Muir made some reference to environmental concerns. In particular, Station Creek runs through M37/492 (WF96/1) and is the source of Leonora's water supply. Mr Muir said it was of poor quality and expressed concern about the quality of the water if mining proceeds. He was also concerned about the effect mining would have on Sandy Soak which lies between M37/491 and M37/492 (WF96/1) and the environmental impact of mining on the creeks which run through M37/393 and M37/394 (WF96/5) and on Marshall Pool to the west of these tenements.

Section 39(1)(b) - assessment of effect on the natural environment.

There is no evidence of an assessment of the effect of the proposed acts on the natural environment of the kind referred to in this criterion.

Section 39(1)(d) - economic or other significance.
Section 39(1)(e) - public interest.
Although concluding that the individual or other significance of each of the proposed acts to Australia or to Western Australia was so small as to be of little account in making its determination, the Seaman panel regarded the mining industry, its importance to the economy and the esssential role that continuing exploration plays in its continuing health as a factor to be taken into acount in the public interest.

Section 39(a)(f) - any other relevant matter.
Under this criterion the Seaman panel took into account that the grantee parties had all incurred expenditure pursuant to exploration or prospecting licences which gave them rights to be granted mining leases and that the native title party could pursue a claim for compensation under s 61 of the Act.

There are also a number of registered native title claims made by other Aboriginal people over the mining leases as follows:

M37/491 and M37/492 (WF96/1) - 6 overlapping claims;

M37/493, M37/494 and M37/495 (WF96/5) - 4 overlapping claims;

M37/496 (WF96/5) - 5 overlapping claims;

M36/341 (WF96/11) - 5 overlapping claims.

We regard these claims as relevant to the issue of imposing a condition relating to negotiated compensation.

In addition, registered claim No WC95/1 was lodged on 23 December 1994 by Ted Coomanoo Evans and Richard Guy Evans on behalf of the Koara People covering an area of 46,769.78 square kilometres which encompasses an area covering all the tenements, but which excludes M37/491 and M37/492 from the claim.

5. CONCLUSIONS AND CONDITIONS

General

The major concern identified in this matter and the other test case of *Waljen* is how the Tribunal can sensibly apply the criteria in s 39 to the grant of those Western Australian mining leases where the only thing which is definitely known is that they will be used for further exploration and that productive mining is not permitted until a NOI is given to and approval granted by the State Mining Engineer. The Seaman panel identified the substantial problems with these mining leases in the following way (*Koara No 1* at 86):

> '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 s 39 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.'

Conditions 3.1 to 3.7 of the original determination in particular were the Seaman panel's attempt to deal with this difficult situation by providing for a further period of negotiation at the productive mining stage. The conditions at least required the grantee party to listen to the native title party's concerns about the proposed mining operations and negotiate about them and provided some (albeit limited) opportunity for the native title party to be informed of any of the effects referred to in s 39 and to make suggestions about them. The invalidity of these conditions required the Tribunal to consider whether to make a determination that the acts may not be done, on the basis that it cannot take into account the criteria in s 39 because it does not know what activities the grantee party intends to carry out pursuant to the grant of the mining lease. The Tribunal considers that the act is both the grant of the mining lease and the exercise of rights under it (*Koara No 1* at 81; *Waljen* at 150-154).

It is arguable that the intention of the right to negotiate provisions of the Act is undermined in these circumstances. One of the major concerns of the native title party was to be informed of what would happen on their land so that they could deal with it in accordance

with their traditional procedures and give consideration to whether to agree to the proposal in the full knowledge of what is involved at the productive mining stage. In the Second Reading Speech on the *Native Title Bill* 1993 (Hansard, House of Representatives, 16 November 1993 at 2880) the Prime Minister said in relation to the right to negotiate that 'this emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land'. The evidence in this case demonstrates the importance that the native title party attaches to knowing what is going to happen on their land. It is arguable that this beneficial intention is thwarted in the circumstances of these mining leases, as the grantee parties cannot say what actions they intend to carry out on the lease areas, and that the Tribunal, given the limitations on its powers, should determine that the acts may not be done. It is the Tribunal's view that the current situation is a serious impediment to it properly giving effect to Parliament's intention.

The native title party sought to partly overcome the difficulties by submitting that in the absence of evidence of what the grantee party intended to do the Tribunal should act on a 'worst case scenario' (which was a test used by the Federal Court in *Dann v Western Australia* (1997) 144 ALR 1) when considering whether the expedited procedure is attracted. The expedited procedure is attracted if the proposed future act 'does not' interfere with the community life of the native title party or with sites of particular significance to them in accordance with their traditions, or cause major disturbance to land (s 237), and means that the Government party may do the act without negotiating in good faith with the other parties as otherwise required by s 31(1) of the Act. The Federal Court decided that in considering the expedited procedure the Tribunal should examine what is made possible on a 'worst case scenario' by the grant of the mining tenement taking account of the terms of the grant and applicable legislation, but not examine what is likely to happen in a particular case by considering what the grantee party intends to do. It is our view that the 'worst case scenario' approach cannot sensibly be adopted to resolve the difficulties in a future act determination of this kind. Unlike s 237, the wording of s 39 does not contemplate the Tribunal taking account of the criteria solely by reference to the rights which are accorded to a grantee party by the grant of a mining lease, without reference to what is actually proposed. It is difficult to see what a 'worst case scenario' would involve. Must the Tribunal assume that the effect of the grant will be that access and the exercise of native title rights will be denied to the native title party over the whole of the tenement for the term of the lease; or that the way of life of the native title party will be totally destroyed; or that the whole of the area will be mined by an open cut mine which destroys the vegetation and all

sites of significance. The criteria in s 39, including those relating to the economic significance and the public interest, are not consistent with an approach which only looks at the terms of the grant. Of course the arguments against the applicability of the s 39 criteria to a 'worst case scenario' also reinforce the argument that Parliament could not have intended the Tribunal to be forced to deal with the grant of a mining lease without knowing what was actually proposed to be done. Nevertheless, that is the situation presented to the Tribunal and we must make our determination even though we do not think the circumstances were envisaged by Parliament and with the qualification expressed below that in some situations, the only appropriate determination may be that the act may not be done because of the impossibility of giving proper consideration to the criteria in s 39.

Despite some reservations arising from the above circumstances, the Tribunal confirms the view of the Seaman panel that this is an appropriate case to determine that the acts may be done on conditions, and rejects the Government and grantee parties' contentions that no conditions are justified. In coming to this conclusion we have given weight to the native title party's concerns about the effect of exploration and possibly mining on the native title rights and interests which they exercise over the area of the mining leases and on sites of particular significance to them. The native title party have a spiritual connection to the country and a continuing physical connection through the exercise of native title rights in the form of access for the purposes of hunting and gathering for sustenance and economic benefit. Their way of life could be adversely affected by exploration and mining, but in weighing the various factors we have also taken into acount that there is no evidence that this involves the carrying out of rites or ceremonies on the lands. There is also no evidence that Koara people live as a permanent community in the vicinity of any of the tenements.

We have also given weight to the fact that the native title party is not opposed to mining provided conditions satisfactory to them are imposed. We acknowledge that the weight to be given to this latter factor is lessened because the native title party cannot be told what mining activities will be carried out and thus have less capacity to influence the sort of conditions which should be imposed. The development of the native title party's social, cultural and economic structures could be adversely or positively affected by mining, although the evidence is that in the past Aboriginal people have not benefitted from mining. We have given weight to the public interest in a viable mining industry in Western Australia and to the right to negotiate provisions not being intended to produce an Aboriginal veto over mining, but to deal with its ongoing development in a way which has beneficial regard to native title and their right to be asked. As with the Seaman panel (*Koara No* 1 at 98), we

have also had regard to the fact that the grantee parties have expended funds on exploration in circumstances which give them a right under the *Mining Act* to obtain a mining lease.

Although concluding on the evidence in this case that it is appropriate to make determinations that the acts may be done, we are still concerned that conditions should be identified to attempt to anticipate, as far as practicable, the possibility that productive mining will occur. In considering these conditions the Tribunal has been mindful of the principles laid down by the Federal Court contained in the propositions referred to above and, in particular, the need for the conditions to be relevant to the scope and purpose of the Act, to be reasonably certain in their meaning and application and to resolve the issues between the parties. We nevertheless note that these requirements of relevance, certainty and resolution have to be met in a context of unknown and uncertain future mining operations.

The Tribunal's conditions can be divided into those which apply to exploration and mining and which are mainly concerned with access and the protection of sites (conditions 1 to 3) and those which apply to productive mining (conditions 4 to 9). At the exploration stage the Tribunal considers that maintenance of access and protection of sites are the principal issues which need to be covered. We acknowledge that the native title party has concerns about exploration affecting their hunting and gathering activities, but do not regard a condition for consultation or socio-economic impact assessment at the exploration stage as necessary except for site protection. Exploration generally involves less disturbance than productive mining and is carried out intermittently. We also take into account that the total area of the Koara native title claim (WC95/1) is 46,769 square kilometres and the total area of these tenements is 4468 hectares (4.468 square kilometres) (*Koara No 1* at 76-77). There is no evidence that the claimed native title rights to hunt and gather over the total area of the claim are not generally exercisable, thus making the adverse impact of exploration on these tenements of less significance. Our conclusion is that while there is some potential for the exercise of native title rights to be interfered with by exploration, the Tribunal does not consider this to be a threat serious enough to warrant the imposition of any condition beyond those which secure access and protect sites. As a matter of practice, it could be anticipated that when consulting about sites the grantee parties would also discuss their proposed exploration activities with the native title party.

What follows is a commentary on the conditions to be imposed by the Tribunal and the original conditions imposed by the Seaman Panel.

Condition 1 - Access

There was no real dispute about this condition which is the same as that imposed by the Seaman panel. It directly relates to the criterion in s 39(1)(a)(iv) by ensuring that freedom of access by the native title party to the mining leases is maintained as far as possible and is relevant to the criteria in s 39(1)(a)(i) to (iii) by enabling the adverse effect of mining on these matters to be reduced.

Condition 2 - Notice of Grant

This condition is similar to that imposed by the Seaman panel, but modified to require that details of the mining lease be given within a specified time. It partly meets the native title party's concern to be informed about activities affecting their land, something which is essential if they are to fulfil their responsibilities in relation to it.

Conditions 3.1 to 3.13 (WF96/1 and WF96/5) and Conditions 3.1 to 3.5 (WF96/11) - Aboriginal Sites

A major concern of the native title party was to ensure protection of sites of particular significance to them in accordance with their traditions. These conditions replace original conditions 2.2 to 2.11 and cover both exploration and mining. The Seaman panel concluded *(Koara No 1* at 96) that conditions should be imposed for site clearance with the expenses of the native title party being met by the grantee parties so as to enable the native title party to participate fully in that activity. The Tribunal generally agrees with this conclusion which was reinforced by the additional evidence of Mr Muir. The Tribunal has modified the original conditions in the following ways:

(i) With respect to WF96/11, the Tribunal accepts that the evidence relating to sites in the vicinity of mining lease M36/341 is not such as to make it obligatory for a site survey and clearance to be carried out. Conditions relating to compliance with the *Aboriginal Heritage Act* are imposed, but the conduct of a site survey will be at the discretion of the grantee party, who will need to decide whether one is necessary to ensure compliance with the *Aboriginal Heritage Act.*

(ii) Compliance with the *Aboriginal Heritage Act* is specifically made a condition of the determination that the acts may be done and the Government party is required to make this a condition of the grant of the mining leases (conditions 3.1 and 15). This will mean that if the grantee parties breach the *Aboriginal Heritage Act* the mining leases will be liable to forfeiture.

(iii) Condition 3.4 in WF96/1 and WF96/5 makes it clear that, even if the native title party does not nominate a person to participate in the Site Survey and Clearance Team, the *Aboriginal Heritage Act* still applies. The original condition 2.2, which allowed the grantee party to 'exercise all the rights given by the mining lease' if no notice of concern about sites was given, could have been taken to mean that the grantee party need no longer be concerned with the *Aboriginal Heritage Act.*

(iv) As a consequence of explicitly making compliance by the grantee parties with the *Aboriginal Heritage Act* a condition of the determinations and the mining leases, the obligation to conduct the site survey and clearance is imposed on the grantee parties (condition 3.2 in WF96/1 and WF96/5) with participation by the native title party.

(v) If the provisions of s 18 of the *Aboriginal Heritage Act* (which permit the Minister to approve interference with or destruction of a site) are activated, the native title party is to be notified of any recommendations made by the Aboriginal Cultural Material Committee to the Minister and thus be in a position to make submissions to the Minister before a final decision is made.

(vi) The original conditions required a complete site survey and clearance prior to exploration, over the whole of each tenement. The Tribunal has acceded to the grantee parties' submission that this requirement be modified. Condition 3.2 (in WF96/1 and WF96/5) now only requires the site survey and clearance to be carried out over those parts of the tenements where it is intended to conduct exploration, mining operations or associated works. The grantee parties may decide to clear the whole area at the outset or do it on a piecemeal basis, in response to their proposed exploration or mining activities.

The grantee parties submitted that condition 3.8 should include bona fide prospective financiers of the grantee party as persons to whom the grantee party is permitted to disclose information about sites on the basis that it is needed for financial due diligence requirements to be met. The Tribunal is concerned to ensure as far as possible that information about sites

is dealt with in accordance with the traditions of the native title party. In our view the condition contains sufficient scope for due diligence requirements to be met.

Conditions 4.1 to 4.2 Productive mining - Notice of Intent information provisions

Conditions 4, 5, 6, 7, 8 and 9 are the Tribunal's attempt to ensure that at the productive mining stage, as far as possible, any adverse impact on the native title party's interests are minimised and any potential benefits to them maximised. Information is to be provided to the parties about issues, some of which are covered by s 39. The Tribunal does not pretend that these conditions are entirely satisfactory from any of the parties point of view, but they at least provide a mechanism for information about the currently unknown effects of productive mining to be gathered and disseminated to the native title party. Condition 4 is an expanded version of original condition 3.1 and commences the information provision process by requiring the NOI and related information to be given to the native title party.

Conditions 5.1 to 5.7 - Socio-economic impact assessment

The native title party submitted that the Government and grantee parties should provide the Tribunal with information to enable the nature and scale of the mining project to be understood and assessed by the native title party; and that the Tribunal should prepare a socio-economic impact assessment ('SIA') as part of this inquiry. For reasons already explained it is not possible for the Government and grantee parties to provide information about mining projects because the grantee parties have no proposals to mine at this stage. Nor does the Tribunal consider that it should, in normal circumstances, carry out its own inquiries into an issue such as this. As stated above, the Tribunal takes the view that in general the production of evidence is a matter for the parties. It would be impractical for the Tribunal to carry out a SIA in all matters of this kind as the Tribunal is aware that over 1700 such applications for mining leases are currently the subject of the right to negotiate and may result in future act determination applications. It would also be a waste of time when only very few result in productive mining and, in any event, largely futile because it would be attempting to make an assessment without knowing what mining activity is actually proposed.

The native title party also submitted that the Tribunal should ask the Government and/or grantee parties to produce a model of what might be involved in a commercial productive mine, so that the hypothetical effects of it on the criteria in s 39 could be more adequately considered. Again the Tribunal does not regard this as appropriate. Apart from the fact that the Tribunal has no powers to require a party to produce evidence of this kind, we consider that any such model would be of little practical utility. Mines vary so much in nature and size that the production of various models is not likely to assist the Tribunal in a particular case, where what will actually happen is unknown.

The Government and grantee parties strongly objected to conditions 5.1 to 5.7. They argued that they were not justified on the evidence, were not within the scope of the Act and were another invalid attempt to achieve the objectives of original conditions 3.1 to 3.7 in that they did not resolve all the issues between the parties.

On the question of evidence, the Tribunal is satisfied that the native title party has a spiritual connection to land which includes the relevant mining leases and exercises certain native title rights and interests over it. We are also satisfied that mining, depending on its nature and size, has the potential to adversely affect native title rights and interests, the native title party's way of life, culture and traditions and the development of their social, cultural and economic structures.

The Tribunal has given careful consideration to whether the conditions offend the principles laid down by the Federal Court. The conditions are designed to provide information to the parties to enable them to deal with these effects if and when they arise. In particular, the native title party will be in possession of information as a result of the SIA which will enable it to take up issues of concern with the other parties and with the community generally. In our view any measure which assists in the protection of native title by the provision of information about the effect of mining on it are within the scope and purpose of the Act, as is the provision of information about the other factors in s 39.

The conditions have been drafted to ensure that they can operate in a certain manner at the mining stage. No further negotiation between the parties or decision making required by another person in relation to the factors in s 39 is required. As stated above, it is our view that *Evans* is not authority for the proposition that the determination must resolve all issues, actual and potential, between the parties in its determination. To interpret *Evans* in this way would lead to the conclusion in a case like this, that the act may not be done, because it is impossible to resolve all issues given the uncertainty about whether mining will take place.

While the Tribunal cannot provide for another period of open-ended negotiations, it can impose conditions which are certain in their meaning and operation at a future time on the occurrence of a specified event or events. The conditions proposed by the Tribunal resolve the issues between the parties now by requiring actions which are within the scope and purpose of the Act to be taken at a specified time in the future.

The Government party argued that the SIA conditions were unnecessary as the question of socio-economic impact at the mining stage was now covered by its general environmental impact procedures which must be complied with by the grantee parties. It relied on the affidavit evidence of Mr Murray quoted above. The Tribunal accepts that the Government party has changed its policy and will now include as a matter of course in its environmental assessment procedures consideration of the effect of mining on Aboriginal people, in so far as this can be related to its effect on the biophysical environment. Undoubtedly this goes some way in meeting the difficulty posed by the current circumstances in that the effect of mining on some of the factors in s 39 will be able to be considered and conditions imposed on the mining leases to ameliorate adverse effects. But in our view, it is not a complete solution to the problem.

One difficulty with the Government party's submission is that its general environmental impact procedures only cover part of what might be included in a SIA and leaves some aspects of the criteria in s 39 unexamined. Obviously a mine could have an effect on aspects of a native title party's way of life, culture and traditions and the development of its social, cultural and economic structures, which are not directly related to the biophysical environment. The impact of large numbers of mining personnel in new or established towns has the potential to adversely affect Aboriginal people's way of life. It may also positively affect it by increasing employment opportunities. The Government party evidence concedes that these effects including employment opportunities or other economic benefits could not be considered as part of its environmental assessment under the *Environmental Protection Act*. While the Minister could consider them, there appears to be no formal structure for the examination of these issues and their presentation to the Minister and there was no evidence of this having occurred.

The other difficulty with the Government party's submission is that whether or not to carry out a SIA will be a matter of discretion for the Government party and the EPA. The Tribunal would be relying entirely on the Government party and the EPA to exercise their discretion in a way that would ensure that the factors in s 39 are examined. Of the 2143 NOI proposals received in the 10 years from 1986 to 1995, 693 were referred to the EPA and 64 were

formally assessed. 108 of the 2143 NOI proposals related to new or greenfields proposals of which 88 were referred to the EPA and 13 formally assessed (*Waljen* at 214). The great majority of proposed mining operations in the past have not been formally assessed by the EPA. The Government party's evidence is that its experience with social impact assessment as part of an environmental assessment is limited. In these circumstances the Tribunal considers that conditions requiring a SIA to be carried out at the mining stage are necessary.

The grantee parties argued that the conditions required it to, in effect, make out the native title party's case for it and that it was for the native title party to produce evidence of the criteria in s 39 and of how they will be affected by the grant of the mining leases. Obviously the native title party must produce evidence which establishes that there are native title rights and interests (and other matters in s 39) which could be affected by mining. However, it is impossible for it to give evidence of actual effects in cases such as this. Where a grantee party has an actual proposal to mine there may be a greater obligation on a native title party to produce evidence of this kind. A SIA will require the cooperation of the native title party in providing the information referred to in Condition 5.4(vi) and failure to produce it will reduce its utility. Depending on the type of information provided, the assessment may assist the native title party in its native title claim or later application for compensation to some extent, but the Tribunal does not regard this as a reason for not imposing it. In so far as the SIA involves the grantee parties making out a case for the native title party in lieu of the native title party doing it in these proceedings, this is a direct result of the grantee parties obtaining a right to mine for forty-two years which it does not intend to exercise for productive mining at this stage.

The Government and grantee parties also argued that the requirement to carry out a SIA was too onerous, given the evidence. We have already dealt with the question of the adequacy of the evidence, but are concerned that onerous conditions and cost not be imposed on the grantee parties. The evidence in WF96/11 provides an example of where such conditions could be regarded as onerous. Mr Cottee and his partners have been working on mining lease M36/279 which adjoins the prospecting licence which they have applied to convert to mining lease M36/341. There has been previous mining on both areas dating back to 1898. The ore body on which the grantee party has been working on M36/279 extends onto proposed M36/341. They have been mining the ore on M36/279 from underground which has been processed for them by Plutonic Mines at Belview. The small financial returns from this mine have been used to continue prospecting on proposed M36/341, which to date has involved drilling and rehabilitating an old mine. The grantee party hopes to enter into an arrangement

with a mining company for further exploration by drilling, once M36/341 is granted. According to Mr Cottee there is gold on the proposed mining lease, but he does not know how much. This evidence highlights the difficulty faced by the Tribunal. If all that happens in the future on M36/341 is the same as the grantee party has been doing on M36/279, then a SIA could be considered to be unnecessary and onerous. On the other hand, further exploration could lead to a major mining operation on the native title party's land and only 10 kilometres from the town of Leinster, where some of them live.

To attempt to overcome the dilemma posed by this evidence the Tribunal obtained a report from Dr Helen Ross (an expert consultant on the socio-economic impact of mining operations on Aboriginal communities) on an appropriate trigger or criteria to determine when a SIA should be carried out. Dr Ross noted that the task was particularly difficult given the uncertainty about the nature of mining operations and the constraint on the Tribunal's condition-making power. She reported that the social impact on Aborigines due to mining and exploration are related to a combination of factors which were identified as :

> The characteristics of the location, especially its cultural meaning to Aborigines and its role in their cultural and social lives but also its biophysical characteristics. The presence of sites was regarded as important.
> The characteristics of the Aboriginal communities affected, especially their vulnerability to impact and their coping capacity.
> The characteristics of the mining operation including the mineral and mining processing methods, the various stages of the operation, the location and type of infrastructure and workforce arrangements such as residence near the mine or fly in/fly out, all of which determine the scale of the project.
> The characteristics of the company and its decision making and communication styles with respect to affected Aboriginal communities.

Dr Ross regarded the presence of sacred sites and the scale of the project as providing a possible basis for the development of a SIA trigger. With respect to the scale of the project she examined the following factors:

> The spatial 'foot print' being the area covered by the mine and associated infrastructure.
> The tonnage or volume of ore available to be extracted or (possibly) the rate of ore extracted per year.
> The economic value of the mine. This was not regarded as suitable as mineral values are subject to fluctuation and the ratio of value to volume will vary among minerals and particular deposits.
> The size of the workforce. This was not totally rejected but Dr Ross pointed out that the possibility of a change in technology and mining methods in the future could make a trigger imposed now, inappropriate at the time of future mining. If it were to be selected it would only be on the basis that it was a convenient measure of the scale of the mine,

not that the number of people working on a mine necessarily caused adverse social impact.
The complexity of the mine, based on the potential environmental impact on such matters as ground water, surface water, vegetation and animal species.

Dr Ross concluded that spatial footprint, tonnage, and complexity of the mine appeared to be the most promising candidates for triggers, with workforce worthy of consideration, and suggested that the Tribunal seek comparative information in order to make judgments.

Prior to obtaining Dr Ross' Report the Tribunal sent an exposure draft SIA condition to the parties which required a SIA to be carried out in all cases of productive mining. Following the Government and grantee parties' objection to the condition the Tribunal invited the parties to make submissions on a workable definition or trigger which would govern when the SIA condition would be required based on what constitutes a small, medium or large mine in the Western Australian Goldfields. The Government party submitted that the size of the mine (whether based on its production, surface area, or number of employees) was not a satisfactory basis for deciding whether a SIA should be carried out. It proposed that the SIA be carried out where the native title party has been determined to be the native title holder; and the EPA has decided to conduct a formal assessment of the proposal in the NOI under the *Environmental Protection Act.* The grantee parties' submission was similar.

The Tribunal advised the parties that the Government party's proposals were not satisfactory. It is our view that requiring a determination of native title before requiring a SIA runs counter to the intention of the Act, which specifically accords the right to negotiate and the benefit of any associated conditions to claimants as well as holders of native title and maintains the status quo between the parties until a native title determination is made. We were also of the opinion that it was not appropriate to use a decision of the EPA to formally assess a proposal as a basis for conducting a SIA. This process involves the exercise of discretion which would not necessarily have regard to all the factors normally covered by a SIA.

The parties were invited to give further consideration to an appropriate trigger for a SIA either by conferring with a view to agreement or by the production of further evidence. The Tribunal had in mind evidence which would be in the possession of the Government and grantee parties about the type and scale of mines and which was subsequently identified by Dr Ross in her report as a candidate for a trigger. No further evidence was produced by the parties and the Tribunal was informed that the parties had reached agreement on the trigger contained in condition 5.1, namely that a SIA should be carried out when the EPA has

decided that a formal environmental assessment is required (that is, on the trigger previously rejected by the Tribunal). The agreement on condition 5.1 was confined to the trigger. The parties maintained their primary contentions - that a SIA should be carried out in all cases of productive mining (the native title party); and that no SIA is justified (the Government and grantee parties).

In the light of this agreement no further evidence on the matters referred to by Dr Ross or otherwise was produced by the parties and the Tribunal did not consider it necessary to seek it. Because of the importance of negotiated outcomes and the central role the parties play in these inquiries we have accepted the SIA trigger agreed to by the parties even though we have reservations about it. In a future matter, it would be open to the parties or the Tribunal to complete the work begun by Dr Ross by obtaining data about the size, area and workforce of mines, to enable consideration to be given to whether a more satisfactory trigger is available.

The grantee party submitted that Dr Ross' evidence was that no single indicator correlated with likely social impact so as to be suitable for a trigger and that a trigger based on the size of mining operations would be arbitrary. The Tribunal does not accept this interpretation of Dr Ross' evidence, noting that she specifically suggested that further information be obtained to enable consideration to be given to a trigger based on the size or complexity of the mine. In the event, it has not been necessary to further consider this issue but it may need to be re-examined in future matters.

The grantee party was also concerned that if a SIA condition becomes standard in these types of inquiries, then the requirement will potentially be very onerous in a future situation where there are large numbers of registered overlapping claimants who have the right to negotiate. The Tribunal anticipates that conditions imposed in this matter will provide guidance for the imposition of conditions in this type of case in future, but will obviously need to re-examine them in the light of future evidence and submissions in particular cases. We do not think we should decline to impose the SIA condition on the basis that it will create a precedent which will automatically be followed in future matters irrespective of the evidence or submissions. Future overlapping claimants in other matters will need to produce evidence to provide a basis for the imposition of the condition. We note again that the need for a SIA condition comes about because the Tribunal is required to make a determination without knowing whether productive mining will occur, or its nature and scale or effects.

Finally, in considering whether the SIA condition is unjustifiably onerous, we note the evidence that very few mining leases actually result in new productive mines. If the rate of establishment of new mines from 1986 to 1995 (on average less than 11 per year) continues in the future the requirement (subject to a trigger) to carry out a SIA is not unduly onerous on the mining industry even if the mines are all on land the subject of native title claims. In practice in most cases, including this one, it is likely that only the conditions relating to exploration will be applicable.

In our view it is appropriate that the obligation to carry out a SIA and its cost be imposed on the grantee parties. They will directly benefit from any mining operations and the Tribunal is aware that it is common for both environmental and socio-economic impact assessments to be carried out by mining companies as part of obtaining approval for mining. In Western Australia, the existing obligation imposed on mining companies to deal with environmental issues in an NOI is set out in the DME's "*Guidelines for Mining Projects in Western Australia"* and social impact including Aboriginal sites is required to be addressed.

We did not regard it as appropriate for the grantee parties to have a free hand in selecting the consultant to carry out the SIA without input from the native title party. Conditions 5.2 and 5.3 provide for dialogue between the parties about the selection of the consultant. If an agreement is not reached, the grantee parties must select from four independent researchers nominated by the native title party. In our view this constitutes a sufficiently certain procedure which is an appropriate means of ensuring that the views of both parties are considered, while minimising the possibility of the grantee parties being required to conduct (and pay) for a SIA with consultants unacceptable to them.

The Government party objected to condition 5.7, which requires it and the grantee parties to provide a detailed response to the SIA report, on the basis that the report is essentially a matter between the grantee parties and native title party. While there will be some mining projects in which the Government party has little direct interest, there are others in which the Government party may be directly involved by way of support through the provision of infrastructure and Government and community facilities. This is not uncommon in large projects. Any Government party response to a SIA will be proportionate to its involvement in a project and related to issues of concern to it identified in the SIA report. We do not regard the requirement as unduly onerous. Because of the trigger for the conduct of SIAs, it is likely that they will only be carried out for larger projects in which the Government party has a direct interest. We regard a written response to the SIA from both the Government and grantee parties as consistent with the policy behind the condition of providing

information to the parties which will assist in protecting native title and deal with other matters in s 39.

Condition 6 - Natural environment

The Seaman panel concluded that there was no material before it which would justify a condition directed to the protection of the natural environment. Some additional evidence about environmental concerns (particularly with respect to water) were given by Mr Muir, but the Tribunal does not regard these concerns, in the absence of actual evidence about the environment, as specific or serious enough to justify the imposition of special conditions relating to the environment. The Tribunal concludes that environmental issues can satisfactorily be dealt with by a modification to the Government party's existing environmental protection regime. The evidence is that it is normal practice for the DME to notify the DEP of mining proposals by way of a weekly list of the NOIs received by the State Mining Engineer. Condition 6 modifies this practice by requiring the Government party to notify the EPA of a proposal by giving the EPA a copy of the NOI. It also requires the Government party to inform the native title party that it may make a submission to the DEP and EPA on whether the proposal should be referred to the EPA.

The Government party submitted that condition 6.1 was unnecessary to protect the interests of the native title party and that a condition which simply required the DME to notify the EPA of a productive mining proposal was sufficient. It argued that:

> there is no need for the Government party to give the native title party an opportunity to make a submission to it and the EPA as pursuant to s 38(1)(b)(ii) of the *Environmental Protection Act* 1986 any person may refer a proposal to the EPA. Receipt by the native title party of the NOI (condition 4) will enable it to consider whether to refer the proposal. the requirement for a copy of the NOI to be provided to the EPA could lead to a large volume of paper unnecessarily moving between DME and the EPA if this condition became standard for all future mining leases. It would also render obsolete the MOU between DME and the EPA under which DME notifies the DPE of all NOIs, but the DME is primarily responsible for assessing the NOIs.

In our view there are important reasons not to modify condition 6. Firstly, the Tribunal is making a determination that the mining lease may be granted in circumstances where it cannot consider the effect of the proposal on the environment as it is required to by s

39(1)(a)(vi) of the Act because it does not know whether there will be a productive mine. Secondly, whether the EPA decides to formally assess a proposal determines whether the grantee party is required to carry out a SIA pursuant to condition 5. In these circumstances, the Tribunal considers that an independent statutory authority, the EPA, should specifically consider whether the proposal should be referred to it for a decision on whether a formal assessment is required. While any person may refer a proposal to the EPA, the EPA has a statutory obligation to require a proposal to be referred if it considers that the proposal is likely to have a significant effect on the environment (s 38(3) *Environmental Protection Act* 1986). The Tribunal does not believe that condition 6 will involve unnecessary bureaucratic paper work for the Government party as the condition, if it becomes a standard one in future cases, only applies to new mines. The situation may well be different where the Tribunal is making a determination about an actual mining proposal, when it would be able properly to consider issues relating to the natural environment and, if necessary, impose specific conditions to deal with it. The Tribunal considers that the MOU can continue to operate with amendment to procedures relating to mining leases of the kind dealt with in this determination.

This condition, combined with conditions 4.1 and 4.2, which require the NOI to be given to the native title party, means that the native title party will have the opportunity to raise its concerns with the EPA and make submissions on whether one of the levels of formal assessment should be carried out. The native title party can also appeal to the Minister if dissatisfied with the decision of the EPA.

Conditions 7.1 to 7.3 - Employment and Training

The native title party expressed a desire to benefit from mining and the Tribunal accepts that conditions which help to achieve this end are desirable. Although there was not a great deal of evidence on this topic the Tribunal regards these conditions as appropriate. They are not onerous and set a minimum standard of what the grantee parties are required to do, while leaving open the possibility that their employment policy could be more comprehensive. The definition of 'mining operations' includes work associated with mining operations and preparatory to them, thus ensuring that this condition will operate from the commencement of the project.

Conditions 8.1 to 8.2 - Cultural Awareness Program

These conditions will assist in the protection of native title rights and interests and minimising of other adverse effects of mining by making persons involved in mining operations aware of the culture of the Koara people.

Conditions 9.1 to 9.8 - Liaison Committee

The native title party requested the establishment of a Liaison Committee. The committee does not have any executive decision-making functions in relation to the mining operations, but is designed to provide a forum for the exchange of information about them and particularly about the implementation of conditions 7 and 8.

Conditions 10.1 to 10.5 - Assignment

These conditions are a modified version of condition 4 imposed by the Seaman panel. The Government party argued that the original condition was not necessary as, by virtue of the Act, the conditions apply to the mining lease whoever holds it; and that expressed as it was, the condition did not ensure that there was a contractual relationship created between the assignee and the native title party. In the Government party's view, the Tribunal's conditions must apply to an assignee of the grantee party by force of the Act (ss 41(1) and 165) and that it would be sufficient to simply state that the conditions apply to any assignee of the grantee party. Section 41(1) of the Act provides that conditions imposed have the same effect as if they 'were terms of a contract among the negotiation parties' and that this effect is in addition to any other effect the determination may have under the Act**.** Because 'negotiation party' is defined by the Act (s 253) to mean 'a Government party, a grantee party or a native title party' it is the Tribunal's view that, unless a condition dealing with assignment is imposed, there is a risk that the assignee may not be contractually bound to the native title party to comply with the conditions. If this were to be the case, there would be scope to avoid the provisions of s 41(1) and thus undermine the overall purpose of the Act. Condition 10.1 applies the conditions to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the tenement) (see below). Condition 10.2 overcomes the potential problem identified by the Government party with original condition 4 by placing an assignee in the same contractual relationship to the native title party as the original grantee party. This is achieved by requiring the assignee to execute a deed undertaking to be bound by the conditions.

The grantee parties submitted that the definition of 'assign' should exclude (i) the grant of a power of attorney; and (ii) normal financing arrangements which involve the encumbrance

of a mining lease. With respect to a power of attorney, they pointed to a practical problem that company officers are not uncommonly granted power of attorney to enable them to sign documents on behalf of the company. The Tribunal accepts that to treat this as an assignment for the purposes of condition 10 (and thus require donees of a power of attorney to sign a deed) would be onerous and unnecessary. We accept that a power of attorney in itself does not involve the transfer of an interest in the mining lease. As the grantee party (or any assignee, as defined) who grants a power of attorney will still be bound by the conditions, there is no need for a power of attorney to be included in the definition of 'assign'.

While we accept that excluding normal financing arrangements from the definition of 'assign' is superficially attractive, a problem arises because a mortgage of a mining lease may include, and unless provided otherwise, shall be deemed to include, a right in the mortgagee, in the event of default, to take possession of and work the mining lease and sell the mining lease (Mining Regulation 79(2)(b)). A security in respect of a mining lease may also include the power to appoint a receiver. Circumstances may therefore arise where financiers become the effective holders of mining leases and if so they should be subject to the same conditions as the original grantee party or a subsequent purchaser of the lease. The Tribunal has dealt with this situation by requiring an assignee in the case of a mortgage, charge or other security to be bound by the conditions only where it takes possession of the tenement or appoints a receiver. Beneficial interests generally, which were included in the definition of 'assign' in the original conditions, have been deleted.

Because, in our view, s 41(1) of the Act does not make it clear that the purchaser of a mining tenement from a grantee party is contractually bound by the conditions of a Tribunal determination, we recommend that Parliament give consideration to an amendment to the Act.

A new condition 10.4 is imposed and relates to condition 3.8 (WF96/1 and WF96/5) which imposes restrictions on the grantee party disclosing information about sites and ensures that the restrictions also apply to an assignee of the mining lease.

Conditions 11.1 to 11.2 - Application of conditions

These conditions are a modified version of original condition 5. Condition 11.1(iii) provides some flexibility to permit another claim to be substituted by the native title party, without the native title party losing the benefits of the conditions imposed as part of this

determination. This situation may arise if the native title party decided to withdraw the claims (which were lodged specifically in response to a s 29 notice and targetted to cover only the area of the mining leases) and consolidate them into one overall claim, such as the main claim of the Koara people WC95/1 which has been lodged over a much larger area.

Condition 11.1(iii) when read with the definition of 'native title party' ensures that the conditions apply in circumstances where the native title party is determined to hold native title (either alone or in conjunction with others) and are not dependent on a determination, in the words of the original condition, that 'the claimed native title exists,' which might be more restrictive.

Condition 11.2 is a new condition which makes it clear that, apart from conditions 3.8 and 13 relating to the disclosure of confidential information, the conditions only apply during the currency of the mining lease.

Conditions 12.1 to 12.4 - Notices

These conditions are in substantially the same terms as original conditions 6.1 to 6.4 with a minor addition to cover the situation where a party does not nominate an address for service of notice.

Conditions 13 to 16 - General

Condition 13 is a new condition which requires the native title party not to disclose confidential information received from the grantee party.

Condition 14 is the same as original condition 7.

Condition 15 obliges the Government party to make certain of the conditions, conditions of the mining lease which has the effect that a breach of them would mean that the mining leases could, by decision of the Minister, be forfeited. The Government party opposed this condition. It argued that it was unfair to the grantee party and would place the Minister in a difficult position in having to make a decision about forfeiture. The Tribunal does not agree and regards the conditions selected to be imposed as conditions of the mining lease (1 - access; 3.1 - compliance with the *Aboriginal Heritage Act*; 3.10 - proposal to interfere

with a site; 4.1 information about the proposal to mine; and 10.2 - assignment) as of such importance in ensuring the protection of native title that the penalty of possible forfeiture should apply to their breaches as well as other consequences under the Act or in contract (s 41(1)). The *Mining Act* gives the Minister the power to make decisions about forfeiture and the Tribunal can see no reason why he or she should not be capable, consistently with administrative law principles, of deciding whether a breach of these conditions is such as to justify forfeiture of the mining lease.

Condition 16 is a new condition, which ensures that the fact of the Tribunal's determination and conditions is made known to the grantee party or an assignee.

A Condition relating to compensation

The Seaman panel decided (*Koara No 1* at 100) that this was not an appropriate case to impose a condition relating to negotiated compensation, on the basis that the question of compensation could be considered at a later stage when productive mining had actually occurred. Although the Federal Court in *Evans* found that the Seaman panel had erred in its interpretation of the compensation provisions of the Act, its reasoning does not compel the Tribunal to impose a condition for negotiated compensation. Whether to do so remains a matter of discretion to be exercised after consideration of the evidence.

The native title party submitted that a condition relating to negotiated compensation paid into trust should be imposed, thus providing it with the option of taking the negotiated compensation in full settlement of any claim for compensation upon a determination of native title (s 52). There are a number of reasons why we do not accept this submission. Firstly, any attempt to calculate or provide a formula to calculate negotiated compensation at this time is fraught with difficulty because not only is the nature of the exploration activities to be undertaken on the mining lease not known, but it is also not certain whether mining will ever take place on the mining lease, or if it does, when and what form it might take. The period of the mining lease including renewal is forty-two years leaving open the possibility that mining technology may change and impacts be of a different nature. Secondly, the native title party does not obtain immediate benefit from a condition requiring payment of monies into trust. If a determination finds that native title does not exist or another group are the native title holders then the native title party will not receive the compensation. Thirdly, the Tribunal is entitled to take into account in exercising its discretion in this respect that a number of other native title claims have been lodged over all the mining leases. Apart from directly raising the possibility that persons other than the

native title party may be found to be the holders of native title, it makes the assessment of negotiated compensation more problematic.

Observations about the Native Title Act and Western Australian mining leases

The Tribunal is of the opinion that the attention of the Commonwealth and Western Australian Parliaments and Governments should be drawn to the incongruity which exists between the Act and the Western Australian *Mining Act* with respect to the mining leases which are used for exploration. Legislative amendment of either or both Acts is required to enable the Tribunal to properly carry out its statutory function. It is the Tribunal's view that this incongruity is a serious impediment to it properly giving effect to Parliament's intention. The difficulties have been previously pointed out in *Koara No. 1* (at 86) and *Waljen* (at 220-229) and are again explained in these reasons. While on the evidence in this case the Tribunal has reached a solution which goes some way to overcoming the difficulties, we regard the situation in which the Tribunal and parties are placed as unsatisfactory. Because of the limited powers in the Act, the Tribunal has been forced to operate within constraints which make it difficult to properly deal with the issues, including the criteria in s 39. The Tribunal cannot impose a condition for an independent arbitrator or require the matter to be returned to the Tribunal at the stage of productive mining. We are also required to impose conditions containing reasonable certainty and which resolve all the issues, in circumstances where the factual situation is far from certain and when it is almost impossible to resolve all the issues, because of the uncertainty about what they might be. In *Evans* (at 26) the Federal Court acknowledged that this placed the Tribunal in an impossible position.

The Government party and grantee parties response to these difficulties has been to take a minimalist position which does little more than to protect access and sites of particular significance and provide for information to be given to the native title party at the time of productive mining. This approach does not adequately deal with the other factors in s 39. The Tribunal has concluded that the position argued for by the Government and grantee parties is not acceptable on the facts of this case, and is of the view that even the additional conditions proposed by the Tribunal may not be satisfactory in the future. In both *Koara No 1* (at 100) and *Waljen* (at 222) the Tribunal pointed out that circumstances may arise where the Tribunal has no alternative but to make a determination that the act may not be done because of the impossibility of properly considering the effect of the proposed act on the criteria set out in s 39.

It is possible for parties voluntarily to enter into so-called conjunctive agreements, which cover both exploration and mining, because the parties can agree up-front on a framework for the conduct of future negotiations at the mining stage, including by provision for the resolution of disputes about mining by a private arbitrator or otherwise. With its current powers, it is not possible for the Tribunal to properly deal conjunctively with mining production at the stage of exploration (even when that exploration is being conducted under the authority of a mining lease).

There are also practical reasons for suggesting legislative amendment. At present the Tribunal is being required to conduct inquiries that may be unnecessary because, in most cases, no productive mining will follow the grant of the mining lease. It would obviously be more efficient and less time consuming for the Tribunal and parties if the relatively straight forward issue of exploration could be dealt with initially, and the more complex issue of mining left to a more appropriate time when information is available about the type and scope of the actual mining operation. If the parties in negotiation and the Tribunal were able initially to deal with exploration, then the current backlog of over 1700 applications for mining leases in the right to negotiate process, for which future act determination applications have not yet been made, could be dealt with more quickly. The problem of dealing with a hypothetical productive mining situation adversely infects the whole process including whether the Government party has negotiated in good faith with the other parties *(Western Australia/Walley/Ngoonooru Wadjari,* NNTT WF97/5, Hon C J Sumner, 25 March 1998).

The Tribunal accepts that the Western Australian mining lease and administrative practices in relation to it existed prior to the *Native Title Act* and it is not the Tribunal's role to suggest that the mining lease provisions of the *Mining Act* be substantially altered when the Western Australian Parliament takes the view that the *Mining Act* is in the public interest and necessary for a successful mining industry. However, the Tribunal believes that consideration should be given to amending the *Native Title Act* to give the Tribunal powers to reconsider conditions for Western Australian mining leases at the time that a NOI is lodged or to delegate consideration of those issues to a private arbitrator. Alternatively, consideration could be given by the Western Australian Parliament to modifying its mining lease to enable native title issues to be reassessed on the giving of a NOI.

Enabling the Tribunal to deal expeditiously with the effect of exploration on the factors in s 39 and leaving the assessment of the effect of mining to a time when there is knowledge of what is proposed would be a more cost-efficient and equitable way of dealing with the issue, and consistent with the intention of the Act which undoubtedly was that the right to negotiate

over a mining lease be exercised and the criteria in s 39 examined with an actual mining proposal in mind.

DETERMINATIONS AND CONDITIONS

The determinations of the Tribunal subject to conditions to be complied with by the parties are appended to these Reasons. Appendix 1 - Applications WF96/1 & WF96/5; and Appendix 2 - Application WF 96/11.

Hon C J Sumner
Presiding Member
19 June 1998

Appendix 1

DETERMINATIONS AND CONDITIONS

APPLICATIONS WF96/1 AND WF96/5

Determinations

The determinations of the Tribunal are that mining leases M37/491 and M37/492 may be granted to Sons of Gwalia Limited and mining leases M37/493, M37/494, M37/495 and M37/496 may be granted to Tarmoola Australia Pty Ltd subject to the following conditions (1-17) to be complied with by the Government party, the native title party and the grantee party.

Conditions

Access

1. Any right of the native title party to access or use the Tenement is not to be restricted except in relation to those parts of the Tenement which are used for exploration or mining operations or for safety or security reasons relating to exploration or mining operations.

Notice of grant

2. The Government party must give to the native title party details of the grant of the mining lease, including the conditions and endorsements, within 21 days of the date on which it was granted.

Aboriginal Sites

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

3.2 To ensure compliance with condition 3.1 and subject to conditions 3.4 and 3.5, the grantee party must not conduct exploration or mining operations (other than reconnaissance prospecting) over a part or whole of the Tenement unless it has first caused an Aboriginal site survey to be conducted over that part or whole of the Tenement.

3.3 The site survey must be conducted by a Site Survey and Clearance Team which (subject to condition 3.4) must include as many persons as are nominated by the registered native title claimant up to a maximum of three nominees, and be conducted in a professional and efficient manner in accordance with the "Guidelines for Aboriginal Heritage Assessment in Western Australia" dated January 1994 or any subsequent guidelines or requirements which may be published or prescribed for the purpose of the *Aboriginal Heritage Act* 1972 (WA) to the extent that those guidelines

or requirements are relevant to the conduct of site surveys, or as otherwise agreed between the registered native title claimant and the grantee party. The grantee party must pay the reasonable fees and expenses of the nominees of the registered native title claimant in relation to the survey. Further unpaid nominees of the registered native title claimant may be included in the Site Survey and Clearance Team at the discretion of the grantee party.

3.4 The grantee party must give written notice to the native title party of its intention to conduct the site survey and when giving notice must include a suitable topographical map showing the areas proposed to be surveyed, and the Tenement location. If, within 30 days of receipt of the notice, the registered native title claimant fails to nominate any persons for the Site Survey and Clearance Team then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA) then the grantee party must take reasonable steps to consult with the registered native title claimant.

3.5 The site survey required under condition 3.2 must be completed within 60 days of the native title party's nomination with the parties co-operating in good faith on the conduct of the survey. If the survey is not carried out in this time due to the failure of the native title party to co-operate in good faith with the grantee party then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA) then the grantee party must take reasonable steps to consult with the registered native title claimant.

3.6 If requested in writing either by the registered native title claimant or the grantee party at any time before, or in the course of, or at the conclusion of the site survey, the registered native title claimant (or his or her nominees) and the grantee party (or its agents, representatives or contractors) must meet on the Tenement for the purpose of identifying the boundaries of the sites.

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

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

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

(b) to a bona fide prospective assignee of the mining lease pursuant to condition 10.4;

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

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

(e) as required by law.

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

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

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

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

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

Productive mining - information provisions

4.1 If the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity (a Notice of Intent), then at the same time the grantee party must give to the native title party:

(a) a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations, related infrastructure, and

(b) information on the following matters (if not included in the proposal):

(i) the mining methods to be used and the infrastructure to be established;

(ii) the likely timetable for, and duration of, the mining operations;

(iii) the identity of any contractors and sub-contractors (if known at the time) engaged or likely to be engaged and the maximum number of personnel likely to be on the Tenement at any one time;

(iv) the likely effect of the proposed mining operations on the environment and proposals to minimise the environmental impact of such mining operations;

(v) details of any proposed environmental monitoring program;

(vi) the proposed means of access and access routes for personnel and equipment, both to and within the Tenement, including particulars of the amount of vehicular and airborne access and any proposals to construct or upgrade roads, landing strips or other access facilities; and

(vii) the proposals for rehabilitation of the Tenement.

4.2 Where there is a material change proposed to the proposal (the Notice of Intent) provided to the State Mining Engineer the grantee party must, prior to implementing the change, advise the native title party in writing of those proposed changes.

Socio-economic impact assessment

5.1 Where the Environmental Protection Authority or the Minister for the Environment gives written notice that a proposal to undertake developmental or productive mining or construction activity on the Tenement is to be formally assessed under the *Environmental Protection Act* 1986 (WA) the grantee party must (subject to paragraph 5.2) prior to commencing mining operations on the Tenement, commission the conduct of a study (the Koara Socioeconomic Impact Assessment ('the KSIA')) and report ('the report') on the effect of the proposed mining operations on the native title party and their culture for the purpose of informing the native title party about those likely impacts.

5.2 The grantee party must give written notice of its intention to conduct the KSIA to the native title party. The grantee party may, in the written notice, nominate one or more independent expert researchers to conduct the KSIA. The grantee party is not obliged to undertake or complete the KSIA if within 30 days of receipt of the written notice the registered native title claimant fails to give written notice to the grantee party either:

(a) agreeing to one or more of the independent expert researchers nominated by the grantee party; or

(b) nominating at least four independent expert researchers who are able to undertake the KSIA within the terms specified in clause 5.4.

5.3 The grantee party must contract with an independent expert researcher to undertake the KSIA and write the report ('the Consultant'), being:

(a) in the case where the registered native title claimant has agreed to one or more of the independent expert researchers nominated by the grantee party in accordance with condition 5.2(a) above, one of the independent expert researchers agreed to; otherwise

(b) one of the independent expert researchers nominated by the native title party.

5.4 The contract between the grantee party and the Consultant must contain terms requiring the Consultant to :

(i) complete the KSIA and submit the report to the grantee party within 6 months from the date when the contract is made;

(ii) consult broadly with the native title party and the grantee party and take into account their comments in planning and undertaking the KSIA and writing the report;

(iii) meet with the registered native title claimant when reasonably requested by him to do so.

(iv) provide a copy of the proposed methodology for the KSIA and a draft of the report to the native title party and grantee party for comment;

(v) keep confidential (except as between the parties and unless disclosure is required by law) information provided in confidence by any party to the Consultant for the purposes of the KSIA;

(vi) design the KSIA and write the report covering at least the following:

(a) a description of, and history of use of, the Tenement and adjacent areas, which may be directly affected by the proposed mining operations ('the Tenement and adjacent areas');

(b) a description of the proposed mine and related works including the size of the construction and mining staff and proposed residential arrangements on the Tenement and adjacent areas and proposed access routes;

(c) the economic, social and cultural significance of and use by the native title party of the Tenement and adjacent areas;

(d) the overall health, economic and educational status of the native title party as a group;

(e) employment opportunities for, and employment patterns of the native title party;

(f) the likely and possible socio-economic and cultural impacts of the proposed mining operations on the native title party and their way of life;

(g) the opinions, wishes and concerns of the native title party in relation to the mining operations on the Tenement and adjacent areas and in relation to the impact of the mining operations;

(h) an analysis of methods of mitigation of the adverse impacts of the mining operations on the native title party; and

(i) an analysis of practical ways to maximise the benefits arising from the mining operations on the native title party including opportunities for the native title party to be involved in the proposed mine economy.

5.5 The Government party, the grantee party and the native title party must co-operate with and provide to the Consultant all information that is within their power and control which is reasonably necessary for the Consultant to undertake the KSIA and where the release of that information by the native title party is not contrary to their law.

5.6 The grantee party must provide to the Government and registered native title claimant copies of the final report of KSIA within 30 days after it is received from the Consultant.

5.7 The Government and grantee parties must provide to the native title party a detailed written response to the KSIA report and the issues raised by it within two months of the receipt of the report by the Government party.

Environmental condition

6. Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity on the Tenement (a Notice of Intent) the Government party through the Department of Minerals and Energy must, prior to approval of the proposal by the State Mining Engineer:

(i) write to the native title party giving it an opportunity within 21 days to make a submission to the Government party and the Environmental Protection Authority on whether it wishes the proposal to be referred to the Environmental Protection Authority under s 38 of the *Environmental Protection Act* 1986 (WA); and

(ii) notify the proposal to the Environmental Protection Authority by providing it with a copy of the Notice of Intent accompanied by any submission made by the native title party in accordance with paragraph (i).

Employment and training

7.1 Prior to the commencement of mining operations and associated works on the Tenement the grantee party must establish and thereafter maintain a recruitment and training policy and program which, subject to the requirements of the grantee's business and availability of members of the native title party are designed to provide employment opportunities for members of the native title party. The matters which are in conditions 7.2 and 7.3 must form part of the recruitment and training policy.

7.2 (a) The native title party may from time to time provide the grantee party with a list of members of the native title party seeking employment or training, such list to include the availability, experience, qualifications and contact details of each person on the list.

(b) At least once in each month the grantee party must give written notice to the registered native title claimant of employment and training opportunities which arise in respect of mining operations and associated works on the Tenement.

(c) The grantee party must consider applications for employment or training positions made by members of the native title party fairly and objectively having regard to the attributes of the person and the requirements of the grantee party's business.

7.3 (a) The native title party may from time to time provide the grantee party with a list of Associated Entities which have the capacity to perform contract work in respect of the mining operations and associated works on the Tenement.

(b) When intending to contract out work on the Tenement the grantee party must give consideration to the engagement of an Associated Entity fairly and objectively, having regard to its capacity to perform the work and the requirements of the grantee party's business.

Cultural awareness program

8.1 Following commencement of mining operations on the Tenement, the grantee party must endeavour to ensure that all persons who are not the native title party and who are engaged directly or indirectly by or on behalf of the grantee party and who may

enter the lease area in relation to the mining operations are given appropriate information for the following purposes:

(a) to familiarise such persons with the traditions and culture of the native title party;

(b) to promote a knowledge and understanding of and respect for the traditions and culture of the native title party; and

(c) to foster good relationships between the native title party and others.

8.2 The registered native title claimant or his or her nominee and the grantee party shall co-operate in formulating and directing the presentation of the information.

Liaison Committee

9.1 Subject to conditions 9.2 and 9.5 and prior to commencement of mining operations on the Tenement, the grantee party must establish and continue a Liaison Committee ('the committee') comprising:

up to 2 persons nominated by the grantee party; and
up to 2 persons nominated by the registered native title claimant.

9.2 The grantee party must give written notice to the native title party of its intention to form the committee and invite written nominations from the registered native title claimant in respect of its representatives on the committee. If within 30 days of the receipt of the notice the registered native title claimant fails to nominate any such persons to the grantee party, or if at any time the registered native title claimant notifies the grantee party in writing that he or she does not wish the committee to be formed or to continue, the grantee party is not obliged to form or continue the committee as the case requires.

9.3 Each party may replace one or both of its members on the committee by giving at least 7 days written notice to the other party. Where a committee member is temporarily not available to attend meetings of the committee, the member may substitute another person to represent the interests of the relevant party during the period when that member is unavailable.

9.4 The functions of the committee will be the following:

(i) to provide a forum for the exchange of information between the parties concerning:
  (a) the mining operations, including proposed changes to those operations;
  (b) matters of importance to either the native title party or the grantee party as they relate to those mining operations or the area covered by the Tenement;

(c) the operation of condition 7 including any employment and training opportunities for the native title party on the Tenement and any member of the native title party seeking employment or training opportunities at the mine; and

(ii) to co-ordinate the development and implementation of the cultural awareness program referred to in conditions 8.1 and 8.2.

9.5 The committee must meet at least once each quarter. If all the committee members nominated by the registered native title claimant or their substitutes fail, without giving at least three days written notice to the grantee party, to attend 3 committee meetings in a row the grantee party is not required to continue the committee. The committee meetings must be open to other grantee party representatives and members of the native title party to attend as observers if they wish.

9.6 The grantee party must provide to the committee, on a quarterly basis, a report:

(i) on the number of members of the native title party in employment and training at the mine, including their respective job classification, the number of applications for employment or training received from the native title party, and the number of job and training offers made by the grantee party to members of the native title party; and

(ii) on the number and nature of contracts entered into between the grantee party and any Associated Entity.

9.7 The location of the committee meetings will be on the Tenement unless agreed otherwise by the members.

9.8 The reasonable costs incurred by members in attending up to four committee meetings per year will be met by the grantee party. This does not cover the professional costs of legal representation.

General conditions

Assignment

10.1 These conditions apply to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the Tenement).

10.2 The grantee party must not assign the mining lease unless and until the assignee executes and delivers to the native title party a deed expressed to be for the benefit of the native title party by which the assignee undertakes to be bound by these conditions as if it were the grantee party. In the case of an assignment consisting of the entering into of a mortgage, charge or other security, the deed must provide that the assignee undertakes :

(i) to be bound by these conditions as if it were the grantee party, if it or anyone on its behalf enters into possession of the Tenement, or if it appoints a receiver to enter into possession of the Tenement; and

(ii) not to transfer the mining lease under any power of sale unless the purchaser executes a deed expressed to be for the benefit of the native title party by which the purchaser undertakes to be bound by these conditions as if it were the grantee party.

10.3 Upon the delivery to the native title party of a duly executed deed in compliance with condition 10.2, the native title party must execute a deed expressed to be for the benefit of the assignee by which the native title party undertakes to be bound by these conditions.

10.4 The grantee party must not disclose to a bona fide prospective assignee of the mining lease any information given to it by the native title party regarding sites unless and until the prospective assignee executes a deed expressed to be for the benefit of the native title party by which the prospective assignee undertakes to comply with condition 3.8 as if the reference in Condition 3.8 to the 'grantee party' were a reference to the prospective assignee.

10.5 For the purpose of conditions 10.1, 10.2 and 10.4 , 'grantee party' includes any person to whom the mining lease is assigned

Application of conditions

11.1 These conditions (other than conditions 3.8 and 13) apply only to that part of the Tenement which remains subject to:

(i) the native title claim;

(ii) another claim made by or on behalf of the native title party (either alone or in conjunction with others); or

(iii) an approved determination that the native title party holds native title (either alone or in conjunction with other persons) in respect of that part of the Tenement.

11.2 These conditions (other than conditions 3.8 and 13) apply only while the mining lease (including renewals) is in force.

11.3 These conditions (other than condition 3.8) do not apply to the grantee party if it ceases to be the holder of the mining lease and an assignee of the mining lease executes a deed as required by condition 10.2. This condition does not relieve the grantee party of any liability incurred under these conditions prior to it ceasing to be the holder of the mining lease.

Notices

12.1 For the purpose of these conditions, the registered native title claimant (from time to time) is authorised to give or receive any notice or other document on behalf of the native title party.

12.2 Notices or other communications under these conditions may be given by delivery, post or facsimile and each party must nominate a postal address and facsimile address for that purpose. Until a party has made such a nomination, its address for service will be taken to be the address of the party's representative at the future act determination application proceedings.

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

12.4 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.

General

13. Except as required by law the native title party must not, without the written consent of the grantee party, disclose to others the grantee party's confidential information relating to its activities pursuant to the mining lease.

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

15. The Government party shall make conditions 1, 3.1, 3.10, 4.1 and 10.2 conditions of the mining lease.

16. The Government party must endorse on the mining lease the fact that the grantee party and any assignee is subject to the terms and conditions of a determination by the National Native Title Tribunal dated 19 June 1998.

Definitions

17. For the purpose of these conditions the following terms have the following meanings:

"assign" includes sell, transfer, part with possession, create a legal interest in or otherwise dispose of in whole or in part, or enter into any mortgage, charge, or other security under which the mortgagee, chargee, or other secured creditor has powers to take possession, sell, convey or to appoint a receiver to take possession; "assignment" and "assignee" have corresponding meanings.

"Associated Entity" means any incorporated body or unincorporated association all the members of which are members of the native title party, and means an individual who is a member of the native title party.

"exploration" includes the activities referred to in s 66 of the *Mining Act* 1978 (WA) and the activities referred to in the definition of "explore" in s 253 of the *Native Title Act* 1993 (Cth).

"Government party" means the State of Western Australia.

"grantee party" means Sons of Gwalia Limited in Application WF96/1 and Tarmoola Australia Pty Ltd in Application WF96/5.

"mining lease" means mining leases M37/491 and M37/492 in Application WF96/1 and M37/493, M37/494, M37/495 and M37/496 in Application WF96/5.

"mining operations" means:

(i) mining operations as defined in the *Mining Act* 1978 (WA) other than any activity associated with exploration activities; and

(ii) any work associated with mining operations including construction of access roads, buildings and work preparatory to mining operations.

"native title claim" means the native title determination application (in its form from time to time) made under the *Native Title Act* 1993 (Cth) by Ted Coomanoo Evans on behalf of the native title party and which :

(i) with respect to Application WF96/1 lodged on 7 July 1995 is identified by National Native Title Tribunal number WC95/22; and

(ii) with respect to Application WF96/5 lodged on 10 August 1995 is identified by National Native Title Tribunal number WC95/42.

"native title party" means:

(i) the registered native title claimants in respect of a native title claim and all persons on whose behalf the native title claim is made; and

(ii) in a case where an approved determination is made that the native title party holds native title to the whole or part of the Tenement (either alone or in conjunction with other persons), means the native title holders.

"reconnaissance prospecting" means exploration operations which do not involve the use of mechanised extractive or other equipment which is capable of causing damage to sites (but which may include the use of vehicles for transportation purposes).

"registered native title claimant"

(i) has the meaning given in the *Native Title Act* 1993 (Cth), and if there is more than one person who constitutes the registered native title claimant, means the first-named registered native title claimant; and

(ii) in the event of an approved determination that the native title party holds native title to the area of the Tenement, means the registered native title body corporate in respect of the native title claim.

Reference to a "site" imports the meaning given by s 39(1)(a)(v) of the *Native Title Act* 1993 (Cth).

"Tenement" means the area of the mining lease.

Appendix 2

DETERMINATIONS AND CONDITIONS

APPLICATION WF96/11

Determination

The determination of the Tribunal is that mining lease M36/341 may be granted to D.J. and R.M. Cottee and P.J. Townsend subject to the following conditions (1-17) to be complied with by the Government party, the native title party and the grantee party.

Conditions:

Access

1. Any right of the native title party to access or use the Tenement is not to be restricted except in relation to those parts of the Tenement which are used for exploration or mining operations or for safety or security reasons relating to exploration or mining operations.

Notice of grant

2. The Government party must give to the native title party details of the grant of the mining lease, including the conditions and endorsements, within 21 days of the date on which it was granted.

Aboriginal Sites

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

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

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

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

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

Productive mining - information provisions

4.1 If the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity (a Notice of Intent), then at the same time the grantee party must give to the native title party:

(a) a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations, related infrastructure, and

(b) information on the following matters (if not included in the proposal):

(i) the mining methods to be used and the infrastructure to be established;

(ii) the likely timetable for, and duration of, the mining operations;

(iii) the identity of any contractors and sub-contractors (if known at the time) engaged or likely to be engaged and the maximum number of personnel likely to be on the Tenement at any one time;

(iv) the likely effect of the proposed mining operations on the environment and proposals to minimise the environmental impact of such mining operations;

(v) details of any proposed environmental monitoring program;

(vi) the proposed means of access and access routes for personnel and equipment, both to and within the Tenement, including particulars of the amount of vehicular and airborne access and any proposals to construct or upgrade roads, landing strips or other access facilities; and

(vii) the proposals for rehabilitation of the Tenement.

4.2 Where there is a material change proposed to the proposal (the Notice of Intent) provided to the State Mining Engineer the grantee party must, prior to implementing the change, advise the native title party in writing of those proposed changes.

Socio-economic impact assessment

5.1 Where the Environmental Protection Authority or the Minister for the Environment gives written notice that a proposal to undertake developmental or productive mining or construction activity on the Tenement is to be formally assessed under the *Environmental Protection Act* 1986 (WA) the grantee party must (subject to paragraph 5.2) prior to commencing mining operations on the Tenement, commission the conduct of a study (the Koara Socioeconomic Impact Assessment ('the KSIA')) and report ('the report') on the effect of the proposed mining operations on the native title party and their culture for the purpose of informing the native title party about those likely impacts.

5.2 The grantee party must give written notice of its intention to conduct the KSIA to the native title party. The grantee party may, in the written notice, nominate one or more independent expert researchers to conduct the KSIA. The grantee party is not obliged to undertake or complete the KSIA if within 30 days of receipt of the written notice the registered native title claimant fails to give written notice to the grantee party either:

(a) agreeing to one or more of the independent expert researchers nominated by the grantee party; or

(b) nominating at least four independent expert researchers who are able to undertake the KSIA within the terms specified in clause 5.4.

5.3 The grantee party must contract with an independent expert researcher to undertake the KSIA and write the report ('the Consultant'), being:

(a) in the case where the registered native title claimant has agreed to one or more of the independent expert researchers nominated by the grantee party in accordance with condition 5.2(a) above, one of the independent expert researchers agreed to; otherwise

(b) one of the independent expert researchers nominated by the native title party.

5.4 The contract between the grantee party and the Consultant must contain terms requiring the Consultant to :

(i) complete the KSIA and submit the report to the grantee party within 6 months from the date when the contract is made;

(ii) consult broadly with the native title party and the grantee party and take into account their comments in planning and undertaking the KSIA and writing the report;

(iii) meet with the registered native title claimant when reasonably requested by him to do so.

(iv) provide a copy of the proposed methodology for the KSIA and a draft of the report to the native title party and grantee party for comment;

(v) keep confidential (except as between the parties and unless disclosure is required by law) information provided in confidence by any party to the Consultant for the purposes of the KSIA;

(vi) design the KSIA and write the report covering at least the following:

(a) a description of, and history of use of, the Tenement and adjacent areas, which may be directly affected by the proposed mining operations ('the Tenement and adjacent areas');

(b) a description of the proposed mine and related works including the size of the construction and mining staff and proposed residential arrangements on the Tenement and adjacent areas and proposed access routes;

(c) the economic, social and cultural significance of and use by the native title party of the Tenement and adjacent areas;

(d) the overall health, economic and educational status of the native title party as a group;

(e) employment opportunities for, and employment patterns of the native title party;

(f) the likely and possible socio-economic and cultural impacts of the proposed mining operations on the native title party and their way of life;

(g) the opinions, wishes and concerns of the native title party in relation to the mining operations on the Tenement and adjacent areas and in relation to the impact of the mining operations;

(h) an analysis of methods of mitigation of the adverse impacts of the mining operations on the native title party; and

(i) an analysis of practical ways to maximise the benefits arising from the mining operations on the native title party including opportunities for the native title party to be involved in the proposed mine economy.

5.5 The Government party, the grantee party and the native title party must co-operate with and provide to the Consultant all information that is within their power and control which is reasonably necessary for the Consultant to undertake the KSIA and where the release of that information by the native title party is not contrary to their law.

5.6 The grantee party must provide to the Government and registered native title claimant copies of the final report of KSIA within 30 days after it is received from the Consultant.

5.7 The Government and grantee parties must provide to the native title party a detailed written response to the KSIA report and the issues raised by it within two months of the receipt of the report by the Government party.

Environmental condition

6. Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity on the Tenement (a Notice of Intent) the Government party through the Department of Minerals and Energy must, prior to approval of the proposal by the State Mining Engineer:

(i) write to the native title party giving it an opportunity within 21 days to make a submission to the Government party and the Environmental Protection Authority on whether it wishes the proposal to be referred to the Environmental Protection Authority under s 38 of the *Environmental Protection Act* 1986 (WA); and

(ii) notify the proposal to the Environmental Protection Authority by providing it with a copy of the Notice of Intent accompanied by any submission made by the native title party in accordance with paragraph (i).

Employment and training

7.1 Prior to the commencement of mining operations and associated works on the Tenement the grantee party must establish and thereafter maintain a recruitment and training policy and program which, subject to the requirements of the grantee's business and availability of members of the native title party are designed to provide employment opportunities for members of the native title party. The matters which are in conditions 7.2 and 7.3 must form part of the recruitment and training policy.

7.2 (a) The native title party may from time to time provide the grantee party with a list of members of the native title party seeking employment or training, such list to include the availability, experience, qualifications and contact details of each person on the list.

(b) At least once in each month the grantee party must give written notice to the registered native title claimants of employment and training opportunities which arise in respect of mining operations and associated works on the Tenement.

(c) The grantee party must consider applications for employment or training positions made by members of the native title party fairly and objectively

having regard to the attributes of the person and the requirements of the grantee party's business.

7.3 (a) The native title party may from time to time provide the grantee party with a list of Associated Entities which have the capacity to perform contract work in respect of the mining operations and associated works on the Tenement.

(b) When intending to contract out work on the Tenement the grantee party must give consideration to the engagement of an Associated Entity fairly and objectively, having regard to its capacity to perform the work and the requirements of the grantee party's business.

Cultural awareness program

8.1 Following commencement of mining operations on the Tenement, the grantee party must endeavour to ensure that all persons who are not the native title party and who are engaged directly or indirectly by or on behalf of the grantee party and who may enter the lease area in relation to the mining operations are given appropriate information for the following purposes:

(a) to familiarise such persons with the traditions and culture of the native title party;

(b) to promote a knowledge and understanding of and respect for the traditions and culture of the native title party; and

(c) to foster good relationships between the native title party and others.

8.2 The registered native title claimant or his or her nominee and the grantee party shall co-operate in formulating and directing the presentation of the information.

Liaison Committee

9.1 Subject to conditions 9.2 and 9.5 and prior to commencement of mining operations on the Tenement, the grantee party must establish and continue a Liaison Committee comprising:

up to 2 persons nominated by the grantee party; and
up to 2 persons nominated by the registered native title claimant.

9.2 The grantee party must give written notice to the native title party of its intention to form the Consultation Committee (the committee) and invite written nominations from the registered native title claimant in respect of its representatives on the committee. If within 30 days of the receipt of the notice the registered native title claimant fails to nominate any such persons to the grantee party, or if at any time the registered native title claimant notifies the grantee party in writing that he or she does not wish the committee to be formed or to continue, the grantee party is not obliged to form or continue the committee as the case requires.

9.3 Each party may replace one or both of its members on the committee by giving at least 7 days written notice to the other party. Where a committee member is temporarily not available to attend meetings of the committee, the member may substitute another person to represent the interests of the relevant party during the period when that member is unavailable.

9.4 The functions of the committee will be the following:

(i) to provide a forum for the exchange of information between the parties concerning:
  (a) the mining operations, including proposed changes to those operations;
  (b) matters of importance to either the native title party or the grantee party as they relate to those mining operations or the area covered by the Tenement;
  (c) the operation of Condition 7 including any employment and training opportunities for the native title party on the Tenement and any member of the native title party seeking employment or training opportunities at the mine; and

(ii) to co-ordinate the development and implementation of the cultural awareness program referred to in conditions 8.1 and 8.2.

9.5 The committee must meet at least once each quarter. If all the committee members nominated by the registered native title claimant or their substitutes fail, without giving at least three days written notice to the grantee party, to attend 3 committee meetings in a row the grantee party is not required to continue the committee. The committee meetings must be open to other grantee party representatives and members of the native title party to attend as observers if they wish.

9.6 The grantee party must provide to the committee, on a quarterly basis, a report:
(i) on the number of members of the native title party in employment and training at the mine, including their respective job classification, the number of applications for employment or training received from the native title party, and the number of job and training offers made by the grantee party to members of the the native title party; and
(ii) on the number and nature of contracts entered into between the grantee party and any Associated Entity.

9.7 The location of the committee meetings will be on the Tenement unless agreed otherwise by the members.

9.8 The reasonable costs incurred by members in attending up to four committee meetings per year will be met by the grantee party. This does not cover the professional costs of legal representation.

General conditions

Assignment

10.1 These conditions apply to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the Tenement).

10.2 The grantee party must not assign the mining lease unless and until the assignee executes and delivers to the native title party a deed expressed to be for the benefit of the native title party by which the assignee undertakes to be bound by these conditions as if it were the grantee party. In the case of an assignment consisting of the entering into of a mortgage, charge or other security, the deed must provide that the assignee undertakes :

(i) to be bound by these conditions as if it were the grantee party, if it or anyone on its behalf enters into possession of the Tenement, or if it appoints a receiver to enter into possession of the Tenement; and

(ii) not to transfer the mining lease under any power of sale unless the purchaser executes a deed expressed to be for the benefit of the native title party by which the purchaser undertakes to be bound by these conditions as if it were the grantee party.

10.3 Upon the delivery to the native title party of a duly executed deed in compliance with condition 10.2, the native title party must execute a deed expressed to be for the benefit of the assignee by which the native title party undertakes to be bound by these conditions.

10.4 The grantee party must not disclose to a bona fide prospective assignee of the mining lease any information given to it by the native title party regarding sites unless and until the prospective assignee executes a deed expressed to be for the benefit of the native title party by which the prospective assignee undertakes to comply with condition 3.8 as if the reference in Condition 3.8 to the 'grantee party' were a reference to the prospective assignee.

10.5 For the purpose of conditions 10.1, 10.2 and 10.4 , 'grantee party' includes any person to whom the mining lease is assigned

Application of conditions

11.1 These conditions (other than conditions 3.8 and 13) apply only to that part of the Tenement which remains subject to:

(i) the native title claim;

(ii) another claim made by or on behalf of the native title party (either alone or in conjunction with others); or

(iii) an approved determination that the native title party holds native title (either alone or in conjunction with other persons) in respect of that part of the Tenement.

11.2 These conditions (other than conditions 3.8 and 13) apply only while the mining lease (including renewals) is in force.

11.3 These conditions (other than condition 3.8) do not apply to the grantee party if it ceases to be the holder of the mining lease and an assignee of the mining lease executes a deed as required by condition 10.2. This condition does not relieve the grantee party of any liability incurred under these conditions prior to it ceasing to be the holder of the mining lease.

Notices

12.1 For the purpose of these conditions, the registered native title claimant (from time to time) is authorised to give or receive any notice or other document on behalf of the native title party.

12.2 Notices or other communications under these conditions may be given by delivery, post or facsimile and each party must nominate a postal address and facsimile address for that purpose. Until a party has made such a nomination, its address for service will be taken to be the address of the party's representative at the future act determination application proceedings.

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

12.4 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.

General

13. Except as required by law the native title party must not, without the written consent of the grantee party, disclose to others the grantee party's confidential information relating to its activities pursuant to the mining lease.

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

15. The Government party shall make conditions 1, 3.1, 3.10, 4.1 and 10.2 conditions of the mining lease.

16. The Government party must endorse on the mining lease the fact that the grantee party and any assignee is subject to the terms and conditions of a determination by the National Native Title Tribunal dated 19 June 1998.

Definitions

17. For the purpose of these conditions the following terms have the following meanings:

"assign" includes sell, transfer, part with possession, create a legal interest in or otherwise dispose of in whole or in part, or enter into any mortgage, charge, or other security under which the mortgagee, chargee, or other secured creditor has powers to take possession, sell, convey or to appoint a receiver to take possession; "assignment" and "assignee" have corresponding meanings.

"Associated Entity" means any incorporated body or unincorporated association all the members of which are members of the native title party, and means an individual who is a member of the native title party.

"exploration" includes the activities referred to in s 66 of the *Mining Act* 1978 (WA) and the activities referred to in the definition of "explore" in s 253 of the *Native Title Act* 1993 (Cth).

"Government party" means the State of Western Australia.

"grantee party" means D.J. and R.M. Cottee and P.J. Townsend.

"mining lease" "means mining lease M36/341.

"mining operations" means:

(i) mining operations as defined in the *Mining Act* 1978 (WA) other than any activity associated with exploration activities; and

(ii) any work associated with mining operations including construction of access roads, buildings and other work preparatory to mining perations.

"native title claim" means the native title determination application (in its form from time to time) made under the *Native Title Act* 1993 (Cth) by Ted Coomanoo Evans on behalf of the native title party on 7 July 1995, and identified by National Native Title Tribunal number WC95/42.

"native title party" means:

(i) the registered native title claimants in respect of a native title claim and all persons on whose behalf the native title claim is made; and

(ii) in a case where an approved determination is made that the native title party holds native title to the whole or part of the Tenement (either alone or in conjunction with other persons), means the native title holders.

"reconnaissance prospecting" means exploration operations which do not involve the use of mechanised extractive or other equipment which is capable of causing damage to sites (but which may include the use of vehicles for transportation purposes).

"registered native title claimant"

(i) has the meaning given in the *Native Title Act* 1993 (Cth), and if there is more than one person who constitutes the registered native title claimant, means the first-named registered native title claimant; and

(ii) in the event of an approved determination that the native title party holds native title to the area of the Tenement, means the registered native title body corporate in respect of the native title claim.

Reference to a "site" imports the meaning given by s 39(1)(a)(v) of the *Native Title Act* 1993 (Cth).

"Tenement" means the area of the mining lease.