

# **NATIONAL NATIVE TITLE TRIBUNAL**

*Infinity Mining Limited v Watarra Aboriginal Corporation RNTBC and Another* [2024]  
NNTTA 94 (11 December 2024)

**Application No:** WF2024/0003; WF2024/0004

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

- and -

**IN THE MATTER of an inquiry into future act determination applications**

**Infinity Mining Limited**  
(grantee party)

- and -

**Watarra Aboriginal Corporation RNTBC (WCD2022/002)**  
(native title party)

- and -

**State of Western Australia**  
(Government party)

**FUTURE ACT DETERMINATION THAT THE ACTS MAY BE DONE SUBJECT TO  
A CONDITION**

**Tribunal:** Ms Nerida Cooley  
**Place:** Brisbane  
**Date:** 11 December 2024

**Catchwords:** Native title – future acts – s 35 applications for determination – mining lease applications – power to make determination – whether grantee party has negotiated in good faith – Tribunal not satisfied grantee party failed to negotiate in good faith – Tribunal does have power to proceed with future act determination inquiry – s 39 criteria considered – effect of acts on native title rights and interests – effect of acts on development of social, cultural and economic

structures of native title party – effect of acts on way of life, culture and traditions – effect of acts on freedom of access – effect of acts on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of acts – public interest in doing of acts – determination that the acts may be done subject to a condition

**Legislation:**

[Aboriginal Heritage Act 1972](#) (WA) s 18

[Native Title Act 1993](#) (Cth) ss 29, 30, 31, 36, 38, 39, 41, 42, 52, 60AB, 151

**Cases:**

*Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC* [\[2021\] NNTTA 7](#) ('Atlas Iron')

*Cheedy and Others v Western Australia and Others* [\[2011\] FCAFC 100](#); [\(2011\) 194 FCR 562](#) ('Cheedy')

*Evans and Another v Western Australia and Others* [\[1997\] FCA 741](#); [\(1997\) 77 FCR 193](#) ('Evans v Western Australia')

*FMG Pilbara Pty Ltd v Cox and Others* [\[2009\] FCAFC 49](#); [\(2009\) 175 FCR 141](#) ('Cox')

*FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another* [\[2020\] NNTTA 8](#) ('FMG v Yindjibarndi')

*Gomeri People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [\[2024\] FCAFC 26](#) ('Gomeri')

*Harrington-Smith on behalf of the Darlot Native Title Claim Group v State of Western Australia (No 2)* [\[2022\] FCA 764](#) ('Darlot Determination')

*Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor* [\[2019\] NNTTA 91](#) ('Kallenia')

*Weld Range Metals Ltd v Western Australia and Others* [\[2011\] NNTTA 172](#); [\(2011\) 258 FLR 9](#) ('Weld Range')

*Western Australia v Thomas and Others* [\[1996\] NNTTA 30](#); [\(1996\) 133 FLR 124](#) ('Western Australia v Thomas')

**Representative of the native title party:**

Elizabeth Kamara, Roe Legal Services

**Representative of the grantee party:**

Les Lowe

**Representatives of the Government party:**

Domhnall McCloskey, State Solicitor's Office; Jennifer Bradbury, Department of Energy, Mines, Industry Regulation and Safety

## REASONS FOR DETERMINATION

- [1] **Infinity** Mining Limited is the applicant for the grant of two mining leases, M 37/1359 and M 37/1360, located in the Goldfields region in Western Australia, both of which are subject to existing prospecting licences held by Infinity. According to the Tribunal's online mapping tool, Native Title Vision, the leases are located about 53 kilometres apart.
- [2] In 2021, the **State** of Western Australia gave notice of the grant of each lease under s 29 of the *Native Title Act 1993* (Cth). The negotiation parties for each lease, being the State, the relevant grantee party (who at that time was not Infinity as I will explain) and any relevant native title party were then required to negotiate in good faith with a view to obtaining the native title party's agreement to the grant of the lease: s 31(1)(b) *Native Title Act*.
- [3] As at the notification day for the leases, being 16 June 2021, the leases fell within the area of the Darlot native title determination application (WAD142/2018) (**Darlot Claim**). The Darlot Claim was entered on the Register of Native Title Claims on 9 July 2021 and, at that time, the registered native title claimant for the Darlot Claim (**Darlot**) became a native title party in relation to the grant of the leases: s 30(1)(a) *Native Title Act*.
- [4] Later, once the *Darlot Determination* was entered on the National Native Title Register, **Watarra** Aboriginal Corporation RNTBC became the native title party in lieu of Darlot: ss 30(1)(c) and 30(2) *Native Title Act*. In accordance with the *Darlot Determination*, Watarra holds non-exclusive native title in relation to the whole of M 37/1359 and the majority of M 37/1360.
- [5] The negotiation parties did not reach agreement and, in May 2024, Infinity applied to the Tribunal for a determination that the leases may be granted.
- [6] I must not make a determination on the application if Watarra satisfies me that the State or Infinity did not negotiate in good faith: s 36(2) *Native Title Act*. Watarra asserts that Infinity did not negotiate in good faith but does not make any such assertion with respect to the State.

[7] I am satisfied this matter can be determined on the papers: s 151(2) *Native Title Act*. For the reasons outlined below, I am not satisfied that Infinity failed to negotiate in good faith and I have determined that the leases may be granted subject to the condition set out in Annexure C.

**Preliminary question – has Infinity negotiated in good faith?**

[8] Watarra must satisfy me that Infinity did not negotiate in good faith. In considering that question, I must view the negotiations as a whole.

[9] The scope of the obligation to negotiate in good faith under s 31(1)(b) has often been the subject of judicial consideration, most recently by the Full Court of the Federal Court in *Gomeroi*. The good faith requirement is directed towards the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is concerned with a party's state of mind as manifested by its conduct: *Cox* at [20].

[10] As discussed in *Gomeroi* at [406], the obligation to negotiate in good faith involves both objective and subjective standards, but the reference to objective standards is the objective standard of honesty against which a party's conduct is to be assessed. The good faith obligation is principally concerned with a negotiating party's intention, namely whether the party has negotiated with the aim of reaching agreement.

***What happened during the negotiations?***

[11] In order to consider the negotiations as a whole, it is useful to outline key events.

[12] In addition to the changes to the native title party outlined above, there was also a change to the grantee party for each lease. The State's notification under s 29 identifies the applicants for the leases as Alec Charles **Pointon** for M 37/1359 and **Zanil** Pty Ltd for M 37/1360. Watarra says that its searches of the State's records show the leases were transferred to Infinity in May 2022. There is no documentary evidence to that effect, but the timing does not appear to be in question.

[13] In the early stages of the negotiation in July and August 2021, the State wrote separately to Pointon and Zanil, requesting that they provide information about their

plans to Darlot, which they did. In accordance with s 31(1)(a) of the *Native Title Act*, the State also invited Darlot to make a submission, but there is no evidence any was made.

- [14] Nothing further of substance seems to have occurred until Mr Les Lowe was appointed to represent the grantee parties and made contact with Darlot, through **Roe Legal Services**, in January 2022. Mr Lowe for Pointon and Zanil then made a request to the Tribunal for mediation assistance in February 2022. From then until shortly after lodgement of this application in May 2024, the negotiations primarily occurred through mediation by the Tribunal under s 31(3) of the *Native Title Act*.
- [15] The first mediation conference was held on 25 May 2022. Due to the pending *Darlot Determination*, there was limited scope for discussion but Mr Mark Gregson of Roe Legal for Darlot explained that the new prescribed body corporate would have no financial resources and would be asking the grantee parties to contribute to the cost of the negotiation process. Prior to the conference, Mr Gregson had provided each of the grantee parties and the Tribunal with a draft negotiation protocol for discussion.
- [16] Mr Lowe similarly explained the minimal financial capacity of the grantee parties, but also raised the possibility of joint funding across both leases and the possible inclusion of other Zanil tenements. The financial circumstances of the grantee parties were acknowledged by Mr Gregson but he also explained that limited opportunity for financial compensation means little incentive for the native title party to undertake the work required. Each of the representatives agreed to discuss these circumstances with their clients. Mr Lowe also provided an overview of the proposed mining projects and a possible meeting between the parties was discussed.
- [17] The *Darlot Determination* was made on 5 July 2022 and, on 28 July 2022, Watarra's representative advised the Tribunal and the parties that it expected to hold an initial substantive meeting within a month and asked Infinity to provide a written proposal in relation to the leases. By that time, Infinity, also represented by Mr Lowe, was the applicant for both leases.
- [18] On 12 August 2022, Mr Lowe provided an update on various matters. The key points were that efforts were being made to produce a suitable mining agreement as a starting point for discussions and Infinity's internal discussions about funding Watarra's costs

were ongoing, but it asked that a budget be provided as soon as possible, noting the protocol was not yet suitable for signing. Additionally, Mr Lowe confirmed that Infinity was now the holder of both leases and was looking to progress a single agreement for all of its tenements, if that would suit Watarra.

- [19] Further communication from Mr Lowe followed on 24 and 25 August 2022 with more detail on the proposed mining activities and to note that a draft mining agreement would be provided soon. On 6 October 2022, Mr Lowe provided Watarra with “Proposed Activities” documents for each lease and then on 9 October 2022, he sent a draft Mining Agreement for comment and discussion. The agreement included a heritage protocol and a schedule of rates which was, at that time, blank. It provided for payments on the basis of a 2% royalty following the commencement of mining operations.
- [20] At the next mediation conference on 7 November 2022, Ms Alexandra Sfyri, who had been identified as Infinity’s legal advisor, attended with Mr Lowe. Roe Legal explained that Watarra planned to have its first annual general meeting (**AGM**) on 29 November 2022 to elect the board of directors. Further, Watarra had no bank accounts, offices, funding or Chief Executive Officer, which may affect the negotiations in the short term, but more information should be available after the AGM. The priority issue for Watarra was its representation and instructions for Roe Legal to participate in the mediation. On the question of funding by Infinity, Mr Lowe said the preference was to discuss cost estimates first, in response to which Roe Legal pointed to the previously provided negotiation protocol. Ms Sfyri advised that, because Infinity is a junior exploration company, detailed discussion on the topic is premature.
- [21] There was also general discussion about the information on mining activities provided by Infinity and the prospect of adding another five tenements to the negotiation. Interestingly, there is no mention of any discussion of the draft mining agreement provided by Infinity. The next mediation conference was expected to be held following Watarra’s AGM.
- [22] In December 2022, the Tribunal sought an update on the outcomes of the Watarra AGM. Mr Lowe responded to note that Infinity had applied for another two

prospecting licence conversions which could be introduced into the negotiation but otherwise it was in the hands of Watarra and awaiting news from the anticipated Watarra meetings. Mr Lowe also anticipated there may be delays associated with Darlot lore time and was keen to have some information from Watarra so that Infinity might progress things on its side during that time to minimise delay.

- [23] Mr Gregson responded to note that, following the AGM, Watarra had no plans to hold a board meeting until early 2023, but advised Infinity that Mr Aldrin Khaw of Grant Thornton is the relevant contact for heritage matters and suggested that might be an avenue for progress by Infinity in the meantime. Mr Gregson also noted his impending departure from Roe Legal.
- [24] According to updates given to the Tribunal in February 2023, Watarra was still in the process of sorting out its instructions to Roe Legal and a standard fee agreement and, as had been suggested, Infinity was in contact with Mr Khaw regarding issues relating to a heritage survey on a different tenement being M 37/983. Mr Lowe said the survey issues were being handled by Mr Pointon of Infinity and noted Watarra was aware of the issues. Mr Lowe thought it was pointless to hold another mediation conference until Watarra had sorted out its administrative arrangements, which Infinity wanted to occur as soon as possible. Watarra did not think mediation would be useful until after the March board meeting.
- [25] On 25 May 2023, Mr Lowe notified Roe Legal of upcoming heritage surveys on two Infinity tenements, unrelated to this process but including M 37/983 mentioned above.
- [26] Roe Legal responded on 18 July 2023 to advise that all heritage surveys on Darlot country must be approved by Watarra and requested that any unfinished surveys cease immediately. Roe Legal again advised survey arrangements must be made through Mr Khaw, although the records indicate Infinity had been in contact with Mr Khaw, at least in relation to the survey for M 37/983.
- [27] On 18 August 2023, Mr Lowe responded to explain that the surveys had been arranged by a consultant anthropologist, who Infinity had understood to be Watarra's preferred heritage service provider. Mr Lowe asked for confirmation of whether that was the case and, if not, for advice on who is that person.

- [28] In July and August 2023, there were also a number of exchanges about Infinity's review of the draft negotiation protocol, which remained subject to approval by Watarra. Overall, Mr Lowe indicated that there were too many details missing from the draft document for Infinity to sign it.
- [29] At the 5 September 2023 mediation conference, Watarra advised that it had settled its operational capacity and a standard Negotiation Protocol and standard Heritage Protocol/Mining Agreement had been settled by the board in August. Watarra thought that the comments previously provided by Infinity on the draft negotiation protocol could be readily addressed. Mr Lowe indicated there would not be any further comments forthcoming from Infinity due to the unexpected resignation of its legal counsel. In addition, there is a brief note that Watarra directors may wish to meet with Infinity regarding the previous heritage surveys in order to support a constructive working relationship between the parties. Mr Lowe also agreed to ensure any future contact on heritage matters would be through Mr Khaw.
- [30] On 15 September 2023, which I note was over a year after the *Darlot Determination*, Watarra sent its approved negotiation protocol (which appears to be materially different to the protocol documents initially provided) to Infinity, together with a cost estimate for the negotiation. The cost estimate was based on one Watarra said had been agreed by another Australian Stock Exchange (**ASX**) listed gold miner and was provided as a starting point for discussions. The estimate contemplated a seven-person negotiation team for Watarra, eight negotiation meetings over the course of 18 months, community consultation meetings and an authorisation meeting. The total of the estimate was just over \$1.25 million. However, Watarra did note that there were mechanisms which could be employed to reduce costs such as holding fewer negotiation meetings and sharing costs with other proponents.
- [31] Mr Lowe sent a response on 29 September 2023, explaining that the costs are beyond the capacity of Infinity and represent 11.5% of its market capital. Mr Lowe again explained the small size and exploratory nature of the proposed activities at this stage and noted that Infinity had proposed a draft heritage agreement in 2022, which it considered suitable to the scale of the resource and size of the company. In conclusion, Infinity advised that it cannot "come to terms" with the negotiation protocol and cost estimate provided and that "[i]n good faith" it proposes a "simple royalty based

mining compensation agreement” because Infinity needs more time drilling and further resources to prove the projects are viable. It offered to make available a full copy of its confidential work programme for M 37/1360 carried out by an independent consultant.

- [32] In early October 2023, the Tribunal followed up on the proposed meeting between Infinity and Watarra. Mr Lowe advised that he thought the meeting had been proposed in relation to the heritage survey issue, which was a result of an incorrect assumption that the archaeologist involved had made the appropriate arrangements and followed procedure, but Infinity had responded to Watarra to explain the circumstances. Mr Lowe noted that there had been no further communication on the issue and Infinity had “rigorously and emphatically” educated its staff about the correct channels to be followed. Given there had been no further communication on the issue, Infinity thought it had been satisfactorily resolved and suggested the parties’ limited resources should be directed to the negotiation.
- [33] A further mediation conference was held on 30 October 2023. Watarra advised that a request had been made for Infinity to be added to the agenda for the 6 November 2023 meeting to discuss the costs estimates and a proposed simplified agreement. Infinity also agreed to prepare a presentation on the small-scale nature of the project. The heritage issue was raised again and Mr Lowe explained that it had been dealt with.
- [34] Eventually, Infinity met with representatives of Watarra by video conference on 5 February 2024. On 28 February 2024, Mr Lowe circulated his notes from that meeting to the Tribunal and the other parties. None of the other parties appeared to dispute the notes at the time, nor have any issues been raised in submissions.
- [35] According to Mr Lowe’s notes, the parties discussed the cultural heritage survey issues outlined above and Infinity agreed to undertake new surveys in the near future. Infinity also agreed to discuss a heritage agreement going forward and stressed the importance of heritage protection, which was of key importance to Ms Verna Vos, the chairperson for Watarra. The notes also record that Infinity reiterated its inability to pay the estimated costs for the negotiation and its proposal for a deferred royalties based solution. The concluding remarks refer to the meeting as “frank, open and fruitful”.

- [36] What would prove to be the final mediation conference was held on 5 March 2024. Infinity advised that the cost estimate was beyond what it could afford and discussed its “proposed royalty-based agreement with a ‘deferment’ provision”. In response, Watarra asked that Infinity provide an estimate of what it could afford, together with its reasoning, as well as an explanation of its deferment proposal. This was to be done by 11 March 2024.
- [37] On 11 March 2024, Infinity provided an 11 page written offer to Watarra, including the requested explanation of its offer and deferment agreement. The written offer contained information to evidence Infinity’s financial position, including its balance funds as at December 2023 of about \$590,000, which it said had been, as at the date of the offer, “even further depleted to approximately AUD400,000”.
- [38] On 15 April 2024, Watarra informed Infinity that its offer was insufficient and asked that it reconsider, taking into account the estimate previously provided. Mr Lowe indicated he would seek instructions but, on 28 May 2024, Mr Lowe advised the parties and the Tribunal that this application had been lodged. The mediation was terminated on 2 July 2024.

***Did Infinity negotiate in good faith?***

- [39] In considering the question of good faith, it is not for me to critique the negotiating style or proficiency of the parties. In particular, the Tribunal’s role is not to form its own assessment of whether a particular offer was “reasonable” or not: see discussion in *Gomeroi* at [95]–[97]. Mortimer CJ observed at [96] that the “Tribunal is after all doing no more at the good faith constraint stage than assessing the course of a negotiation, and measuring it objectively against a standard of honesty, open mindedness and willingness to listen”. Her Honour went on to observe that making a patently unreasonable offer might be one indicia of a lack of fair dealing or honesty, or it may not. All will depend on the evidence and circumstances.
- [40] Watarra submits that Infinity’s negotiations have not been in good faith and do not meet the requirements of s 31(1)(b). Its arguments centre on two main issues, the fact that no agreement was reached on costs to enable negotiations to proceed and a lack of discussion on heritage surveys.

- [41] On the costs issue, Watarra says that it sees the negotiations as a “partnership”, part of which means that Infinity needs to adequately resource Watarra to obtain its free, prior and informed consent. Specifically, Watarra says Infinity took a “rigid, non-negotiable position” by insisting it lacked financial capacity to fund the negotiation meetings but without making any counter offers or making any effort to meet with Watarra to further discuss its financial situation or the negotiation cost estimate. Infinity’s approach, Watarra says, was to offer a “grossly insufficient sum” to assist the negotiations and request a deferred agreement. Overall, it says that Infinity was going through the motions with a closed mind or rigid or pre-determined position.
- [42] Ms Vos, who is the chairperson for Watarra and a Darlot common law holder of native title, provided an affidavit in these proceedings. Ms Vos is highly critical of Infinity in her affidavit and says it has shown “disregard and contempt” towards Watarra, all of which is refuted by Mr Lowe in his affidavit in a similarly critical manner. Mr Lowe also submitted a character reference from Mr Nicholas Harris to address some of the criticisms raised by Ms Vos.
- [43] Ms Vos refers to the provision of the protocol in September 2023 as the “starting point to commence discussions on the cost”. While that may be true from Watarra’s perspective, it fails to take account of the fact that the negotiations, including general discussions on costs and Infinity’s circumstances, had been on foot with Watarra since the *Darlot Determination*, over a year earlier. Ms Vos also gives some explanation of why the offer made by Infinity was insufficient, although that does not appear to be an explanation or discussion shared with Infinity during the negotiations.
- [44] Ms Vos says the expectation was that Infinity would reconsider its offer, make a counteroffer or request a meeting to discuss further. When that did not happen and this application was made, Ms Vos says she saw it as a lack of willingness to operate in good faith and strong-arm tactics. She also questions the timing of this application but the reasoning behind that observation is not clear.
- [45] In response, Infinity says that Watarra chose to ignore its financial position and offered only generalities and a repeat of its original demand in its email of 15 April 2024 rejecting Infinity’s proposal and asking that it reconsider the budget. Infinity says that it took action to make this application when it became apparent that the two

parties could “never come” to an agreement on negotiation costs because Watarra’s demands could not be met. Infinity argues that Watarra took a “boilerplate” approach more suited to a major gold producing miner than a junior exploration company. Mr Lowe says in his affidavit that Infinity had expected Watarra to revise its budget and when it did not, with the budget being beyond Infinity’s capacity to pay, it formed the view that the parties were too far away from any settlement.

[46] It is not unreasonable for Watarra to seek funding for its participation in the negotiation. That is quite common industry practice and, as noted by Watarra in its contentions, it is entitled to charge for costs incurred in s 31(1)(b) negotiations: s 60AB *Native Title Act*. However, the application of s 60AB is not in issue here. Watarra put forward a sizeable budget for an entire course of negotiations. The budget was speculative, being based on an example used for another project. There does not seem to have been much thought given to whether it was suitable for a negotiation about these particular leases. For example, it is not clear why an 18 month negotiation involving eight negotiation meetings would be required on the facts of this matter. Watarra did say there were ways of adjusting the budget to save costs, but it did not press to have those discussions with Infinity.

[47] For its part, Infinity had been clear about its circumstances and the exploratory nature of its projects from the outset. I note that the representative from Roe Legal who participated in the mediation changed in about December 2022, so perhaps some of that history was lost. In any event, the issues were discussed during the 5 March 2024 mediation conference and Infinity provided a detailed written explanation of and reasoning for its offer as requested. There was little in the way of a response from Watarra, other than a rejection of the offer and a request to again reconsider the original budget. If, as Ms Vos says, Watarra thought that one way of progressing the negotiation on costs might be through a meeting, it could itself have proposed that step as an active participant in the negotiation, but it did not.

[48] On the face of the material, it seems both parties could have done more to interrogate or adjust the proposed budget given the issues raised by Infinity.

[49] Ultimately, there was no obligation on Infinity to agree a budget of the kind proposed and, as pointed out by the State, there is also no requirement for the negotiation to

have reached any particular stage before a future act determination application is made, so the fact that the negotiation did not proceed past the discussion of negotiation costs is not fatal: see *Cox* at [23] and [30].

[50] Watarra says that Infinity's offer was "grossly insufficient". That may be so, but I could not say it is so unreasonable as to conclude it was not made in good faith in circumstances where Infinity provided detailed reasoning and offered an alternative type of agreement.

[51] As noted, Watarra also points to a lack of discussion about conducting heritage surveys in the lease areas, particularly in the context of the unauthorised heritage survey mentioned above and the significance of the areas as outlined by Ms Vos.

[52] In her affidavit, Ms Vos explains that, in addition to being the registered native title body corporate (**RNTBC**) for the *Darlot Determination*, Watarra assists the Darlot People with Aboriginal heritage protection, environmental protection and land and water management issues, which are key concerns for Darlot People. Ms Vos also explains that, prior to the *Darlot Determination*, there were a number of persons providing heritage approvals across Darlot country who were not authorised by the native title holders. The implication is that this is how the issues arose with the surveys undertaken by Infinity.

[53] Ms Vos also says that Mr Lowe's actions in relation to giving notice of the heritage survey on other tenements show arrogance and condescension towards Watarra. It is not clear how giving notice of a survey shows arrogance and condescension. Nonetheless, Infinity had accepted there were flaws in its processes despite the evidence indicating there had been some contact with Mr Khaw regarding one of these particular surveys.

[54] Infinity says that it displayed genuine concern about heritage, responded to Roe Legal's correspondence and apologised for the misunderstandings in the execution of the heritage survey.

[55] Infinity contends this issue of a lack of discussion about heritage surveys in the lease areas has only been raised by Watarra now as a question of good faith. There is some appeal in that submission because there is no evidence in the correspondence that

Watarra sought to initiate discussions about heritage surveys on the leases with Infinity. I note that the draft agreement provided by Infinity in 2022 included a heritage survey process which would have been the ideal opportunity for discussion on that issue.

- [56] In terms of its conduct overall, Infinity also points out that it attended all meetings and Tribunal mediation conferences, engaged in an open and transparent manner and responded to requests for information. It says it was patient with respect to delays in responses from Watarra and was open about its proposed plans for the leases and its financial position. Having regard to the entirety of the negotiations as evidenced in the material it would be difficult to disagree.
- [57] Pointon and Zani provided details of the nature of the projects at an early stage as requested by the State. Other versions of this information appear to have been provided during the mediation. As it contends, Infinity was also transparent about its financial circumstances and limited liquidity, which informed its approach to the negotiations. Both parties raised their financial constraints early in the process and Infinity appears to have been reasonably forthcoming with disclosure regarding its financial capacity and its plans for the leases. The evidence indicates that Infinity generally followed through on its commitments to provide information about its proposed activities, as well as a draft agreement, and operated with a degree of consistency and transparency.
- [58] Although it was clearly keen to move the negotiations forward as soon as reasonably possible and was perhaps frustrated behind the scenes, the correspondence shows that Infinity was reasonably patient and understanding of the delays in Watarra establishing its practices and procedures for its role as RNTBC, and instructions on the negotiation protocol, which took over a year following the *Darlot Determination*.
- [59] Infinity repeatedly raised the prospect of other tenements being included in the negotiations, which is not indicative of a closed mind. It asked for a budget and when it explained it could not afford the budget, it provided an alternative offer and detailed reasons explaining that offer. This was coupled with its offer for what it called a “deferred agreement”, but which appears to be the royalty payment contemplated by

its draft agreement. It was evidently this gulf between the proposed budget and Infinity's financial position that precipitated the conclusion of the negotiations.

[60] Infinity also attended a meeting with representatives of the Watarra board to explain its project and circumstances, and to discuss the concerns with its cultural heritage practices raised by Watarra. Based on the evidence, Infinity took responsibility for that error and agreed to abide by Watarra's requirements. In the event, once its offer was simply rejected, Infinity decided to make this application.

[61] Having regard to the negotiations as a whole, I am not satisfied that Infinity failed to negotiate in good faith. In my view, it was endeavouring to reach agreement, albeit not in the same form and on the same timeframe as Watarra. It follows that I have the power to make a determination in this matter.

### **Determination under s 38**

[62] Under s 38 of the *Native Title Act*, I am required to make one of the following determinations:

- (a) that the grant of each lease must not be done;
- (b) that the grant of each lease may be done; or
- (c) that the grant of each lease may be done, subject to conditions to be complied with by any of the parties.

[63] The matters that I must take into account in making a determination are those set out in s 39(1) of the *Native Title Act*. The *Native Title Act* does not specify the weight to be afforded to each matter listed in s 39 – that will depend on the evidence (see *Western Australia v Thomas* at 166). In considering the effect of the leases on the matters listed in s 39(1)(a), I must also take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned and existing use by persons other than Watarra: s 39(2) *Native Title Act*.

[64] Under s 39(4), I must also take into account any relevant issues upon which the parties agree. Further, if all parties consent, I need not take into account the matters mentioned in s 39 to the extent that they relate to agreed issues. In this case there are

no matters on which the parties agree and I have considered each of the matters in s 39 as set out below.

***Information about the leases and the areas of the leases***

*M 37/1359*

[65] M 37/1359 is approximately 200 hectares in size and located about 43 kilometres north-westerly of Leonora. The area is currently subject to prospecting licence P 37/8278 held by Infinity. The underlying land tenure is pastoral lease and there are no registered Aboriginal sites under the *Aboriginal Heritage Act 1972* (WA) in the area.

[66] The State's material includes the Mining Proposal for Small Mining Operations originally lodged by Pointon, which identifies the project by the name Barlows Gully. The proposed activities are described as a "low risk small-scale scrape and detect that may or may not involve a mobile dry blowing plant". Total tonnage is estimated to be less than 50,000 tonnes, with a disturbance area of less than 3.62 hectares. The proposal states that "no more than 2 hectares of native vegetation will be disturbed as the lease has been heavily worked by hand and machine since its discovery in the late 1890's [sic]".

*M 37/1360*

[67] M 37/1360, project name Great Northern, is approximately 133 hectares in size and about 14.5 kilometres easterly of Leonora. The underlying land tenure comprises reserves and an area of road and again, there are no registered Aboriginal sites in the area. The existing prospecting licence held by Infinity is P 37/8310. There is also evidence of a pending miscellaneous licence held by another company over 1.89% of the lease area and two pipeline licences comprising 4.18% of the lease area. Native title has been determined not to exist in relation to nearly 6% of the lease area, which appears to comprise an area of road and a recreation and water reserve.

[68] While M 37/1360 is also a conversion of a prospecting licence, its circumstances are evidently quite different to M 37/1359 due to the extent of available data from earlier programs.

[69] The supporting statement which accompanied the lease application states that the lease area “has several open stopes and a central shaft and a large mullock heap which together comprise the Great Northern Workings” and that “[dependent] on results from proposed drilling and other geological investigation, it is proposed to refurbish the existing shaft and workings to current standards and then extract the remaining (plus any future discoveries) gold”. It is not proposed to have any accommodation onsite nor to process any ore onsite. The application is also accompanied by a rough map showing the existing and proposed workings and a mineralisation report.

*Conditions and regulatory requirements*

[70] In its contentions, the State has explained the rights conferred by a mining lease and the regulatory regimes which will apply to the conduct of activities under the leases. In addition, in its material, the State has provided copies of the endorsements and conditions which it proposes to impose on the grant of each lease as shown in Annexure A.

[71] During the course of the inquiry, the Tribunal communicated with the parties about a number of additional conditions, a version of which had originally been proposed by the State in its correspondence to the parties in July and August 2021. Those additional conditions are discussed further from [129] below.

*Consideration of the s 39 criteria*

*What effect will the grant of the leases have on particular matters relating to Watarra and what are its interests, proposals, opinions or wishes?*

[72] The native title rights and interests held by Watarra are described in the entry of the *Darlot Determination* on the National Native Title Register maintained under the *Native Title Act: s 30(3)(a) Native Title Act*.

[73] In relation to the relevant parts of the leases, Watarra holds the non-exclusive native title rights and interests to:

- (a) access, traverse, remain in and move about the area;
- (b) camp and erect shelters on the area;

- (c) access, use and take for any purpose the resources of the area;
- (d) hold meetings, participate in cultural activities and conduct ceremonies;
- (e) maintain and protect places of significance on the area; and
- (f) receive a portion of any resources (not including minerals or petroleum) taken from the Determination Area by Aboriginal people who are also governed by Western Desert traditional laws and customs.

[74] The first of the matters I must take into account, as listed in s 39(1)(a), is the effect of the grant of the leases on the following matters relating to Watarra:

- (a) the enjoyment of its registered native title rights and interests;
- (b) its way of life, culture and traditions;
- (c) the development of its social, cultural and economic structures;
- (d) freedom of access to the land or waters and freedom to carry out rites, ceremonies or other activities of cultural significance in accordance with traditions; and
- (e) any area or site, on the land or waters concerned, of particular significance to Watarra.

[75] In determining how the grant of the leases will affect these matters I must take into account the nature and extent of existing non-native title interests and any other existing uses of the land or waters in the lease areas, which I have outlined above: s 39(2) *Native Title Act*.

[76] Watarra makes a number of fairly broad, generalised contentions about the impact of the grant of the leases, both generally and in relation to the effect of the grant of the leases relevant to the criteria under s 39(1)(a). It also sets out a table of impacts relevant to s 39(1)(a)(i)–(v), which include loss of access to traditional hunting and bushfood grounds, impacts on camping and fires, loss of amenity, loss of transmission of cultural knowledge and damage to heritage. Infinity has responded to many of these contentions in discursive and equally sweeping terms, which I do not propose to detail. However, there is very limited evidence in support of either party's contentions in relation to these matters. Watarra's evidence is given by Ms Vos.

[77] I will consider each of the matters listed in s 39(1)(a) in turn.

*Effect of the acts on the enjoyment of Watarra's registered native title rights and interests*

[78] Section 39(1)(a)(i) is concerned with the effect of an act on the enjoyment of the registered native title rights and interests. In this context, the Tribunal must assess the likely effect of each lease having regard to how the registered native title rights and interests are exercised and enjoyed in the relevant area (see *FMG v Yindjibarndi* at [48]).

[79] Ms Vos refers in very general terms to people collecting bush medicines and going hunting and camping within the area of the leases and surrounds. However, there are no specifics regarding the extent or frequency of activities undertaken in the lease areas, which is what would be required to enable me to reach any conclusion regarding the effect of the grant of either lease on this matter. Ms Vos also foreshadows that the noise and sand from mining activities will mean Darlot People stop going to these areas. However, given the lack of evidence regarding any activities undertaken within the area of the leases, this is largely speculative.

[80] The area of each of the leases is also subject to existing mining and other uses and has been the subject of historical mining activities, although to varying degrees.

[81] On the basis of the evidence provided, I cannot conclude that the grant of the leases will affect the enjoyment of the registered native title rights and interests because there is wholly insufficient evidence of that enjoyment in these areas.

*Effect of the acts on Watarra's way of life, culture and traditions*

[82] Watarra says that the exercise of native title rights to hunt, camp and protect heritage in the area of the leases and surrounds is an important part of the way of life of the Darlot People. It says it is through these activities that children and young people are taught the traditional laws and customs relating to kinship, use of resources, language and the Darlot People's relationship to the land, flora and fauna.

[83] Again, there is no evidence of these matters other than Ms Vos' very general reference to activities occurring in the lease areas and surrounds.

[84] In light of the existing uses of the lease areas, and the lack of evidence, there is little I can draw regarding the adverse effect of the grant of either lease on Watarra's way of life, culture and traditions.

*Effect of the acts on the development of Watarra's social, cultural and economic structures*

[85] Watarra asserts that the Darlot People's use of the lease areas form an important part of the social, cultural and economic life of the community.

[86] Specifically, it says:

- (a) recreation activities in the lease areas are critical in addressing social disadvantage faced by Darlot People including a lack of access to proper housing, overcrowding and a lack of access to services;
- (b) hunting and collecting bush foods is critical to the survival of those Darlot People who rely on those foods as an important part of their diet; and
- (c) the lease areas are culturally important as places for Darlot People to teach, learn and practice Darlot culture.

[87] However, as before, there is no evidence of any of the activities to which Watarra refers occurring in either lease area nor of the particular structural issues to which Watarra refers. Given the lack of evidence, and taking account of the existing uses of each area, I am unable to conclude that the grant of either lease will affect the development of Watarra's social, cultural or economic structures.

*Effect of the acts on Watarra's freedom of access to the land or waters and freedom to carry out rites, ceremonies or other activities of cultural significance in accordance with traditions*

[88] Ms Vos says mining activities will restrict access and prevent Darlot People exercising their native title rights and interests.

[89] As cited by the State, Infinity states in its application that:

the freedom of access, rites, ceremonies and cultural activities would be respected by [Infinity], supported by the provisions of the [*Aboriginal Heritage Act*] and a consultative approach by [Infinity]. Other than safety considerations in operational areas there would be no restrictions.

[90] I am satisfied there will necessarily be some restriction on the Darlot People's access to the lease areas, particularly for safety reasons, although the impact of these restrictions is less clear due to the lack of evidence regarding the Darlot People's use of the lease areas.

*Effect of the acts on any area or site, on the land or waters concerned, of particular significance to Watarra*

[91] There are no registered Aboriginal sites under the *Aboriginal Heritage Act* in the area of either lease but that is not determinative of this question.

[92] Watarra contends that the cultural landscape of the lease areas includes sites that evidence the Darlot People's occupation and use of the area of each lease and the surrounds over tens of thousands of years. It says that the preservation of the landscape and these sites is critical for the continued transmission of knowledge to younger Darlot People.

[93] While I understand the sentiment expressed by Watarra in this submission, this criterion is concerned with specific areas or sites of *particular* significance, that is of more than ordinary significance, in accordance with Darlot traditions. Such an area or site must be identified and able to be located and its particular significance explained: *Weld Range* at [279]. For s 39(1)(a)(v), the area or site must also be on the relevant lease area.

[94] Ms Vos says there is a *Tjukurrpa* and women's song line which "comes down within the vicinity of ... M 37/1359, following the water courses toward Lake Raeside, which is a significant heritage site". This evidence suggests the song line may be near to but does not pass through the area of M 37/1359, given it is "within the vicinity". Additionally, the particular significance of the song line in accordance with traditions is not explained. Therefore, I am unable to make any finding about the location of the song line or its particular significance in accordance with Darlot traditions.

[95] In relation to M 37/1360, Ms Vos also identifies sites and a men's and women's story line that "comes down from the Chain of water holes to Bummers creek, Malcolm and onto Lake Raeside" as highly significant and sacred. Again, the particular significance of these sites in accordance with traditions is not explained, nor is the location. None

of these areas are shown on any of the mapping provided by the parties. From Native Title Vision, I can see a registered site called Mt Malcolm to the north of the lease and the registered site of Lake Reyside (Raeside) to the south of the lease. Therefore, based on the evidence provided, I am also unable to make any finding in relation to the existence of any areas or sites of particular significance in the area of M 37/1360.

[96] In the absence of any evidence of any areas or sites of particular significance to Watarra in the area of either lease, I cannot conclude that the grant of either lease will have any effect on any area or site of particular significance.

*Interests, proposals, opinions and wishes of Watarra*

[97] I must also take into account Watarra's interests, proposals, opinions or wishes in relation to the management, use or control of the land or waters subject to the registered native title rights: s 39(1)(b) *Native Title Act*.

[98] Watarra submits that the Darlot People are opposed to the development in what it says is such an environmentally sensitive and important area to them (culturally, socially and economically). There is little evidence provided of those sensitivities and it is clear from the material that the area of both leases is, and has historically been, the subject of mining activity. Nonetheless, I have taken into account Watarra's wish that it would prefer there was no development in the areas subject to the registered native title rights and interests and that the leases not be granted.

[99] In the alternative, Watarra says that if the development proceeds, the Darlot People wish to be informed about the ways in which heritage and environmental concerns can be mitigated by Infinity. In its contentions, the State accepts Watarra's secondary position is that it should be kept informed about the development. I will return to this point later.

*What is the economic or other significance of the grant of the leases?*

[100] Under s 39(1)(c) I am required to take into account the economic or other significance of the leases to Australia, the State, the areas in which the leases are located and to the Aboriginal peoples and Torres Strait Islanders who live in those areas. This requires an evaluation of the economic or other significance of the leases, rather than

consideration of the significance of exploration or mining generally (*Western Australia v Thomas* at 175–176).

- [101] Watarra refers to Infinity’s own information about the leases in its offer document provided in March 2024, particularly that the leases will not yield a resource of significance or interest for the larger regional producing companies. It notes also Infinity’s advice that M 37/1360 has only attained an “inferred mineral resource” of 2,700 ounces and M 37/1359 has not yet achieved that “lowest category”. Watarra says, therefore, that the heritage significance of the leases outweighs their economic significance, although, as discussed above, there is no evidence regarding any areas or sites of particular significance in the area of either lease and very little evidence generally regarding heritage matters.
- [102] Infinity says its reporting to the ASX, as provided to Watarra, discloses that the leases contain a potentially world class gold resource, but requires further testing to prove up the potential. Infinity refers to gold ore targets that potentially amount to over 500,000 ounces of gold.
- [103] The reports mentioned appear to be those said to be attached to Infinity’s offer to Watarra, although from the Tribunal’s mediation records, it does not appear those documents were attached. In any event, there is a publicly available ASX report dated 29 February 2024 on the ASX website which refers to 500,000 ounces, but that is in the context of Infinity continuing to pursue “its strategic regional resource target of up to 500,000 ounces”. According to that announcement, Infinity’s regional interests go far beyond the leases. The inferred estimate for Great Northern included in that document is 2,700 ounces as reflected in the offer document itself. Therefore, while the leases might form part of that wider, regional potential, Infinity’s arguments regarding the scale of the economic significance of the grant of the leases are not made out.
- [104] The State contends the grant of the leases will be of economic significance to the local region, to the State and to the nation because their grant will enable the continued development of a significant national industry. The State has not provided any evidence to support that contention. It relies on earlier Tribunal decisions which have accepted the economic benefit from the grant of mining tenements, although the

degree of that benefit varies on the facts. The State also submits that the leases will contribute licence and rental fees for the State and income for the nation. It says there is also likely to be a local benefit in further developing the local industry, including for Watarra.

[105] The projects proposed by Infinity are, by its own argument, not of a large scale, comparative to other projects in the region. Further, none of the resources have yet been proved beyond the inferred resource for M 37/1360.

[106] There is no evidence to support Infinity's assertions about the scale of the economic benefit arising from the grant of the leases. However, I can accept that there will be at least some economic benefit arising from the leases, particularly to the local economy, through the conduct of mining activities, as well as through the fees paid to the State.

*Is there any public interest in the grant of the leases?*

[107] Section 39(1)(e) requires the Tribunal to consider whether there is any public interest in the grant of the leases.

[108] The scope of s 39(1)(e) was considered by the Full Court of the Federal Court in *Gomeroi*. Mortimer CJ observed at [213] that, “[i]t is well established ... that Parliament’s use of the phrase “any public interest” confers a wide discretionary value judgment”. Her Honour went on to note at [214] that the adjective “public” asks a repository of power such as the Tribunal to look at “interests common to or held amongst a wider community, but not necessarily across an entire community, or nation” and at [221] that, “informed by the objects of the [*Native Title Act*] and the values set out in the Preamble” the Tribunal is required to “form its own views on where the public interest lies both as a separate consideration and as part of a holistic exercise, reflecting on all the factors in s 39(1)”.

[109] O’Byrne J, with whom the Chief Justice agreed, framed the analysis as requiring a consideration of both the public benefits and public detriments of the proposed acts, in order to assess whether there is any overall (or net) public benefit: *Gomeroi* at [345].

[110] Watarra says there is no public interest in the leases being granted because of their limited economic value as discussed above.

[111] In contrast, the State contends that the public interest is served by the continuation and/or development of a significant national industry which provides economic benefits at all levels of government.

[112] The Tribunal has previously recognised that there is a public interest in maintaining a viable mining industry (*Western Australia v Thomas* at 176). In *Cheedy* at [138] the Full Court of the Federal Court accepted that general proposition while noting that it may be necessary for the Tribunal to consider the public interest in the particular project rather than by reference to the mining industry in general.

[113] No party has raised any particular public detriment arising from the grant of the leases. Therefore, while the public benefit arising from the grant of these particular leases may be small, I am satisfied there is overall, some public interest in their grant.

*Are there any other relevant matters?*

[114] Under s 39(1)(f) I must take into account any other matters I consider relevant.

[115] Watarra asks that I take into account its good faith evidence, which it says shows that Infinity does not intend to work respectfully with Watarra. As explained, I am not satisfied that Infinity failed to negotiate in good faith. As to whether the material evinces a lack of respect or intent to work respectfully with Watarra, I do not think that it does. I think it evinces a degree of frustration with the process and the scale of the costs sought by Watarra, given Infinity's circumstances, but I could not say that there is any evident lack of respect. I do not accept Watarra's submission on this aspect.

[116] The State contends that the effect of the grant of the leases on the natural environment may be a relevant factor but argues that State and Commonwealth environmental protection and heritage regimes will regulate environmental impacts and minimise the effect of the leases.

[117] In that respect, I have taken account of the endorsements and conditions which the State proposes to impose on the grant of the leases. No other party has made any specific contentions in relation to environmental matters.

***Should the leases be granted?***

[118] There is no evidence on which to conclude that the grant of either lease will have an adverse effect on the matters outlined in s 39(1)(a)(i), (ii), (iii) or (v), but I accept that the grant of each lease will limit Watarra’s freedom of access for s 39(1)(a)(iv). I have also taken account of Watarra’s preference that the leases not be granted.

[119] The projects proposed are not of a large scale, although the full extent of possible works is not clear at this stage. Each area is subject to existing land tenure and tenements and there is some evidence of prior mining activities, more so in the case of M 37/1360. The activities undertaken will be subject to the State’s regulatory requirements and the conditions and endorsements as provided by the State, which regulate how mining activities may be conducted. While the economic significance of either grant is not substantial, there is some overall public benefit in their grant for the reasons explained.

[120] Overall, weighing the factors in s 39(1) and taking into account the matters in s 39(2), my conclusion is that the leases may be granted but I will turn next to consider the question of conditions.

***Should the grants be subject to conditions?***

[121] The scope of the Tribunal’s power to impose conditions under s 38(1)(c) was considered by the Federal Court in *Evans v Western Australia*. RD Nicholson J observed at 213:

... there is nothing in s 38(1)(c) which expressly limits the nature of conditions other than s 38(2). It is apparent the conditions must be attached to “a determination that the act may be done” subject to the conditions.

The subject matter of the conditions appears to be shaped by the broad purpose there be a determination of the act and by the requirements of s 39 that in making its determination the arbitral body must take into account the criteria there listed.

The consequences flowing from the exercise of the power are the proposed act may only be done as if the conditions were terms of a contract among the negotiation parties; the conditions are also subject to overrule: s 42(1); and where the conditions relate to compensation, there is the requirement for payment into trust: ss 41(3) and 52.

From the nature of these provisions there is certainly a requirement for linguistic certainty because, absent it, the conditions could not operate as in contract and provisions for payment could fail. That uncertainty is not what is contended for in this case.

*Conditions proposed by Watarra and Infinity*

[122] In the alternative to its primary argument that the leases should not be granted, Watarra proposes that I impose a condition requiring Infinity to enter into a mining agreement with it before the leases are granted and also that Infinity pay Watarra's costs of negotiating and drafting the s 31 agreement.

[123] Infinity opposes the condition regarding funding on the basis that it would amount to a "bad faith" condition because Infinity is unable to finance negotiations. Instead, Infinity proposes a condition requiring it to enter into a "deferred compensation agreement" with Watarra.

[124] Neither of the conditions proposed by the parties are appropriate because they lack the required certainty and would leave the issues between the parties unresolved: see *Evans v Western Australia* at 214.

[125] Watarra also sought conditions requiring Infinity to consult with Watarra and conduct environmental and heritage surveys on the leases prior to ground disturbing activities, as well as a requirement for new surveys on the unrelated tenements, the subject of the unauthorised surveys discussed during negotiations.

[126] Any conditions I impose must relate to the scope of this inquiry and be informed by the s 39 criteria. There is no basis for me to impose any conditions regarding unrelated tenements. Further, the condition proposed by Watarra regarding the conduct of environmental and heritage surveys on the leases lacks sufficient certainty to form the basis of a condition which takes effect as a contract between the parties. It is also unsupported by the evidence.

[127] Accordingly, I do not propose to impose any of the conditions proposed by Infinity or Watarra in their contentions.

*Conditions proposed by the State*

[128] As mentioned, Annexure A includes the endorsements and conditions the State proposes to attach to the grant of each lease and my determination is made on the basis those conditions will be imposed.

- [129] During the inquiry, the Tribunal made inquiries with the State about whether it was intending to impose extra ‘native title related’ conditions on the grant of each lease as has occurred in previous cases (see for example *Atlas Iron*). The State explained that conditions of this nature had been included in its initial correspondence to Pointon, Zanil and Darlot in July and August 2021, but had not been accepted by either party. As pointed out by Infinity, the State’s correspondence did not make any specific request regarding acceptance of those conditions but nonetheless they withered on the vine of the failed negotiations.
- [130] The State later agreed to impose the three **extra conditions** included at Annexure B which it says it routinely offers in cases such as this. The State indicated that if the parties agreed, it would place the extra conditions on the grant of each lease.
- [131] During the course of consultation, Infinity indicated it was agreeable to conditions of this kind.
- [132] Watarra had no comment other than to note that its preferred standard terms are:
- (a) for proponents not to make a s 18 application under the *Aboriginal Heritage Act* without Watarra’s prior written consent; and
  - (b) “for proponents not to commence any ground disturbing activity on the tenements without a heritage survey first being conducted”.
- [133] The State opposed Watarra’s preferred terms as being contrary to the intent of the *Aboriginal Heritage Act*. It submitted further that Watarra’s preferred conditions were in opposition to the State’s extra conditions and therefore Watarra must by implication be taken to have rejected the extra conditions. I am not sure I would go quite that far. Certainly Watarra has proffered its preferred approach but has not expressed a view otherwise.
- [134] Infinity also opposed Watarra’s preferred conditions, noting the terms of the *Aboriginal Heritage Act* and questioning whether such a condition regarding a heritage survey could be imposed when Infinity would be agreeing to something “sight unseen”. It also questioned my power to impose such conditions.

[135] I do not propose to impose conditions of the kind proposed by Watarra. There is no basis on the evidence for the imposition of such conditions and, in my view, the second condition in particular lacks the degree of certainty required for a condition which would take effect as a contract between the parties.

[136] However, the extra conditions offered by the State do assist in addressing certain matters which arise from the material, particularly in keeping Watarra informed about development on the leases and environmental safeguards (which was a concern acknowledged by the State) and providing some certainty regarding the question of access.

[137] The extra conditions are not drafted in a form suitable to take effect as a contract between the parties. They are drafted by the State for inclusion as conditions on each lease. The issue of requiring the State to include conditions as conditions of a tenement was discussed in *Kallenia* at [184].

[138] I am of the view that it is most appropriate for the extra conditions to be conditions of each lease as offered by the State. For that reason, my determination is made subject to a condition that the State must make each of the extra conditions a condition of each lease as set out in Annexure C.

***The grant of the leases and the relationship between the parties***

[139] Watarra was in a difficult position in the negotiations in this matter as a newly minted RNTBC without established resources and procedures. I suspect this not only contributed to the delays evidenced in the materials but also presented limitations in how equipped it was to participate in the negotiations, even to the point of its capacity to adequately progress the costs issue. Similar to the sentiment expressed early in the negotiations by Mr Gregson, Ms Vos says in her affidavit that Watarra gives priority to proponents who can properly resource negotiations and engagements. That is an entirely understandable position but, given Watarra is also obliged to negotiate in good faith, can carry consequences where those de-prioritised proponents press on. Watarra cannot expect that all proponents will proceed, or be in a position to proceed, as it proposes.

[140] The difficulties faced by Watarra in its capacity to negotiate as a new RNTBC without established systems and procedures or adequate funding are illustrative of many cases which come before the Tribunal. In these types of scenarios, the native title parties can find themselves at a disadvantage in their ability to participate in the negotiations and the grantee parties, particularly those without deep pockets, can be left frustrated by the process.

[141] It is also not unusual for such circumstances to lead to a good faith challenge, some successful, and some not, as was the case here. Unfortunately, in this case, there was also a degree of resentment which came through in the affidavit material, no doubt reflecting these parties' frustrations at the failed negotiations.

[142] However, those sentiments were not, on the face of the parties' communications, evident during the negotiations. Ultimately, assuming the leases are granted, they will be granted in Darlot country and it is in the interests of both Infinity and Watarra to establish a good working relationship. Therefore, I would encourage the parties to move past the question of good faith, which I have decided, and endeavour to work together as they had expressed the desire to do during the negotiations.

### **Determination**

[143] I determine that:

- (a) the grant of mining lease M 37/1359 may be done subject to the condition set out in Annexure C; and
- (b) the grant of mining lease M 37/1360 may be done subject to the condition set out in Annexure C.

**Ms Nerida Cooley**  
**Member**  
**11 December 2024**

## ANNEXURE A



Government of Western Australia  
Department of Mines, Industry Regulation and Safety



## DRAFT Tenement Endorsement and Conditions Extract

Tenement: M 37/1359

#	ENDORSEMENTS	Status	Start Date	End Date
1	The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972.	Draft		
2	This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of uranium ore.	Draft		
3	The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.	Draft		
	<b>In respect to Water Resource Management Areas (WRMA) the following endorsements apply:</b>	Draft		
4	The Lessee's attention is drawn to the provisions of the: <ul style="list-style-type: none"> <li>Waterways Conservation Act, 1976</li> <li>Rights in Water and Irrigation Act, 1914</li> <li>Metropolitan Water Supply, Sewerage and Drainage Act, 1909</li> <li>Country Areas Water Supply Act, 1947</li> <li>Water Agencies (Powers) Act 1984</li> </ul>	Draft		
5	The rights of ingress to and egress from, and to cross over and through, the mining tenement being at all reasonable times preserved to officers of Department of Water and Environmental Regulation (DWER) for inspection and investigation purposes.	Draft		
6	The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water and Environmental Regulation (DWER) relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.	Draft		
7	The taking of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless current licences for these activities have been issued by Department of Water and Environmental Regulation (DWER).	Draft		
8	Measures such as drainage controls and stormwater retention facilities are to be implemented to minimise erosion and sedimentation of adjacent areas, receiving catchments and waterways.	Draft		
9	All activities to be undertaken so as to avoid or minimise damage, disturbance or contamination of waterways, including their beds and banks, and riparian and other water dependent vegetation.	Draft		
10	The Lessee's attention is drawn to the provisions of section 55 of the Land Administration Act 1997.	Draft		
	<b>In respect to Proclaimed Ground Water Areas the following endorsement applies:</b>	Draft		
11	The taking of groundwater and the construction or altering of any well is prohibited without current licences for these activities issued by the Department of Water and Environmental Regulation (DWER), unless an exemption otherwise applies.	Draft		
#	CONDITIONS	Status	Start Date	End Date
1	Exploration and prospecting disturbances, excluding supporting infrastructure, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety. Backfilling and rehabilitation being required no later than 12 months after completion of the activity unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.	Draft		
2	All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.	Draft		
3	Unless the written approval of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.	Draft		
4	The Lessee making verbal or written contact with the holder of any underlying pastoral or grazing lease within a reasonable time prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.	Draft		
5	The Lessee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of- <ul style="list-style-type: none"> <li>the grant of the Lease; or</li> <li>registration of a transfer introducing a new Lessee;</li> </ul> advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.	Draft		
6	The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Executive Director, Resource and Environmental Compliance, Department of Energy, Mines, Industry Regulation and Safety for their assessment and written approval prior to commencing any developmental or productive mining or construction activity.	Draft		
7	All supporting infrastructure for exploration and prospecting including core yards, laydowns, camps, and access tracks (excluding drill lines), being rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines,	Draft		

#	CONDITIONS	Status	Start Date	End Date
	Industry Regulation and Safety. Rehabilitation being required by the earlier of 12 months from the infrastructure being no longer required to support exploration, or 12 months from the relevant programme of work expiring, unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.			
8	The tenement holder must maintain appropriate records of exploration/prospecting activities, and associated rehabilitation undertaken, in order to demonstrate compliance with all conditions and environmental management and rehabilitation practice commitments. These records to be made available to the Department upon request.	Draft		
9	All exploration and prospecting operations to comply with the environmental management and rehabilitation practice commitments provided in the approved programme of work.	Draft		

– End of Report –



## DRAFT Tenement Endorsement and Conditions Extract

**Tenement:** M 37/1360

#	ENDORSEMENTS	Status	Start Date	End Date
1	The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972.	Draft		
2	This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of uranium ore.	Draft		
3	The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.	Draft		
	<b>In respect to Water Resource Management Areas (WRMA) the following endorsements apply:</b>	Draft		
4	The Lessee's attention is drawn to the provisions of the: <ul style="list-style-type: none"> <li>• Waterways Conservation Act, 1976</li> <li>• Rights in Water and Irrigation Act, 1914</li> <li>• Metropolitan Water Supply, Sewerage and Drainage Act, 1909</li> <li>• Country Areas Water Supply Act, 1947</li> <li>• Water Agencies (Powers) Act 1984</li> </ul>	Draft		
5	The rights of ingress to and egress from, and to cross over and through, the mining tenement being at all reasonable times preserved to officers of Department of Water and Environmental Regulation (DWER) for inspection and investigation purposes.	Draft		
6	The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water and Environmental Regulation (DWER) relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.	Draft		
7	The taking of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless current licences for these activities have been issued by Department of Water and Environmental Regulation (DWER).	Draft		
8	Measures such as drainage controls and stormwater retention facilities are to be implemented to minimise erosion and sedimentation of adjacent areas, receiving catchments and waterways.	Draft		
9	All activities to be undertaken so as to avoid or minimise damage, disturbance or contamination of waterways, including their beds and banks, and riparian and other water dependent vegetation.	Draft		
10	The Lessee's attention is drawn to the provisions of section 55 of the Land Administration Act 1997.	Draft		
	<b>In respect to Proclaimed Ground Water Areas the following endorsement applies:</b>	Draft		
11	The taking of groundwater and the construction or altering of any well is prohibited without current licences for these activities issued by the Department of Water and Environmental Regulation (DWER), unless an exemption otherwise applies.	Draft		
#	CONDITIONS	Status	Start Date	End Date
1	Exploration and prospecting disturbances, excluding supporting infrastructure, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety. Backfilling and rehabilitation being required no later than 12 months after completion of the activity unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.	Draft		
2	All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.	Draft		
3	Unless the written approval of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.	Draft		
4	The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Executive Director, Resource and Environmental Compliance, Department of Energy, Mines, Industry Regulation and Safety for their assessment and written approval prior to commencing any developmental or productive mining or construction activity.	Draft		
5	Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface.	Draft		
6	The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any mining activities on Recreation & Water 8946.	Draft		
7	No mining within 25 metres of either side of the petroleum pipeline licence area of 36 & 118 and to a depth of 50 metres being the Consultation Area as shown in TENGGRAPHI, without the mining tenement holder and the petroleum pipeline licensee consulting with each other and reaching agreement on access and mining activities to be undertaken within the Consultation Area.	Draft		

#	CONDITIONS	Status	Start Date	End Date
8	No surface excavation approaching closer to the boundary of the Consultation Area than a distance equal to three times the depth of the excavation without the mining tenement holder and the petroleum pipeline licensee reaching agreement as to a lesser distance.	Draft		
9	No explosives being used or stored within 150 metres of the petroleum licence area without the mining tenement holder and the petroleum pipeline licensee reaching agreement as to a lesser distance.	Draft		
10	The rights of ingress to and egress from the petroleum pipeline licence area being at all times preserved for the employees, contractors and agents of the owners and operators of the pipeline.	Draft		
11	Such further conditions as may from time to time be imposed by the Minister responsible for the Mining Act 1978 for the purposes of protecting the pipeline and any existing condition imposed for this purpose may be cancelled or varied.	Draft		
12	All supporting infrastructure for exploration and prospecting including core yards, laydowns, camps, and access tracks (excluding drill lines), being rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety. Rehabilitation being required by the earlier of 12 months from the infrastructure being no longer required to support exploration, or 12 months from the relevant programme of work expiring, unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.	Draft		
13	The tenement holder must maintain appropriate records of exploration/prospecting activities, and associated rehabilitation undertaken, in order to demonstrate compliance with all conditions and environmental management and rehabilitation practice commitments. These records to be made available to the Department upon request.	Draft		
14	All exploration and prospecting operations to comply with the environmental management and rehabilitation practice commitments provided in the approved programme of work.	Draft		

– End of Report –

**ANNEXURE B****EXTRA CONDITIONS THE GOVERNMENT PARTY IS OFFERING TO PLACE ON THE TENEMENT**

- Any right of the native title party (as defined in sections 29 and 30 of the *Native Title Act 1993* (Cth) to access or use the land the subject of the Mining Lease is not to be restricted except in relation to those parts of the land which are used for mining operations or for safety or security reasons relating to those activities.
- If the lessee gives a notice to the Aboriginal Cultural Heritage Committee (the Committee) under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice on the native title party, together with copies of all documents submitted by the lessee to the Committee with or in support of the notice (exclusive of sensitive commercial and cultural data) whether given to the Committee at the time it gives the notice to the Committee, or at any subsequent time whilst the Committee consider the notice.
- Where, prior to using machinery to disturb the surface of the land the subject of the Mining Lease for the purpose of preparing for or carrying out mining operations, the lessee submits a plan of proposed operations and measures to safeguard the environment or any addendums to such plans to the Department of Energy, Mines, Industry Regulation and Safety for approval pursuant to section 82(1)(ca) of the *Mining Act 1978* (WA), the lessee must at the same time give to the native title party a copy of the proposal or addendums (as the case may be), excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.

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**ANNEXURE C****CONDITION**

The Government party must make each of the following a condition of the lease.

1. Any right of the native title party (as defined in sections 29 and 30 of the *Native Title Act 1993* (Cth) to access or use the land the subject of the Mining Lease is not to be restricted except in relation to those parts of the land which are used for mining operations or for safety or security reasons relating to those activities.
2. If the lessee gives a notice to the Aboriginal Cultural Heritage Committee (the Committee) under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice on the native title party, together with copies of all documents submitted by the lessee to the Committee with or in support of the notice (exclusive of sensitive commercial and cultural data) whether given to the Committee at the time it gives the notice to the Committee, or at any subsequent time whilst the Committee consider the notice.
3. Where, prior to using machinery to disturb the surface of the land the subject of the Mining Lease for the purpose of preparing for or carrying out mining operations, the lessee submits a plan of proposed operations and measures to safeguard the environment or any addendums to such plans to the Department of Energy, Mines, Industry Regulation and Safety for approval pursuant to section 82(1)(ca) of the *Mining Act 1978* (WA), the lessee must at the same time give to the native title party a copy of the proposal or addendums (as the case may be), excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.