Future act determination–mining lease must not be granted

WDLAC (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49

Deputy President Sumner, 27 May 2009

Issue
In this case, the native title party sought a determination that a future act (the grant of a mining lease) must not be done. The area the mining lease would affect is a site of particular significance to the native title party. The National Native Title Tribunal determined that the lease must not be granted essentially because the interests, proposals, opinions and wishes of the native title party in relation to the management, use and control of the area concerned should be given greater weight than the potential economic benefit or public interest in the mining project proceeding. This is the first determination made by the Tribunal to that effect.

Request for Minister to overrule
On 10 June 2009, Holocene asked the Commonwealth Attorney General to overrule the Tribunal's determination on the grounds that it is in the national interest or in the interests of the State of Western Australia for the minister to do so. Any declaration must be made before 28 July 2009—see ss. 42(2) to (4).

Background
The state (the government party) gave notice under s. 29 of the *Native Title Act 1993* (Cwlth) (NTA) of a proposal to grant a mining lease under the *Mining Act 1978* (WA) to Holocene Pty Ltd (the grantee party). More than six months after the s. 29 notice was given, the grantee party made an application pursuant to s. 35(1) on the basis that negotiating parties had been unable to reach agreement of the kind mentioned in s. 31(1)(b). The native title party submitted that the grantee party had not negotiated in good faith but the Tribunal rejected that submission—see *Holocene Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu)/Western Australia* [2009] NNTTA 8.

The lease was to cover 3144 hectares, around 87% of which affected part of Lake Disappointment in the Gibson Desert. The area concerned wholly overlapped a site registered under the *Aboriginal Heritage Act 1972* (WA) (AHA). It also entirely overlapped part of the determination area of the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) (WDLAC, the native title party). WDLAC is the registered native title body corporate that holds the Martu People's native title on trust—see *James v Western Australia* [2002] FCA 1208 (*James No. 1*) and *James v Western Australia (No 2)* [2003] FCA 731.

Contentions
The grantee party sought a determination that the act may be done subject to the conditions it proposed, which were based largely on conditions imposed by the Tribunal in other matters. The government party sought a determination that the act may be done but reserved its position regarding the proposed conditions. The native title party sought a determination that the act must not be done. This is one of only three cases in which the native title party has maintained this position in an inquiry before the Tribunal.

The parties agreed that:

- the registered native title rights and interests relevant to this proceeding were those set out in the determination of native title made in *James No. 1* and included the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others ('exclusive' native title);
- the Tribunal may accept the facts set out in *James No. 1*—at [61] to [62].

Details of the project
The grantee party proposed to use the lease area to extract and process potash (potassium sulphate). A resource of 25 million tonnes had been established within the exploration licences the grantee party already held. Mining was to take place on the surface of the Lake Disappointment by means of a five-metre wide and three-metre deep brine collection trench. A causeway would be built adjacent to the trench. Brine would be pumped from the trench into evaporation ponds near the northern shore of the lake. Potassium salts would be harvested using a fleet of harvesters and trucks. The final product would be transported to Perth along a public access road to the Talawana Track, which runs through the Martu determination area. Existing roads and tracks would be upgraded and a new access road from the lake to the Talawana Track built. The area affected by the various project facilities would be around 25 square kilometres. The anticipated lifespan of the project was 40 to 50 years, with a workforce of about 60 people employed on a fly in/fly out basis unless local people could be employed.

Relevance of 'term sheet' agreement
The relevance of what was called the 'term sheet' agreement, entered into by the native title and grantee parties as part of the good faith negotiations and tendered by the native title party in these proceedings, was in issue. The grantee party's solicitor referred to it in correspondence as an 'in principle' agreement. The term sheet agreement was the subject of public announcements, including a release by the Martu People's commercial advisor entitled 'Traditional Owners Fully Support Reward Minerals Limited Lake Disappointment Potash Project' and a release by Reward Minerals Ltd (the grantee party's parent company) entitled 'Commercial terms agreed with Martu for Lake Disappointment', which summarised those terms. The grantee party submitted the term sheet was subject to a 'without prejudice' privilege.

The Tribunal found that the term sheet agreement was subject to a 'without prejudice' privilege but that the public announcements made in relation to it, with

the consent of both parties, were admissible for the purpose of establishing the fact of the in principle agreement and some of its terms—at [60].

Native title party's evidence

An on-country hearing, held at a community called Jigalong, was attended by the Tribunal and native title party. (It was digitally recorded for the grantee and government parties.) The oral evidence was limited to matters addressed in an affidavit by Teddy Biljabu, Mitchell Biljaba, Billy (Nyaparu) Landy, Timmy Patterson, Bobby Roberts, Brian Samson and Allan Charles (the Martu elders' affidavit). All but one of the deponents of that affidavit gave oral evidence, along with six additional witnesses. The native title party provided interpreters. It was agreed that leave to cross-examine would not be requested. The native title party's evidence also included:

- a statement about the cultural significance of Lake Disappointment by Professor Robert Tonkinson (the Tonkinson statement);
- the 2001 Martu native title claim connection report;
- the affidavit of Jeremy Maling, an anthropologist, annexing a draft heritage survey report (the Maling report);
- a DVD of the Lake Disappointment Aboriginal heritage survey discussions conducted by Mr Maling;
- financial and ASX documents relating to Reward Minerals Limited for the 2008 and 2009 period.

Section 155 direction varied

A confidentiality direction, made by the Tribunal under s. 155, provided that the Tonkinson statement and the connection report evidence must not be disclosed to anyone except certain identified people (e.g. counsel, instructing solicitors, expert anthropologists). The Tribunal thought it appropriate to refer to some of that evidence and so, to that extent, varied the s. 155 direction because much of it was already in the public domain in a book written by Professor Tonkinson. Deputy President Sumner:

[A]ppreciate[d] that from an Aboriginal perspective the fact that material which is of secret and sacred kind has been made public does not mean that they are happy to see its continuing dissemination. However ... I considered it important to refer publically again to the material ... to ensure ... my reasons are fully understood and the factual basis of my determination is clear—at [28], referring to *Parker v Western Australia* (2008) 167 FCR 340; [2008] FCAFC 23 (summarised in *Native Title Hot Spots* Issue 27).

Beneficial construction of the NTA

The native title party made contentions based on the importance of protecting Martu native title rights, including that the wishes of the native title party should be a paramount consideration, which 'undoubtedly' was 'one of the central matters for consideration'—at [40].

In support of that contention, reference was made to the Preamble to the NTA and to the fact that a beneficial construction should be given to provisions of the NTA

designed to protect (among other things) native title rights and interests. The Tribunal accepted that this principle applied:

> As the Federal Full Court recently noted, the right to negotiate regime is an element of the protection of native title, one of the main objects found in s 3 of the NTA and, given its beneficial nature, it is not to be narrowly construed—at [42], referring to *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [18], Spender, Sundberg and McKerracher JJ.

The Tribunal also noted (among other things) that:

- the relevant 'main objects' in s. 3 of the NTA are to provide for the recognition and protection of native title, establish ways in which future dealings affecting native title may proceed and set standards for those dealings;
- the NTA was enacted with knowledge of the mining industry's importance and the right to negotiate provisions were intended to deal with the ongoing grant of mining titles—at [45].

Relevance of international instruments

The native title party contended that the underlying principles of the *Racial Discrimination Act 1975* (Cwlth) (RDA) were reflected and supplemented in international law, including in instruments such as the Universal Declaration of Human Rights and the Declaration on the Rights of Indigenous People. The Tribunal found that:

> [T]he use which can be made of international instruments is as an aid to the interpretation of statutes where the terms of the statute are ambiguous. ... [T]here is no relevant ambiguity in s 39 of the NTA and thus these are not matters which can directly impact on the Tribunal's deliberations in this inquiry—at [46].

Legal framework—the s. 39 criteria

Pursuant to s. 38(1), the Tribunal must make one of three types of determination:

- that the act must not be done;
- that the act may be done;
- that the act may be done subject to conditions to be complied with by any of the parties.

The criteria for making a future act determination are found in s. 39. It was noted (among other things) that:

- in exercising its power, the Tribunal weighs those criteria by giving proper consideration to each on the basis of the evidence;
- there is no common thread running through the s. 39 criteria and so the Tribunal may be required to take into account diverse and sometimes conflicting interests;
- the NTA does not direct that greater weight be given to some criteria over others and so the weight given to each depends upon the evidence—at [37] to [38].

The Tribunal went on to consider the evidence against the s. 39 criteria.

Enjoyment of registered native title rights and interests—s. 39(1)(a)(i)

Under s. 39(1)(a)(i), the Tribunal must take into account 'the effect of the act on the enjoyment by the native title parties of their registered rights and interests'. In this case, this meant the rights and interests determined by the court and registered on the National Native Title Register. Pursuant to s. 29, the 'native title party' was WDLAC but, as was noted, it was 'self-evident' that the Tribunal was concerned with the effect of the act on the Martu People's enjoyment of those rights and interests—at [64].

The Tribunal makes its assessment against this criterion by examining the evidence relating to the actual exercise or enjoyment of the registered rights in the relevant area. In this case, it was the effect of the grant of the proposed lease considered in the context of the whole project. Most of the proposed mining operations would affect the surface of Lake Disappointment. The Martu evidence was that (among other things):

- they go to the lake at least once or twice a year to look after sites and keep their Law strong but they 'cannot walk over' some parts of the lake, 'no one can';
- over parts that were safe, Martu hunted and collected bush foods.

Overall (but leaving to one side issues as to the significance of the lake and the impact on the Martu People's culture and authority in relation to it) the Tribunal found that the effect of the act on the physical enjoyment of the Martu People's registered rights would not be substantial—at [81].

It was agreed that the native title right to 'exclusive possession' would be affected by the grant of the lease and that the right to make decisions about the use and enjoyment of the area of the proposed lease would be abrogated for the life of the lease. It was also agreed that the following rights (in summary) would be affected:

- to live on the area of the lease;
- to hunt, fish and gather;
- to use ochre, soils, rocks and stones and flora and fauna;
- to take, use and enjoy waters—at [72] to [74] and [78] to [79].

However, the evidence was that the Martu did not exercise these last four rights over the area concerned. As to the native title right to be acknowledged as the traditional Aboriginal owners of the area: '[E]ven if other Aboriginal people were to be employed on the Project ... [t]he fact of them being [so] employed ... could not in any way be used to say that they are traditional owners of the area'—at [77].

Way of life, culture and traditions—s. 39(1)(a)(ii)

Under this criterion, the Tribunal must take into account the effect of the act on the way of life, culture and traditions of the native title party. The strength of Martu traditional culture and connection to country was accepted by all parties.

Part of Professor Tonkinson's statement regarding the cultural significance of Lake Disappointment summarised the Martu traditional social structure, culture and attachment to land as follows:

> [T]he Martu believe that, during the world-creative activities of all the ancestral Dreaming beings, all the structural and legal essentials of life were laid down, and in a kind of contract, these beings demanded from their human descendants two big things: obedience to the dictates of 'the Law' and the faithful performance of rituals, which together will guarantee the continuing flow of enabling powers into the human realm, thus assuring the ongoing fertility of all living things and the continuance of Martu society.

The Martu elders' affidavit provided a 'more contemporary confirmation' of the position and oral evidence given on country 'was a powerful endorsement of the strength of feeling about Martu culture'—at [84] to [85].

The native title party contended that, if the proposed lease was granted without the permission of the Martu People, the authority of Martu culture would be undermined and the social and cultural structures of the native title party would thereby suffer. The Tribunal found that, generally speaking, the grant of the proposed lease would not detrimentally impact on the way of life, culture and traditions of the native title party in any substantial way—at [87].

However, Deputy President Sumner was careful to point out that:

> The effect of the future act on Lake Disappointment ... does have relevance to this criterion because of the importance of the Lake to the Martu and its connection to their way of life, culture and traditions in a spiritual way and otherwise—at [88].

Development of social, cultural and economic structures—s. 39(1)(a)(iii)
Under this criterion, the Tribunal must take into account the effect of the act on 'the development of social, cultural and economic structures' of the native title party. There was no evidence of any economic structures of the Martu which could be affected in an adverse way. As to the Martu People's social structures, there was no specific evidence relating to this factor. It was noted (among other things) that:

- the mine would be some distance from the two nearest Aboriginal communities and there were restrictions on entry to both of those communities;
- conditions could be crafted to minimise activities or contact which could have a detrimental effect on the Martu People's social structures—at [93] to [94].

As the effect on Martu cultural structures was 'inextricably bound up' with the importance of Lake Disappointment, it was dealt with later in the Tribunal's reasons.

Freedom of access and freedom to carry out rites and ceremonies—s. 39(1)(a)(iv)
The Tribunal must take into account the effect of the act on the native title party's 'freedom of access' and 'freedom to carry out rites, ceremonies or other activities of cultural significance' on the area concerned 'in accordance with their traditions'.

The conditions proposed by both the government and the grantee party attempted to maintain Martu access to the area to the greatest extent possible. However: 'In this case the conditions would be of little significance as the evidence only suggests

minimal access to the subject area and would in any event only be a relatively minor amelioration of that impact'—at [97].

Areas or sites of particular significance—s. 39(1)(a)(v)
The question considered under this criterion was 'whether there is an area or site of particular significance (being that which is of special or more than ordinary significance to that native title party) that will be affected by the future act'. This involved making a value judgement about whether, from the Martu's point of view (and according to their traditions), the area or site was special or different from other areas or sites—at [99].

It was found that the project would affect a site of particular significance. However, in the Tribunal's view, it was important 'to explore the detailed evidence which provides the basis for this finding and examine how the site will [actually] be affected' by the grant of the lease—at [103].

The main area of dispute was the level of significance of the Lake Disappointment site. The native title party said it was of profound cultural significance and danger. The grantee party said that it was of special significance but not of such a level that mining could not be contemplated without the formal consent of the Martu.

The total area of the site as registered is 3,758 square kilometres, comprised of the main lake (over which the mining operations would occur if the lease was granted), a number of smaller lakes and a larger area of land around the lakes. Under the AHA, it is a 'closed' site i.e. written consent is required to view the site file information. The Tribunal found that the fact that the site was classified as 'closed access' and described as 'ceremonial and mythological' suggested it was of special significance—at [108].

Professor Tonkinson's statement on the lake's cultural significance contained evidence that:

> [N]o Mardu ever set foot near it [the lake], because to them it is the home of the dreaded Ngayunangalgu (will eat me). These cannibal beings, which dwell in their own complete world beneath the lake and emerge to attack human trespassers, are mythologically and totemically important to the Mardu. They are involved in certain curative magical activities ... but a strong fear of them keeps Mardu well away from their habitat.

Professor Tonkinson also said that: 'Traditionally, the salt lake Kumpupintil [Lake Disappointment] would almost certainly have constituted by far the largest no-go area in the Martu homelands'. As to the situation now, according to the Tribunal:

> It is ... clear that ... some Martu Elders and the Martu community generally, as expressed through two community meetings, ... are prepared to contemplate mining on parts of the Lake. ... The evidence of some Elders at Jigalong that they are opposed to mining is consistent with Professor Tonkinson's view. But that must be balanced against other evidence which shows that this is not a case of absolute prohibition on mining by current Martu Elders—at [111].

However, it was found (contrary to the grantee party's submissions) that the Martu connection report reaffirmed the importance of the site to the Martu:

> What the Connection Report shows is that, consistent with other evidence, it is not a site which requires the total exclusion of certain categories of people unless accompanied by certain rituals or senior men nor is it a site from which women are excluded. .... Nevertheless, I am satisfied that the evidence overwhelmingly established it as a very important place in Martu culture and tradition—at [122].

The report of a site survey conducted by Dr Guy Wright in 2006 allowed for the grant of exploration licences that comprised part of the project. Eight Martu men took part. The exploration program surveyed involved using a helicopter to lift a geoprobe that retrieved a 42 millimetre diameter core of sediment and brine from the lake. A small trench would also be dug in the lake with a shovel. Dr Wright reported that, at the conclusion of the survey, the Martu men felt they should discuss the issue of exploration more broadly within the Martu community.

The exploration program was approved over areas identified in a map attached to Dr Wright's report at a community meeting convened by WDLAC in October 2006. However, no consent was given to access certain identified areas and the consent that was given was for the limited purposes specified. The Martu elders' affidavit evidence was that they consented on the basis that disturbance to Lake Disappointment would be minimal and the period when men would be on the lake 'would be very short'. The Tribunal accepted that the exploration program was confined to the activities as described but noted that the Martu elder's evidence did not reflect the fact 'that it must have been known to the Martu that exploration may lead to a proposal to mine'—at [128].

A second heritage survey (the Maling Report) was commissioned by the grantee party and specifically related to the proposed lease and a pending miscellaneous licence. The eight Martu consultants confirmed the ethnographic values of the entire registered site and agreed to the project proceeding on the area previously approved for geoprobe drilling and manual trenching (i.e. avoiding certain identified areas). In addition, the Martu consultants did not want any mining or other activity on the islands. The Maling report said (among other things) that any further works would require additional consultation and that Martu monitors must be present during any ground disturbing activity.

The Martu elders' affidavit included the following evidence:

- Lake Disappointment 'country', which includes the lake itself and the country around it, 'has long been an area that is special to the Martu. Our song line goes all around and through Lake Disappointment';
- the whole of Lake Disappointment is a sacred site under Martu culture and the lake also contains other sites that are special;
- 'big parts' of Lake Disappointment 'are dangerous and there are areas on and around the lake that must not be disturbed'.

The oral evidence of Martu people at the on-country hearing confirmed the strong connection to the Dreamtime through stories and song lines in and around Lake Disappointment. The Tribunal was satisfied that:

> The whole of the evidence leaves no doubt that the Lake is of spiritual significance to the Martu including the surface of the Lake which traditionally was not visited. ... The evidence also establishes that this spiritual significance extends to areas around the Lake because of the Dreaming stories associated with it and such places as Savory Creek which runs into it—[141].

As to the 'level' of significance, it was found that:

> Although it is not so sacred or dangerous that it needs to be avoided in all circumstances, the evidence overwhelmingly establishes it [the lake] as an important place which is integrated into Martu culture and connection to country generally—at [149].

Relevance of the heritage protection regime to s. 39(1)(a)(v)

Submissions were made in relation to the protective regime found in the *Aboriginal Heritage Act* 1972 (WA) (AHA) which, in summary:

- provides for the protection and preservation of Aboriginal sites and objects;
- makes it an offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site (registered or not) without ministerial consent granted under s. 18;
- requires a person seeking consent under s. 18 to outline the nature and extent of consultation with Indigenous stakeholders (including native title parties), outline strategies to minimise impacts on sites and declare they have read and understood any heritage survey report tendered in support of their application;
- provides a defence to a prosecution if the person can prove they did not know, and could not reasonably be expected to have known, that the place was a site covered by the AHA.

The Tribunal can (and does) take the operation of the AHA into account when making a future act determination and may leave issues arising under s. 39(1)(a)(v) to the state regime. However, to so in this case would mean 'avoiding the Tribunal's responsibilities' to properly consider the issue:

> The grantee party cannot comply with the AHA by planning its operations in a way that avoids the site, and approval will be needed under s 18 before mining commences. The State regulatory regime cannot be relied on to make a finding that the Project will not affect Lake Disappointment because either it can be avoided or the Minister will not approve interference with it—at [145].

In other words, even the most 'efficient and well resourced' site-protection system could not ensure that the project would go ahead 'without interference with an Aboriginal site of particular significance to the native title party'—at [144].

Disturbance to site would not be minimal

The grantee party argued that the mine would affect only 'a minute fraction' of Lake Disappointment. However, the Tribunal found that:

> [T]he disturbance to the Lake from the proposed mining ... will not be minimal. The evaporation ponds and brine trench with a potential to extend for some 20 kilometres with the accompanying infrastructure and activities in collecting the potash salts means that there will be considerable interference to it—at [151].

Further, the project would last for up to 50 years, which also indicated that 'its impact on the site would not be minimal'—at [152] to [153].

Conclusion on s. 39(1)(a)(v)

The Tribunal concluded that Lake Disappointment:

> [N]ot only formally falls within s 39(1)(a)(v) as a site of particular significance but ... is of very great significance to the Martu despite the contemporary qualification that mining on part of it could be contemplated on acceptable terms—at [149].

Existing non-native title rights and interests and use of the land—s. 39(2)

The area of the proposed mining lease is the subject of exploration licences held by the grantee party and both the grantee party and the public access the Talawana Track and Canning Stock route, which run near to the proposed lease area.

Native title party's interests, proposals, opinions or wishes—s. 39(1)(b)

Under this criterion, what must be taken into account is the native title party's 'interests, proposals, opinions or wishes in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests that will be affected by the act'. In this case, there were registered rights that would be affected (e.g. the right to make decisions about the use and enjoyment of the area).

The native title party contended that the mining lease should not be granted unless the grantee party developed a satisfactory working relationship with the Martu and provided them with reasonable benefits, including some 'ownership' of the project. The grantee party said the native title party had no right of veto and could not rely on the alleged inadequacy of commercial terms or on terms previously negotiated.

The evidence already considered that was relevant to this criterion included the term sheet agreement and the results of the two heritage surveys over Lake Disappointment. Other relevant evidence, found in the Martu elders' affidavit, included the following:

> [T]he Martu ... know that we have to live in a world with white men and white men's law. We know that to protect our land, sometimes we have to give up a little bit even if it affects our culture and law. But the white man cannot have all our land. We give them a little bit but no more. We let go of a fingernail, and it hurts us, but we do this so we do not have to lose an arm. So we agreed to let Holocene to come onto parts of our land, but no more, so we could protect and save all the other parts of our land. This is the price we must pay to protect our culture and our Law for the future of the Martu.

> Holocene and Reward thought that the payment to the Martu of the money and royalties and other compensation and shares set out in the Term Sheet was fair compensation when they agreed to the Term Sheet. It was very important that we would get royalty payments and shares in Reward as we would own part of the Project and share in its success and we would keep a share of the land. This made it easier to agree to allow Holocene to build the Project on our land and to accept the effect on Martu culture.
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> Now Holocene and Reward are saying that they will not give us a royalty or shares in Reward and that Holocene and the Government only have to pay very small compensation because they think the land is worth so little. This is a white man's attitude and completely ignores the impact on Martu culture by the mining activities, particularly as this will happen without our approval.
>
> If there is no trust and respect, if there is no Martu involvement and no fair compensation paid to the Martu, then the Martu will not agree to mining on Martu land.
>
> We want jobs for our people, but more than that, we want contracts for our companies, like our trucking company, and we want contracts to build and maintain the roads and track. This will give us independence, experience and a future, so we can develop our communities and offer our young people a future on their country. We want our boys and girls to go to University and learn trades to be able to work for and help their people. We want to use any money that we get from this Project to do these things for our people. We though all this would be discussed as part of the Stage 2 of our negotiations with Holocene and Reward and be part of our agreement.
>
> The Martu need to be consulted about the Lake and the mine because the Martu are responsible for the Lake. It is part of us; it is our culture and our Law. We should be told exactly where Holocene plans to mine, the location of its plant, camp, trenches and ponds. ... In the end Martu need to be told about all aspects of the Project and operations before we can decide whether we are prepared to agree to it going ahead.

It was accepted that opposition to mining was not raised by the native title party until after negotiations dissolved. However, the Tribunal also accepted the Martu elders' reasons for now declining to give their consent, as set out in their affidavit:

> For them it is one thing to enter negotiations in contemplation of mining which involved certain benefits and other terms, but quite another to consent to it when an acceptable and beneficial agreement could not be reached—at [159].

Distinguishing *Australian Manganese*

In *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387; [2008] NNTTA 38 at [57], the Tribunal rejected a submission that it should make a determination that a mining lease must not be granted *solely* because no agreement had been reached with the native title party because allowing the grant would adversely affect 'their aspirations to self-determination'. The Tribunal said this was 'tantamount to suggesting' that the native title party had 'a veto over the proposal' which was 'clearly not the law'. The grantee party relied on this finding.

The Tribunal acknowledged there were some elements common to both *Australian Manganese* and the present case, such as:

- negotiations about a comprehensive agreement broke down and the native title party would consent to mining only if a satisfactory agreement was reached; and
- there was a finding that there would be no significant impact on the enjoyment of native title rights or the other criteria in s. 39(1)(a)(i) to (iv)—at [162].

However, the 'major distinguishing feature' was that, in *Australian Manganese*, there was no evidence for the purposes of s. 39(1)(a)(v) that any site of significance would be interfered with: 'The evidence only established the possibility that such a site or sites existed on the mining lease area. In those circumstances, the Tribunal determined that the provisions of the AHA could be relied upon'—at [162].

Further, the fact that a native title party was not opposed to mining, but had not reached a satisfactory agreement in relation to it, did not 'automatically justify a determination that the act may be done'. As was noted:

> In the present case the Tribunal is dealing with a future act which will directly affect a site of particular significance to the Martu and that is an important matter to be weighed in the balance—at [162].

A further point of distinction was the weight to be given to the native title holders' interests, proposals, opinions or wishes etc. under s. 39(1)(b) in the circumstances of this case. The Tribunal was of the view that:

> [T]he fact of a determination of exclusive native title rights ... does increase the weight that can be given to this criterion. It cannot be of such weight applied in a standard way that it would be tantamount to a veto to be applied in all cases. ... [However as] ... a general proposition, there is a difference between making a future act determination over an area of exclusive possession [as in this case] and making a determination over an area where the right to exclusive possession has been extinguished and the capacity to exercise or enjoy other native title rights is seriously attenuated because of the exercise of non-native title rights, such as pastoral interests—at [163].

Economic or other significance—s. 39(1)(c)

Under this criterion, the Tribunal must take into account:

> The economic or other significance of the act to Australia, the state or territory concerned, the area in which the land or waters concerned are located and the Aboriginal peoples and Torres Strait Islanders who live in the area—s. 39(1)(c).

As was noted, it is the significance of the future act itself which must be considered, not its contribution to the maintenance of a viable mining industry overall—at [165].

The evidence accepted by the Tribunal included that:

- as there is no current domestic supply of potash, Australia imports around 500,000 tonnes per year;
- the grantee party's proposal was based on an initial output of 200,000 tonnes per year at an 'ex-gate' value of $100 million, producing royalties to Western Australia in excess of $5 million per annum;

- there should be substantial taxation revenue for the Commonwealth and Western Australia;
- the WA Department of Agriculture and Food supported the project.

The grantee party conceded there were no project design or specification documents yet and no feasibility studies had been commissioned. There was also evidence of a downward trend in potash prices and some potential difficulties in raising finance but the grantee party confirmed at the hearing that it still intended to proceed with the project. The Tribunal rejected the native title party's contention that the project was entirely speculative, finding that there was 'a reasonable prospect' it would go ahead and, if it did, it would potentially benefit the Australian and state economies. The fact that its status was unconfirmed was 'a minor consideration in the difficult task of weighing up the competing considerations'—at [171] to [172].

The Tribunal accepted the native title party's contention that the benefit, economic or otherwise, to the local Aboriginal People (essentially, the Martu) was limited to 'the possibility of some of them being employed and their businesses engaged in work contracts and an upgraded road'—at [178].

It was noted that the native title party's entitlement to compensation: '[C]annot be seen as an economic benefit. Rather, it is a legal entitlement to be recompensed for ... loss or damage suffered'—at [177].

Public interest—s. 39(1)(e)
The Tribunal accepted (as it has previously) that 'there is a public interest in a thriving mining industry' and that the grant of the mining lease in question had the potential to enhance it—at [180].

The Tribunal also acknowledged that, 'in the abstract', it may be in the public interest to refuse the grant of a mining tenement:

> To take an extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth. ... Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people—at [182].

In this case, the Tribunal was satisfied that the public interest would be served by the project. However, 'this interest must be balanced against the interests of the native title party and their wishes in relation to the interference with an important traditional site'—at [183].

Any other matter the Tribunal considers relevant—s. 39(1)(f)
The Tribunal took account of the fact that the grantee party had expended approximately $250,000 in payments to the native title party for meetings and heritage surveys, in addition to the high cost of it exploration programs. The grantee party contended it incurred this expenditure because the native title party consistently advised that it did not object, in principle, to the project. The Tribunal was not convinced that the native title party's agreement to exploration constituted

an 'in principle' agreement to mining. However, it was accepted that the term sheet agreement indicated 'a readiness to proceed with it, albeit subject to final agreement from stage two of the negotiations'—at [184].

The environmental protection regime was also taken into account. Rehabilitation of the proposed lease area would, in practice, fully restore the native title right to access the area and control persons entering it. However, this would only be done at the end of the project, i.e. some 50 years hence. Therefore, it was not 'a factor that should be given a great deal of weight' because:

> For the whole of this time there would be development on Martu land that would have a considerable impact on the surface of the Lake and on the spiritual relationship of many of the Martu to it—at [187].

The Tribunal decided (over the objections of the grantee party) that, under s. 39(1)(f), it could have regard to the Martu People's current opposition to mining based on the fact that there has been a failure to agree acceptable terms—at [188].

Proposed conditions for payment

The main issue in this case was the scope of the Tribunal's power to impose conditions in relation to monetary payments. Subsection 38(2) provides that the Tribunal 'must not determine' (i.e. impose) a condition on a determination 'that has the effect that' native title parties are entitled to payments worked out by reference to 'the amount of profits made, any income derived or 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'. The native title party contended that s. 38(2) did not prevent the Tribunal from 'imposing other conditions requiring the payment of money (or the provision of equity)' by the grantee party to the native title party. However, the Tribunal was of the view that:

> [T]he law relating to the powers of the Tribunal to impose conditions for the payment of monetary amounts is clear. ... [I]t is not within the Tribunal's power to impose conditions of the kind sought by the native title party for the awarding of compensation or payments in the nature of compensation—at [196].

Conclusion

As the Tribunal noted, weighing up the various factors involved in exercising its discretion under s. 38 had not been an easy task in this case. Given that the other factors raised by s. 39 were fairly evenly balanced, the main issue was the effect of the project on a site of particular significance (Lake Disappointment), 'in the context of the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land'—at [200] and [202] to [203].

It was noted that:

> The Martu community along with many Aboriginal communities throughout Australia ... [is] in transition from a traditional society to one which accommodates the reality of living among a dominant culture that has little in common with their traditions. As part of this accommodation, the Martu are prepared to contemplate activity on their land which traditionally they would not have agreed to in return for

> benefits of an appropriate kind. In my view, negotiations about mining on part of Lake Disappointment fall into this category—at [211].

It was too simplistic to say (as the grantee party did) that there was now no cultural impediment to prevent the lease being granted. The issue was more nuanced:

> It involves the native title party in a compromise which would have seen them give up some of their traditional culture and way of life (including as a result of interference with a place of great importance to them) in return for benefits which would see them and particularly their children involved in the mainstream economy. As a result of the breakdown in negotiations, this compromise is no longer available—at [212].

According to the Tribunal, the 'clear inference' from the evidence was that the native title party would not have agreed to exploration, entered into negotiations (beyond those required as part of its obligation to negotiate in good faith) or continued to negotiate if the only result was going to be an entitlement to compensation and 'not the other benefits that were clearly in contemplation'. According to the Tribunal:

> The expectation of the Martu ... would have been that, in return for mining on a place that is very special to them, benefits of this kind could be negotiated. What they now say is that the substantial interference with one of their important traditional sites is not acceptable in the light of the limited benefits available to them i.e. effectively for the upgrading of a road and the possibility of some employment and business opportunities—at [214].

While native title parties do not have a veto, they are entitled to say 'no' and, if they do, they are entitled 'to have the Tribunal give considerable weight to their view about the use of the land in the context of all the circumstances'—at [215].

In this case, it was found that the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the project proceeding—at [216].

Decision

The Tribunal determined that the act, i.e. the grant of the mining lease, must not be done—at [218].