



FROM THE CHARGE D'AFFAIRES

AUSTRALIAN PERMANENT MISSION
GENEVA

1 April 2016

Mr Karim Ghezraoui
Chief Officer
Special Procedures Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
Palais Des Nations
1211 Geneva 10
Switzerland

Dear Sir

Urgent Appeal from the Special Rapporteur on the rights of Indigenous peoples in relation to the proposed Carmichael coal mine in the Galilee Basin, Queensland

I refer to the communication [AUS2/2016] concerning the proposed Carmichael coal mine in the Galilee Basin, Queensland, which accompanied your letter dated 29 February 2016.

As requested, the Foreign Minister Ms Julie Bishop MP has been advised of the communication.

Australia takes its obligations under international human rights law seriously and is a longstanding party to both the International Covenant for Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Australia is committed to upholding its obligations in relation to the right of everyone to take part in cultural life (Article 15(1)(a) of the ICESCR)¹ and to enable ethnic, religious or linguistic minorities, including Indigenous peoples,² the right to enjoy their own culture, to practice and profess their own religion and to use their own language (Article 27 of the ICCPR). Australia respects the diversity of Aboriginal and Torres Strait Islander cultures, languages and their strong spiritual connection to country. Australia acknowledges that its obligations extend to all parts of federal States, including the State of Queensland, without limitation or exception (Article 50 of the ICCPR and Article 28 of the ICESCR).

Australia has supported the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) since 3 April 2009. The Declaration provides impetus for the Australian Government and Aboriginal and Torres Strait Islander peoples to work together in trust and good faith to advance human rights. It sets out important principles in relation to the fundamental human rights of Indigenous peoples for nations to continue to work towards.

¹ Australia notes that General Comments and General Recommendations of United Nations treaty bodies are not binding on States Parties but gives careful consideration, in good faith, to these views.

² UN Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5.

As a resolution of the United Nations General Assembly, the Declaration carries political and moral weight. Although many, but not all, of the principles set out in the Declaration reflect, or provide guidance in relation to, Australia's obligations under international human rights treaties, Australia is only legally bound by the obligations in those treaties.

In Australia's view, some principles in the Declaration remain unsettled at international law, particularly those relating to self-determination and free, prior and informed consent. Consistent with the principles of the Declaration, Australia recognises the importance of engaging in good faith consultation with Indigenous peoples in relation to decisions that affect them. Australia's view is that free, prior and informed consent does not include a right of veto. It interprets the meaning of free, prior and informed consent and the right to self-determination consistently with Australia's territorial integrity and political sovereignty, as provided for by common Article 1 of the ICCPR and ICESCR which are reflected in Articles 3 and 46 of the Declaration.

The Queensland Government has and will continue to address native title and cultural heritage issues in accordance with the requirements under the Commonwealth *Native Title Act 1993* (the NTA) and the Queensland *Aboriginal Cultural Heritage Act 2003*, which aim to safeguard the rights of the Wangan and Jagalingou People under the governing laws of the State of Queensland and the Commonwealth.

There is no intention to extinguish the native title rights of the Wangan and Jagalingou People by compulsory acquisition over the mining lease areas. The grant of the Carmichael Mine mining leases would suppress but not extinguish any native title rights and interests.

While it is correct that an Indigenous Land Use Agreement was not authorised by the group in 2014, those negotiations remain on foot despite the fact that following the decision of the National Native Title Tribunal (the Tribunal), the mining leases may be validly granted. The Queensland Government is committed to resolving native title matters by agreement wherever possible and is hopeful that an Indigenous Land Use Agreement may still eventuate following ongoing internal restructure within the Wangan and Jagalingou claim group.

The operation of Native Title in Australia

In Australia, the NTA recognises and protects native title.³ The NTA is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Commonwealth *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal and Torres Strait Islander peoples and is intended to further advance the process of reconciliation among all Australians. The NTA provides a national system for the recognition and protection of native title and for its co-existence with the national land management system.

Under the NTA, the Federal Court of Australia is responsible for the determination of applications that native title exists. The Tribunal is an independent body that makes administrative decisions and assists parties to resolve disputes, particularly about future acts. The court and tribunal system affords procedural fairness and ensures equality before the law. The Australian Government funds a national network of native title representative bodies and service providers to perform functions under the NTA for the benefit of native title claimants and holders. These functions include assistance to make and progress native title claims and to negotiate future act agreements.

A future act, as defined in the NTA, is an act done after 1 January 1994 (for non-legislative acts) or 1 July 1993 (for legislative acts) that extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise. Importantly, the

³ The *Native Title Act 1993* (NTA) is available at <<https://www.legislation.gov.au/Details/C2014C00631>>.

NTA includes detailed provisions which give native title holders and claimants a right to negotiate about the doing of certain future acts on native title land and afford holders and claimants procedural fairness. In order for a future act to be valid it must be done in compliance with the NTA. The procedural rights afforded to native title claimants and holders follow an escalating pattern relative to the potential impact on native title.

The grant of a mining lease which affects native title can only validly be made where the native title party agrees to the grant, or, where, following an inquiry, the Tribunal determines that the grant can be made. In this matter applications were made to the Tribunal to determine if the grant of two mining leases could be made because there was no agreement. These are known as future act determination applications.

The NTA also provides compensation on just terms to native title holders for any extinguishment or impairment of native title by the validation of existing interests and the doing of future acts.

Over 30 per cent of land in Australia is subject to a native title determination and 32 per cent is subject to a native title claim as at 31 December 2015.⁴

Where possible, the Australian Government encourages land use and ownership issues to be resolved through mediation and negotiation rather than litigation.

Information on the current status of the Native Title claim lodged by the Wangan and Jagalingou people in 2004 (addressing question 2)

A native title determination application was made to the Federal Court of Australia (*Adrian Burragubba & Ors on behalf of the Wangan and Jagalingou Peoples v State of Queensland & Ors* (QUD85/2004)) on 27 May 2004 and accepted for registration from 5 July 2004.⁵

Registration of a claim affords the group certain procedural rights under the NTA in relation to dealings in the claim area, pending determination of its native title status. A native title application is made by one or more individuals (the Applicant) who are authorised by the claim group to collectively deal with all matters arising from the application.

The resolution of the claim has been complicated by two overlapping native title claims, including one from the Bidjara people. The most recent order of the Federal Court of 21 December 2015 was that the Wangan and Jagalingou Peoples' case be relisted for directions at a date to be fixed after the interlocutory hearings in the Bidjara matter⁶ in April 2016. The resolution of the Wangan and Jagalingou claim has also been delayed due to changes in the members of the applicant (that is, changes in the party bringing the claim on behalf of the claim group). There can be only one determination of native title over any particular area.

National Native Title Tribunal consultation with Indigenous peoples and the procedural rights afforded native title claimants (addressing questions 3 and 6)

⁴ National Native Title Tribunal, Determinations of Native Title and Claimant Applications (2016), http://www.nntt.gov.au/Maps/Schedule_and_Determinations_map.pdf.

⁵ *Adrian Burragubba & Ors on behalf of the Wangan and Jagalingou Peoples v State of Queensland & Ors* (QUD85/2004), in which the twelve members of the Applicant, including Mr Burragubba, claim the existence of native title on behalf of the Wangan and Jagalingou people, is a separate matter from *Adrian Burragubba v State of Queensland & Ors* (QUD344/2015), in which Mr Burragubba is the only member of the Applicant in QUD 85/2004 seeking judicial review of the administrative decision made by the Tribunal that the relevant mining leases may be granted.

⁶ *Brendan Wyman & Ors on Behalf of the Bidjara People #6 v State of Queensland & Ors* (QUD216/2008) and *Arwa Waterton & Ors on behalf of the Bidjara People #7 v State of Queensland & Ors* (QUD644/2012).

Under the NTA, certain future act processes, including the right to negotiate and the associated future act determination application process, provide for native title parties⁷ to engage in relevant negotiations.⁸

The Tribunal has a specific statutory role in relation to the right to negotiate process.⁹ Parties to the right to negotiate process are the Government party (State, Territory and/or Commonwealth), the native title parties and the grantee parties, usually the development proponent or the mining company. Under the right to negotiate process, the Government, grantee and native title parties are required to negotiate in good faith with a view to reaching agreement.¹⁰

Upon the request of any party involved in a right to negotiate process, the Tribunal must mediate to assist parties to reach an agreement. Mediation encourages a constructive discussion where each party is able to talk about its point of view. It provides a framework for positive and productive negotiations and encourages parties to develop positive ongoing working relationships. Parties have control over the outcome, rather than the Tribunal making a decision about what will happen. A party to an Indigenous Land Use Agreement negotiation or future act negotiation may seek assistance from the Native Title Tribunal to mediate the negotiation, without charge.¹¹ In the matter of *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* (the Adani matter),¹² no request was made to the Tribunal to provide mediation assistance.

The NTA provides that if any party lodges a future act determination application after a minimum of a six month negotiation period, the Tribunal must conduct an inquiry before determining whether that the act must not be done, may be done, or may be done subject to conditions to be complied with by any of the parties.¹³ In the Adani matter, the Tribunal undertook an inquiry according to its functions under the NTA, in which process, the Tribunal is the arbitral body and delivers an arbitrated determination.¹⁴ In line with standard practice, during this inquiry the Tribunal provided the Wangan and Jagalingou People's representative an opportunity to answer questions, including whether the Government and grantee parties negotiated in good faith. No issue of good faith was raised in the Adani matter, including by the applicants whom Australia understands brought this communication.

Registered native title claimants are afforded procedural rights under the NTA including in relation to future act determinations. Registered native title claimants share many of the rights enjoyed by determined native title holders under the future act regime. These include some of the most important rights given by the future acts regime, including the right to negotiate in relation to the grant of mining leases. Provisions also require proponents of a future act to conduct good faith negotiations with the native title party. The NTA allows parties to submit evidence demonstrating a lack of good faith or submissions regarding other reasons that a future act should not be granted in a future act determination.

In this matter, the Tribunal issued directions requiring parties, including the Wangan and Jagalingou People, to submit contentions and evidence according to the directions, allowing replies and

⁷ For the purposes of the right to negotiate (Part 2, Division 3, Subdivision P of the NTA), a native title party is defined as a registered native title body corporate or a registered native title claimant in relation to any of the land or waters that will be affected by the act (paragraph 29(2)(a) and section 30 of the NTA).

⁸ NTA, Part 2, Division 3, Subdivision P.

⁹ NTA, section 75.

¹⁰ NTA, section 31.

¹¹ A voluntary agreement between a native title group and others about the use of lands and waters, which has been registered under the NTA.

¹² [2015] NNTTA 16. Available at < <http://www.austlii.edu.au/au/cases/cth/NNTTA/2015/16.html>>.

¹³ NTA, section 139.

¹⁴ Ibid.

opportunities for comment.¹⁵ The Wangan and Jagalingou People's representative informed the Tribunal that no submissions would be made by the native title party. After the compliance date, Mr Burragubba submitted an unsigned statement regarding the Carmichael Mine. The Tribunal asked the parties for their view on whether the statement should be considered. The Wangan and Jagalingou People's position was that the Tribunal should not consider the statement.

The Tribunal, when making a future act determination, must take into account the criteria found in section 39 of the NTA. These criteria include 'the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act.' The weight attributed to each criterion depends upon the evidence provided. The Tribunal bases its decision on the material provided to it and does not have a duty to conduct its own inquiries or obtain evidence.

Federal/State Government consultation with Indigenous people in relation to free, informed and prior consent (addressing question 4)

Australia encourages all Australians to participate fully and freely in our democratic processes and specifically recognises how important it is for Aboriginal and Torres Strait Islander peoples to have a voice and a means to express it. Australia recognises the importance of engaging in good faith consultation with Indigenous peoples in relation to decisions that affect them.

Consultation and engagement between the Australian Government and Aboriginal and Torres Strait Islander peoples occurs through a variety of ways, from the community level by officers of the Department of the Prime Minister and Cabinet's Regional Network to direct engagement with the Prime Minister through the Indigenous Advisory Council.

Similar consultation also occurs at the State and Territory levels of government.

Australia's statement on the Declaration clarified that Australia's laws concerning land rights and native title are not altered by its support of the Declaration.¹⁶ However, Australia supports Indigenous peoples' aspiration to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity.

The NTA sets out processes for engaging and negotiating with Indigenous peoples in relation to native title land. The future acts regime establishes processes which must be complied with before certain acts affecting native title can validly be done. These processes can include a requirement to notify or negotiate with native title claimants and holders. It can also require proponents to negotiate with native title parties in good faith about whether the act proposed can be done. The NTA also enables native title claimants and holders and other people to negotiate voluntary Indigenous Land Use Agreements about the management of land and water. The nature of this system makes it unnecessary to consult directly with the Australian Government prior to approval of any project affecting land.

In relation to this particular matter, from 2012, the State of Queensland, the Applicant and Adani have attempted to negotiate an Indigenous Land Use Agreement in relation to the Carmichael Mine project. Such an Agreement is the preferred manner of obtaining agreement to the grant of the mining leases prior to commencing the arbitral process under the NTA. Unfortunately, over a three year period, the Indigenous Land Use Agreement could not be finalised.

¹⁵ As per NTA, section 142.

¹⁶ The Australian Government's statement is available at

<http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

Once the intention to grant the mining leases is notified, the State is bound by statutory obligations under the NTA requiring it to negotiate in good faith in relation to the proposed grant.¹⁷ The State provided all native title parties with an opportunity to make submissions to it, in writing or orally, regarding the grant of the mining leases. The Wangan and Jagalingou Applicant did not take up the opportunity to make such submissions. Further, the Wangan and Jagalingou Applicant (which was legally represented), did not contest that the State negotiated in good faith when it had the opportunity to do so before the Tribunal.

The State (when acting as proponent) and Adani are also subject to the cultural heritage requirements under the Queensland *Aboriginal Cultural Heritage Act 2003*, including a duty of care to ensure that an activity does not harm Aboriginal cultural heritage.¹⁸ Submissions and evidence were provided to the Tribunal that dealt with these key aspects under the NTA and the Aboriginal Cultural Heritage Act as part of its inquiry into whether the mining leases should be granted. There is also a registered Cultural Heritage Management Plan approved under Part 7 of the Aboriginal Cultural Heritage Act between the native title party (the Wangan and Jagalingou People) and the grantee party (Adani Mining Pty Ltd) over part of the project area that overlaps with mining leases 70505 and 70506 (relating to the Carmichael coal mine).¹⁹

Safeguards to ensure Indigenous people are not unduly subjected to pressure and external interference in the context of mining licences being issued (addressing question 5)

The Australian Government's Leading Practice Sustainable Development Program brings together leading practices to address key sustainable development issues for the mining sector. These cover environmental, social and economic considerations. They promote leading practice by providing practical guidance to mine managers in Australia and overseas. The Program has strong support from both the mining and community sectors as a significant contribution to building capacity. In particular, the Working with Indigenous Communities Handbook provides guidance for resource developers on how to work effectively with Indigenous communities. This handbook assists companies to engage meaningfully with Indigenous peoples and focuses on the importance of building trusting and mutually respectful relationships.

As stated above, a party to an Indigenous Land Use Agreement negotiation or future act negotiation may seek assistance from the Tribunal to mediate the negotiation, without charge. In the Adani matter, the Wangan and Jagalingou Peoples did not request mediation assistance from the Tribunal.

Other provisions of the NTA help ensure Indigenous peoples are not unduly subjected to pressure and external interference by private corporations. The future acts regime establishes processes which must be complied with before certain acts affecting native title can validly be done. These processes can include a requirement to notify or negotiate with native title parties. It can also require proponents to negotiate with native title parties in good faith about whether the act proposed can be done. The Federal Court of Australia has ruled that future acts cannot be validly undertaken in cases where companies have failed to negotiate in good faith.²⁰

Good faith was raised by the Wangan and Jagalingou Applicant against Adani Mining Pty Ltd in relation to a previously applied for mining lease comprising part of the Carmichael Mine area. After hearing the evidence, the Tribunal held that Adani had negotiated in good faith and there was no evidence to the contrary. In respect of the two mining leases subject of the current appeal proceedings, lack of good faith in conducting negotiations was not alleged against either the State or Adani during the Tribunal proceedings.

¹⁷ NTA, subsection 31(1)(b).

¹⁸ *Aboriginal Cultural Heritage Act 2003* (Qld), section 23.

¹⁹ See [48] of the Tribunal decision in the Adani matter.

²⁰ *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35.

project is subject to conditional approvals under both that Act and the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.²⁶ Adani Mining Pty Ltd also undertook a social impact assessment which was provided to the State.²⁷

In Queensland, the environmental management of mining is governed by the Queensland *Environmental Protection Act 1994*. For mining activities, Chapter 5 of the Environmental Protection Act requires the grantee party (Adani Mining Pty Ltd) to apply for an environmental authority, a breach of which attracts penalties under that Act.²⁸ The holder of an environmental authority has a duty to ensure that persons acting under the authority comply with the conditions of the authority.²⁹

Indigenous heritage values were considered as part of the Queensland Government environmental impact assessment of the Carmichael coal mine. An outline of the environmental impact assessment process and relevant documents with information on the assessment of Indigenous heritage values can be found at the following website: <http://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html>.

Implementation and awareness raising of the United Nations Declaration on the Rights of Indigenous Peoples (addressing question 10)

Australia gives effect to the principles of the Declaration through a range of laws, policies and practices.

The Australian Government supports greater awareness and respect for the Declaration amongst individuals, communities, civil society and government agencies.

During 2014 the Australian Human Rights Commission and the National Congress of Australia's First Peoples conducted a Declaration Dialogue Series which aimed to raise awareness of the Declaration and facilitate discussion about the Declaration. This Dialogue Series was supported by a website and discussion papers.



Tanya Bennett
Chargé d'affaires

²⁶ See [34] of the Tribunal decision, above n 12.

²⁷ See [98] of the Tribunal decision, *ibid*.

²⁸ *Environmental Protection Act 1994* (Qld), section 430.

²⁹ See [51] of the Tribunal decision, above n 12.

Information on the number and percentage of mining licence disputes in which the National Native Title Tribunal has decided in favour of the licence being issued (addressing question 7)

The Tribunal has made 852 future act determinations²¹ related to mining licenses.²² Of these, 846 determined the future act may be done or may be done subject to conditions (approximately 99 per cent). The remaining six determined the future act must not be done.

Of the 846 determinations that a future act may be done or done subject to conditions, 22 per cent required the Tribunal to make a determination where the parties could not agree the doing of the act while 78 per cent were achieved by the agreement of the parties.

Implications for the right to reparation for damage to ancestral homelands from unfavourable court decisions and safeguards against coercion in accepting Indigenous Land Use Agreements (addressing question 8)

If negotiations about a proposed Indigenous Land Use Agreement that would validate the grant of mining rights are unsuccessful and the non-native title parties still wish that the mining rights be granted, the non-native title parties may apply for a future act determination by the Tribunal that allows the mining rights to be validly granted. The Tribunal may make a determination that the future act (the grant of the mining rights) may be done, may be done subject to conditions, or must not be done.

The NTA has provisions regarding compensation for future acts, including about compensation for the grant of mining rights following a future act determination by the Tribunal. The grant of mining rights may be subject to the non-extinguishment principle.²³ This means that native title rights and interests may not be permanently extinguished by the grant of mining rights and may instead be suspended to the extent of and for the duration of their inconsistency with mining rights. Compensation may be payable to native title holders for the grant of mining rights.²⁴ A native title holder may apply to the Federal Court for a compensation determination.²⁵

Compensation for damages to ancestral homelands may apply under State or Territory heritage and sacred sites protection acts including the Queensland *Aboriginal Cultural Heritage Act 2003* (Qld).

Proposals that are likely to have a significant impact on matters of National Environmental Significance require approval under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. While Indigenous heritage values are not in themselves matters of National Environmental Significance, those values may be encompassed within other matters of National Environmental Significance, such as the values of specific World Heritage properties. Indigenous heritage values were not considered as part of the Commonwealth assessment for the Carmichael coal mine.

Social and Environmental impact assessments of proposed Carmichael coal mine undertaken by Government (addressing question 9)

The State and Commonwealth Governments have accredited the Environmental Impact Statement process undertaken by Adani Mining Pty Ltd for the Carmichael Coal Mine and Rail Project which was conducted under the Queensland *State Development and Public Works Organisation Act 1971* under a bilateral agreement between the Commonwealth and State Governments. The proposed

²¹ A future act determination is a decision by the Tribunal about whether a future act, attracting the right to negotiate, may be done, may be done subject to conditions, or must not be done.

²² Statistics include applications for mining leases and exploration licences that do not attract the expedited procedure.

²³ NTA, subsection 24MD(3).

²⁴ NTA, subsections 24MD(2)-(4) and Part 2, Division 5.

²⁵ NTA, sections 50 and 61.

NATIONAL NATIVE TITLE TRIBUNAL

Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People [2015] NNTTA 16 (08 April 2015)

Application Nos: QF2014/0003 and QF2014/0004

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Adani Mining Pty Ltd (grantee party)

- and -

Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People (QC2004/006) (native title party)

- and -

The State of Queensland (Government party)

SUMMARY

As this matter may be of public interest, the National Native Title Tribunal has prepared this summary to accompany the determination. The summary does not form part of the determination; the only authoritative statement of the Tribunal's reasons is the determination itself. The published reasons for the determination and this summary are available on the Tribunal's website (www.nntt.gov.au) and through Austlii.

Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People [2015] NNTTA 16 (08 April 2015)

The National Native Title Tribunal's role

The grant of a mining lease which affects native title can only validly be made where the native title party agrees to the grant, or, where, following an inquiry, the Tribunal determines that the grant can be made. In this matter applications were made to the Tribunal to determine if the grant of two

mining leases could be made because there was no agreement. These are known as future act determination applications.

There are three possible determinations the Tribunal can make: that the grant of the mining leases can occur, that the grant of the mining leases can occur with conditions attached, or the grant of the mining leases must not occur [55]. A determination that the grant can occur does not mean that it must. Whether a grant proceeds is a matter for the government.

A future act determination application can only be made if at least six months have passed since the Government party gave notice of its intention to grant the mining lease, and if the parties have been unable to reach agreement regarding the proposed grant of the mining lease.

The inquiry

The Tribunal when making a future act determination must take into account the criteria found in section 39 of the Native Title Act 1993 (Cth) ('NTA') [56]. The weight attributed to each criteria depends upon the evidence provided [57]. The criteria include a consideration of: the effect of the proposed mining leases on the enjoyment of registered native title rights and interests; the way of life, culture and traditions; and on any sites of particular significance to the native title party in accordance with their traditions. There are many other matters to consider, including the native title party's opinions or wishes in relation to the management or use of the area concerned, as well as the economic or other significance of the proposed mine and the public interest in whether the mining lease should be granted. To assist with considering the section 39 criteria, the Tribunal issues directions requiring each party to submit contentions and evidence relevant to the criteria.

The applications

These applications (QF2014/0003 and QF2014/0004) were made to determine whether two mining leases (ML70505 and ML70506) could be granted to Adani Mining Pty Ltd. On 10 October 2014 Adani Mining Pty Ltd (the grantee party) made future act determination applications in respect of mining leases 70505 and 70506, applied for as part of the Carmichael Coal Mine and Rail Project in Queensland's Galilee Basin. The applications stated that the negotiation parties had not been able to reach agreement [9]. This determination is strictly in relation to whether these two particular mining leases can be granted, as per the section 39 criteria of the NTA.

It is emphasised that this determination is not part of an indigenous land use agreement ('ILUA') process. The Tribunal does not have any decision making role in relation to the content or outcomes of ILUA's. Tribunal assistance in the course of ILUA negotiations could have been requested by the parties under s24CF of the NTA. It was not.

The parties

The parties to the inquiry are the grantee party (Adani Mining Pty Ltd), the Government party (the State of Queensland) and the native title party (the registered claimant, the Wangan and Jagalingou People) [5].

Under the NTA, registered native title claimant means 'a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to land or waters'.

Currently, the persons whose names appear on the Register of Native Title Claims are Adrian Burragubba, Irene White and Patrick Malone, who jointly comprise the applicant to native title determination application proceedings [6]. The native title party is the Wangan and Jagalingou People, not any individual named claimant nor any other representative group [7][24]. The Wangan and Jagalingou People have had their claim registered since 5 July 2004 and they, as a collective, are

entitled to procedural rights under the right to negotiate provisions. All parties to this matter including the Wangan and Jagalingou People are legally represented [8] and the legal representatives seek instructions and submit material to be considered by the Tribunal as part of the determination process.

Material submitted

During the course of this inquiry, the Wangan and Jagalingou People confirmed that they would not be alleging that the grantee party or the Government party did not negotiate in good faith [14]. Accordingly, the parties were only required to submit material regarding section 39 of the NTA. Both the Government party and grantee party submitted their contentions and evidence by the required date [18][19]. The native title party's material was due by 30 January 2015. A few days before the compliance date, the Wangan and Jagalingou People's legal representative informed the Tribunal that no contentions or evidence would be submitted. No material was submitted and no request seeking an extension was received.

On 5 February 2015, one of the named claimants for the Wangan and Jagalingou People, Mr Adrian Burragubba, submitted a statement regarding the Carmichael Mine; it was unsigned and stated to be by Adrian Burragubba on behalf of the Wangan and Jagalingou Families Representative Council [22]. The Tribunal asked the grantee party, the government party, and the native title party for their view on whether that statement should form part of the decision-making process.

The Tribunal decided that the statement was not relevant for the purposes of the decision [30] after considering the matter and the response of each party's legal representative [27][28], and a response from Mr Burragubba. The native title party's position was that the Tribunal should not consider the statement of Mr Burragubba as part of the decision making process in relation to the applications [26]. Relevant however to Mr Burragubba's representations I accept that the native title party did not indicate its support or consent to the grant of the mining leases [32].

Where the Tribunal has insufficient evidence or where one or more parties has not submitted evidence, the Tribunal will base its decision on the material provided to it and will not normally conduct its own inquiries and obtain evidence [63]. Evidence is preferably provided in affidavit form. The Tribunal has from time to time accepted unsworn witness statements particularly where there is no objection drawn from the other parties and the evidence is not contested. An assertion or apprehension of impact or affect in the absence of evidence is not enough for the Tribunal to make findings.

Determination

For the reasons contained within the determination [60]-[120], the determination is that the acts, being the grant of mining leases 70505 and 70506 to Adani Mining Pty Ltd, may be done.

END OF SUMMARY

NATIONAL NATIVE TITLE TRIBUNAL

Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People, [2015] NNTTA 16 (08 April 2015)

Application Nos: QF2014/0003 and QF2014/0004

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

- and -

IN THE MATTER of an inquiry into future act determination applications

Adani Mining Pty Ltd (grantee party)

- and -

Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People (QC2004/006) (native title party)

- and -

The State of Queensland (Government party)

FUTURE ACT DETERMINATION THAT THE ACTS MAY BE DONE

Tribunal:	Mr J R McNamara
Place:	Brisbane
Date of decision:	8 April 2015
Hearing dates:	On the papers

Catchwords: Native title – future act – applications for the grant of mining leases – s 39 criteria considered – effect on registered native title rights and interests – effect of act 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 – any other matters the Tribunal considers relevant – determination that the act may be done – reduced tenement area – partial abandonment – absence of native title party evidence – insufficient evidence – parties to the inquiry – meaning of native title party.

Representatives of the grantee party: Mr William Oxby and Ms Alice Hoban, Herbert Smith Freehills

Representative of the native title party: Ms Nadia Rosenman, Chalk & Fitzgerald

Representatives of the Government party: Ms Leilehua Helu, Crown Law
Ms Julieanne Butteriss, Department of Natural Resources and Mines

Legislation: Aboriginal Cultural Heritage Act 2003 (Qld) ss 8, 23, 160, 169
Environmental Protection Act 1994 (Qld) ss 319, 430, 431
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Environmental Protection Regulation 2008 (Qld)
Mineral Resources Act 1989 (Qld) ss 276, 307
Mineral Resources Regulation 2013 (Qld) s 22
Native Title Act 1993 (Cth) ss 23B, 24MD, 30, 31, 35, 36, 38, 39, 61, 66B, 76, 77, 109, 141, 151, 238, 253
Native Title (Queensland) Act 1993 (Qld), s 20
State Development and Public Works Organisation Act 1971 (Qld)

Cases: Adani Mining Pty Ltd/Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/State of Queensland [\[2013\] NNTTA 52](#) ('Adani Mining v Wangan and Jagalingou')
Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland [\[2006\] NNTTA 3](#) ('Cameron v Gugu Badhun')
Carpentaria Gold Pty Ltd/Birri People/Queensland [\[2010\] NNTTA 148](#) ('Carpentaria Gold v Birri People')
Cheedy on behalf of the Yindjibarndi People v Western Australia (includes Corrigendum dated 6 July 2010) [\[2010\] FCA 690](#) ('Cheedy v Western Australia')
Cheinmora v Striker Resources NL & Ors [\(1996\) 142 ALR 21](#) ('Cheinmora v Striker Resources')
Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland, [\[2012\] NNTTA 31](#) ('Drake Coal v Smallwood')
FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia [\[2009\] NNTTA 91](#) ('FMG Pilbara v Yindjibarndi People')

Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia [\[2006\] NNTTA 19](#) ('Griffin Coal v Nyungar People')

Monkey Mia Dolphin Resort Pty Ltd/Western Australia/Albert Darby Winder and others, [\[2001\] NNTTA 50](#); (2001) 164 FLR 361 ('Monkey Mia v Albert Darby Winder')

Peter George Hunt and Others v Widi People of the Nebo Estate #1 and Another [\[2014\] NNTTA 120](#) ('Hunt v Widi People of the Nebo Estate #1')

Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people, [\[2000\] NNTTA 67](#) ('Placer (Granny Smith) v Wongatha People')

Queensland Gas Company Limited & Ors/Iman People #2; Mandandanji People/Queensland [\[2010\] NNTTA 210](#) ('QGC v Iman People #2')

Western Australia/Judy Hughes & Others on behalf of the Thalanyji People, Ronald Crowe and Others on behalf of Gnulli/Rough Range Oil Pty Ltd, [\[2004\] NNTTA 108](#) ('Western Australia v Thalanyji and Gnulli')

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

Western Desert Lands Aboriginal Corporation v Western Australia and Another (2009) 232 FLR 169; [\[2009\] NNTTA 49](#); (2009) 2 ALR 214 ('Western Desert Lands v Holocene')

REASONS FOR DECISION

Background

- [1] On 9 October 2013, the State of Queensland ('the Government party') gave notice under s 29 of the Native Title Act 1993 (Cth) ('the Act') of its intention to grant mining leases 70505 ('the first proposed lease') and 70506 ('the second proposed lease') to Adani Mining Pty Ltd ('the grantee party'). For the purpose of s 29(4)(a), 30 October 2013 was specified as the notification day for both leases.
- [2] The notices provide that:
- (a) The first proposed lease covers approximately 16 960 hectares (169.60 square kilometres) located approximately 144 kilometres North West of Clermont within Isaac Regional Council;
 - (b) The second proposed lease covers approximately 1588 hectares (15.58 square kilometres) located approximately 173 kilometres West North West of Clermont within Isaac Regional Council;
 - (c) Grant of the leases would authorise the grantee party to mine and carry out associated activities under the Mineral Resources Act 1989 (Qld) ('MRA') for a term not exceeding 30 years with the possibility of renewal for a term not exceeding 30 years;
 - (d) any person who is or becomes a native title party, with reference to a three month period from the notification day to take steps to do so (see s 30 of the Act) is entitled to certain rights. These are the procedural rights provided in Part 2 Division 3 Subdivision P of the Act.
- [3] Both leases wholly overlap with the native title claim of the Wangan and Jagalingou People (QC2004/006) which has been registered on the Register of Native Title Claims since 5 July 2004. The Wangan and Jagalingou People are the 'native title party' for this inquiry and there are no other overlapping registered claims or determinations. As a consequence of Federal Court orders made by Justice Collier on 7 August 2014 (see s 66B of the Act), Adrian Burragubba, Patrick Malone and Irene White jointly replace Jessie Diver, Patrick Fisher, Lynette Landers, Irene White, Elizabeth McAvoy, Patrick Malone and Les Tilley as the

applicant in the native title determination application proceedings. The Register of Native Title Claims was amended accordingly (see s 66B(4) of the Act).

The section 35 future act determination application and subsequent inquiry

- [4] Negotiation parties (see s 30A of the Act) are required to negotiate in good faith with a view to obtaining the agreement of the native title party to the granting of the leases, whether that be with or without conditions to be complied with by any of the parties (see s 31(1)(b) of the Act).
- [5] The parties to this matter are the grantee party, the Government party and the native title party (s 141 of the Act).
- [6] A native title party (see s 29(2)(b) and s 30) is any registered native title claimant. Registered native title claimant, under s 253 of the Act, means ‘a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters’. As noted above, the persons whose names are on the Register are Adrian Burragubba, Irene White and Patrick Malone. Those persons are the applicant for the native title determination application proceedings in the Federal Court for the Wangan and Jagalingou People; s 61 of the Act confirms that in a native title determination application made by a person or persons authorised to make the application by a native title claim group, those persons are jointly (not individually) the applicant.
- [7] In *Monkey Mia v Albert Darby Winder*, the Tribunal considered various authorities regarding the nature of a claim group and said ‘the principles affirmed in these cases support its [the Tribunal’s] decision that a ‘native title party’ is the registered native title claimants acting on behalf of the claim group collectively and not each individual registered native title claimant’ at [20]. The Tribunal referred to the finding in *Placer (Granny Smith) v Wongatha People* that a native title party is the registered native title claimants acting collectively and that each individual registered native title claimant is not entitled to separate representation in a right to negotiate inquiry. In this collective context, the agreed decision-making process for the claim group is important and legal representation will be taken into account. As the Tribunal explained in *Monkey Mia v Albert Darby Winder* (at [19]), the ‘Tribunal will be prepared to act on the consent given by the native title party collectively unless there is some credible

suggestion that this is not appropriate. Lawyers acting for the native title party should normally be in a position to advise the Tribunal that the consent has properly been given, based on the established decision making processes of the native title claim group'. It is the native title party, as per the features explained, that is entitled to procedural rights under the right to negotiate provisions.

- [8] In this future act matter, the native title party is legally represented by Ms Nadia Rosenman of Chalk & Fitzgerald. The grantee party is legally represented by Mr William Oxby and Ms Alice Hoban of Herbert Smith Freehills. The Government party is legally represented by Ms Leilehua Helu of Crown Law.
- [9] On 10 October 2014, the grantee party applied under s 35 of the Act for the Tribunal to make a future act determination in respect of each proposed lease. As required by s 35(1), more than six months had passed since notification and no agreement of the kind mentioned in s 31(1)(b) of the Act had been made.
- [10] On 13 October 2014, President Webb QC appointed me for the purpose of making the determination in respect of the proposed leases. I considered the conditions outlined in s 76 of the Act and accepted the applications pursuant to s 77 of the Act the following day.
- [11] On 22 October 2014, parties were provided with a map prepared by the Tribunal's Geospatial Services showing the proposed leases, any overlapping and surrounding claim/determination areas, topography and underlying tenure. Parties were given the opportunity to make any comments by 29 October 2014 and advised that, subject to my consideration of any comments received; the map would be used for decision-making purposes. All parties emailed the Tribunal indicating they had no such comments.
- [12] On 23 October 2014, I convened a preliminary conference with the parties. One of the issues raised was whether any party intended to allege that either or both of the Government party or grantee party had not negotiated in good faith for the purposes of s 31(1)(b) of the Act; if so alleged, the Tribunal would have to make a finding on that issue and would only have power to determine the substantive issue under s 39 of the Act if satisfied that the relevant party had negotiated in good faith (see s 36(2) of the Act). The native title party's representative Ms Rosenman indicated she would inform the Tribunal and parties of her instructions on that matter by 24 November 2014. I also queried whether parties wished to seek the President's

direction for a s 150 conference to be held to try and resolve any matter relevant to the inquiry; no party requested that assistance, though the option remained open for them to do so at a later time.

- [13] Later that day, I made directions requiring parties to submit contentions and evidence in relation to the good faith issue and also the criteria outlined in s 39 of the Act.
- [14] On 25 November 2014, Ms Rosenman informed the Tribunal and parties that the native title party would not be raising the good faith issue and requesting retention of the direction dates regarding the s 39 criteria. With the agreement of all parties, I vacated good faith directions 1-5 and the substantive compliance dates (directions 6-13) remained in place.
- [15] On 15 January 2015, the Government party's representative requested that an updated Tribunal map be produced to reflect the grantee party's recent abandonment of parts of the first proposed lease (see 'area of the first proposed lease' below). Tribunal overlap analyses produced that day confirmed that the area of the first proposed lease had reduced from approximately 169.62 square kilometres to 135.21 square kilometres. An updated version of this map was then distributed to parties. It showed the outline of the area of the proposed lease as at the date of the future act determination application ('FADA'), and clearly marked the reduced area of the first proposed lease reflecting the updated records. Parties were given until 22 January 2015 to provide any comments. By email on 21 January 2015, the grantee party requested that the FADA application area be reduced to be consistent with the updated area of the first proposed lease 'on the basis that the determinations can only be made in respect of the area of the MLs'.

Area of the first proposed lease

- [16] The area of the first proposed lease reduced part way through the inquiry, as explained by correspondence outlined below. At the time I accepted the future act determination applications, the area of the first proposed lease was approximately 16 960 hectares (169.6 square kilometres) as per the s 29 notice. It is in relation to the area as per the s 29 notice that I make my decision. Nonetheless, I note the Tribunal has received the following material demonstrating that the area of the first proposed lease, as reflected in DNRM public records, has reduced to approximately 13 525.18 hectares/135.25 square kilometres:

- (a) Mining lease report for first proposed lease generated 26 November 2014 (Annexure 9.1 GVP Contentions) showing the original area followed by a later mining lease report for the first proposed lease (generated 15 January 2015; Annexure 9.2 GVP Contentions) showing the reduced area;
- (b) Correspondence from the grantee party dated 2 December 2014 notifying the Department of Natural Resources and Mines ('DNRM') of the reduction in area pursuant to s 307 MRA and attaching mapping and other material (see Annexure 63 GVP Contentions described below);
- (c) Tribunal's iSpatial overlap analysis report generated 22 January 2015 showing the reduced area of 135 square kilometres;
- (d) Explanation in grantee party contentions dated 16 January 2015 that the area reduced to 13 525 hectares (paragraph 3.5 GP Contentions), supported by the public inquiry report generated 16 January 2015 showing 13 525.1793 hectares (Annexure C, GP Contentions);
- (e) Explanation in Government party contentions that the Government party received a notice on 2 December 2014 under s 307 MRA that the grantee party was abandoning part of the first proposed lease (specifically parts of Lot 1 on SP 164918 and Lot 5091 on PH 1882) (see annexure 63 GVP Contentions); and
- (f) An email from the Government party dated 15 January 2015 explaining the following parts of ML70505 were abandoned: 'Firstly, the surface area within Lot 5091 on PH1882 and part of Lot 1 on SP164918 (on 13 March 2014) and later the area of the mining lease application over Lot 5091 on PH 1882 (on 3 December 2014)'.

Material received

- [17] Accompanying each Form 5 (i.e. arbitral application) submitted by the grantee party were the following:
- (a) Section 29 notice for both proposed leases as published in the National Indigenous Times on 9 October 2013;

- (b) DNRM mining lease report for the relevant proposed lease accessed on 10 October 2014; and
- (c) Map showing the proposed leases produced by the grantee party dated 28 May 2014.

[18] In compliance with the directions, the Government party submitted a statement of contentions ('GVP Contentions') on 16 January 2015 regarding the s 39 criteria, together with the following:

- (a) Annexure 1 – s 29 notice for each proposed lease
- (b) Annexure 2 – Overlap analysis report for the first proposed lease
- (c) Annexure 3 – Overlap analysis report for the second proposed lease
- (d) Annexure 4 – Extract from the Register of Native Title Claims for the native title party's claim
- (e) Annexure 5 – Map of the first proposed lease and surrounding area produced by DNRM's Mines Online created 15 January 2015
- (f) Annexure 6 – Map of the second proposed lease and surrounding area produced by DNRM's Mines Online created 15 January 2015
- (g) Annexure 7 – Map of the proposed leases produced by NNTT created 15 January 2015 (see [15] above)
- (h) Annexure 8 – Current and historical mining permits in the vicinity of the proposed leases
- (i) Annexure 9.1-9.3 – Public enquiry report for the first proposed lease dated 26 November 2014; public enquiry report for the first proposed lease dated 15 January 2015; public enquiry report for the second proposed lease dated 15 January 2015;
- (j) Annexure 10.1 – Land title search record for Lot 1 on SP164918 dated 24 October 2014;
- (k) Annexure 10.2 – Record of Grazing Homestead Perpetual Lease No. 12/2545 granted 3 July 1976;
- (l) Annexure 11.1 – Land title search record for Lot 662 on PH 1491 dated 24 October 2014;
- (m) Annexure 11.2 – Record of Pastoral Lease No. 12/662 granted 23 September 1976;
- (n) Annexure 12 – Land title search record for Lot 5091 on PH 1882 dated 24 October 2014
- (o) Annexure 13-59 – Public enquiry reports for various mining tenure
- (p) Annexure 60 – Email from Department of Aboriginal and Torres Strait Islander and Multicultural Affairs ('DATSIMA', now Department of Aboriginal and Torres Strait

Islander Partnerships ('DATSIP') to DNRM dated 27 November 2014 delivering cultural heritage search results from DATSIMA's Cultural Heritage Database and Register;

- (q) Annexure 61 – Code of Environmental Compliance for Mining Lease Projects published by the Department of Environment and Heritage Protection (Version 1.1);
- (r) Annexure 62 – Aboriginal Cultural Heritage Act Duty of Care Guidelines (Gazettal date: 16 April 2004);
- (s) Annexure 63 – Email from the grantee party dated 2 December 2014 notifying DNRM that it is abandoning part of the first proposed lease, under s 307 of the MRA, with the following attachments: a letter from the grantee party to DNRM dated 28 November 2014 notifying DNRM of the abandonment; Attachment 1 (map highlighting abandoned area); Attachment 2 (Metes and bounds of the revised area); Attachment 3 (Map of revised area); and Attachment 4 (List of persons being notified).

[19] The grantee party submitted its material on 16 January 2015, consisting of a statement of contentions ('GP Contentions') together with the following:

- (a) Annexure A – Email from DATSIMA to the grantee party's representative Ms Hoban dated 14 January 2015 explaining cultural heritage database and register results;
- (b) Annexure B – Land title search results for Grazing Homestead Perpetual Lease survey plan 164918 and Lot 662 on Crown Plan 1491 (search dates: 16 January 2015);
- (c) Annexure C – DNRM Public Enquiry Reports (all accessed on 16 January 2015) for the proposed leases, as well as ML70441, ATP 1044, EPC 1078, EPC 1080, EPC 1105, EPC 1483, EPC 1528, EPC 1690, EPC 1957;
- (d) Annexure D – Map of underlying and adjacent tenure to the first proposed lease, prepared by the grantee party dated 13 January 2015;
- (e) Annexure E – Map of underlying and adjacent tenure to the second proposed lease, prepared by the grantee party dated 13 January 2015;
- (f) Annexure F – Map of mining and petroleum tenures underlying and adjacent to the first proposed lease dated 16 January 2015;

- (g) Annexure G – Map of mining and petroleum tenures underlying and adjacent to the second proposed lease dated 13 January 2015;
 - (h) Annexure H – Map of other rights and interests underlying and adjacent to the first proposed lease dated 16 January 2015;
 - (i) Annexure I – Map of other rights and interests underlying and adjacent to the second proposed lease, dated 13 January 2015;
 - (j) Annexure J – Letters regarding approval of Cultural Heritage Management Plan ('CHMP') consisting of:
 - (i) Letter from Ms Tarrago of Aboriginal and Torres Strait Islander Land Services (Department of Environment and Resource Management) to Mr Haseler, Counsel for the grantee party, dated 28 October 2011 confirming approval;
 - (ii) Letter from Ms Tarrago of DATSIMA to Mr Carter of Environment Land Heritage dated 16 May 2014 advising of the Adani Carmichael Expansion Project CHMP being approved;
 - (k) Annexure K – Executive Summary to the Environmental Impact Statement ('EIS') for the Carmichael Coal Mine and Rail Project.
- [20] The native title party's material was required by 30 January 2015. On 23 January 2015, the native title party's representative, Ms Rosenman, emailed the Tribunal and parties stating 'we have today had instructions that the native title party will not be making any submissions in relation to the grant of the two mining leases in question'. Consistent with that email, no material was received as at the compliance date.
- [21] On 3 February 2015, I emailed parties noting that the Government party (by email 2 February 2015) and the grantee party (at paragraph 4.2 GP Contentions) indicated their preference for the determination to be made on the papers (that is, without a hearing) and asked for the native title party's view. Ms Rosenman replied later that day indicating the native title party supports a determination being made on the papers. The Tribunal emailed parties indicating that they would be informed at a later time of whether I would decide the matter on the papers (see s 151(2) of the Act).

Material received from Mr Burragubba

- [22] On 5 February 2015, one of the three registered claimants, Mr Adrian Burragubba, emailed the Tribunal referring to the future act determination applications and proposed leases within the body of the email and attaching a statement ('Mr Burragubba's statement'). This email was not sent directly to any of the party representatives for this matter nor any of the other registered claimants. However, it was sent generally to each party's organisation in addition to the following other agencies/organisations: Adani Mining Pty Ltd, the Department of State Development Infrastructure and Planning, the Indigenous branch of the United Nations, the Department of Environment and Heritage Protection, Mr Mick Gooda at the Australian Human Rights Commission, DNRM and Chalk & Fitzgerald (the native title party's representative firm). The heading reads as follows:

Wangan and Jagalingou Families Representative Council
Statement by the Wangan and Jagalingou People about the Carmichael Mine
To the National Native Title Tribunal
CC:Adani Mining P/L (Mining Party); Queensland Government (State Party)

- [23] After having set out his views on a range of matters, in the final paragraph of the statement, Mr Burragubba states 'for these reasons our lawyers were asked to tell the tribunal that we can no longer participate in these proceedings'. This is consistent with Ms Rosenman's email of 23 January 2015 (see [20] above). The statement is not signed but reads at the bottom:

Adrian Burragubba, Wangan and Jagalingou Traditional Owner
On behalf of the Wangan and Jagalingou Families Representative Council
Monday 2 February 2015

- [24] Mr Burragubba is one of three registered claimants. He alone is not 'the native title party', nor is the Families Representative Council. For the purposes of this decision, the native title party is the Wangan and Jagalingou People as listed on the Register of Native Title Claims (see [5]-[8] above).
- [25] The Tribunal emailed party representatives and Mr Burragubba on 6 February 2015 noting: the compliance date had passed; the native title party's representative had previously confirmed no material would be submitted; no extension request had been submitted; and all parties had confirmed their preference for the decision to be made on the papers. I asked for each party to submit their view by 11 February 2015 on whether Mr Burragubba's statement should be considered as part of the decision-making process.

- [26] The native title party emailed the Tribunal on 11 February 2015 confirming ‘we are instructed by the applicant for the native title party that the member should not consider the statement of Mr Burragubba as part of the decision making process in relation to the applications. We advise that the earlier decision by the native title party applicant not to make a submission on the grantee party’s applications for the grant of the two mining leases was unanimous as between each member of the native title party applicant’.
- [27] The Government party emailed the Tribunal on 11 February 2015 making various comments concerning the statement and the inquiry and concluded that the Government party is of ‘the view that the issue of whether it should be considered is one for the Native Title Party as it has the specific facts relating to how the Statement came into being and its authenticity’. The Government party went on to note that the position of the native title party regarding the statement is clear as per the native title party’s 11 February 2015 email above.
- [28] The grantee party wrote to the Tribunal on 11 February 2015 setting out relevant facts in paragraphs numbered 1 - 6, and said that Adani’s position is that the NNTT must determine whether the document is relevant to the determination having regard to those factual matters and that the Document (Mr Burragubba’s statement) did not contend that the position of the native title party has changed (from Ms Rosenman’s advice on 23 January 2015 that no material would be submitted), or that the relevant future acts not be done. The grantee party went on to note that if the document is found to be relevant in making the future act determinations, the grantee party requests the opportunity to respond to it and requests that appropriate weight be given in the context of the factual circumstances explained.
- [29] On 12 February 2015, the Tribunal acknowledged receipt of each party’s viewpoint and advised that decisions regarding Mr Burragubba’s statement and whether to hold a hearing would be forthcoming. Later that day, Mr Burragubba emailed the Tribunal and the Government party (which the Government party forwarded to all party representatives) putting forward his view as follows:

Dear Kate and Leilehua,

I wish to clarify a number of matters.

As a member of the Applicant, I put forward my view to our legal representative yesterday. The view of the Applicant conveyed to you was not a unanimous position of the members arrived at by consensus, as the rules governing the Applicant provide for in the first instance. As no collective discussion took place between the members of the Applicant to give direction to our legal representative, I thought it important to put my position to you directly.

As I stated in writing to the other members of the Applicant and our legal representative, my view is this:

The statement is a faithful representation of the Family Council's position, which itself is in accord with the decisions of the Claim Group. It is self-explanatory. It is not an objection under the terms of the order. While it may be a little bit unconventional it is not a breach of anything.

For the record, the following is my position; and I also believe it is in the interests of the Applicant, in relation to the Family Council and the W & J Claimant, to adopt the same. I therefore proposed the response be –

“The W & J applicant doesn't have a position on the Family Representative Council's statement submitted by Adrian Burragubba, and takes the view that it is entirely a matter for the Tribunal to consider and respond to the statement”.

Further, the State Party's response shows a misunderstanding of our decision structure and the importance of the W&J Family Representative Council and its role; and the importance of the Applicant abiding by the guidance of the Family Council. The Council is central to the collective governance of the W&J people in between meetings of the Claim Group; and provides resolutions and advice for the Applicant to consider when making the decisions it is authorised to make. Ignoring the Council is a serious concern for us; and a contrary direction taken by the Applicant needs to be fully explained. This has not occurred so far in relation to this matter.

At a meeting of the W&J Family Representative Council on the 24th October, convened by Qld South Native Title Representative Body, the Council resolved that the applicant should object to Adani's application for a determination. In this, the W&J Family Representative Council was acting consistently with a resolution dealt with by the Claim Group at the authorisation meeting on 5 October 2014, when the Adani ILUA was rejected. The Applicant was informed of this resolution of the Council.

My agreement not to lodge a formal objection was based on the reasons given in the Statement that I submitted on behalf of the W&J Family Representative Council.

A final point in relation to the State Party's response: it is obvious that the reference to the Carmichael mine area also applies to the area encompassed by the application for the leases ML 70505 and ML 70506. As attested to in the W&J Family Representative Council Statement, our Country and culture is an indivisible whole. At no time has the W&J Claimant Group, through its own determination, consented to the proposed mine or any of its component parts. The W&J Family Representative Council's objection is a broader one that goes to the heart of our rights as an Indigenous People, and the issue of obtaining our free, prior and informed consent for matters affecting our traditional territories, upon which we uphold all of our spiritual, cultural, family and social, environmental and economic values, rights and interests.

I sincerely hope that Member McNamara will consider what I have put forward here.

Yours sincerely

Adrian Burragubba

- [30] On 23 February 2015 each party's legal representatives were informed of my decision that Mr Burragubba's statement is not considered to be relevant for decision-making purposes, explained as follows:

The position of the native title party, as communicated by its legal representative, is that the statement is not to be considered. While 'any matter the Tribunal considers relevant' is one of the criteria the Tribunal must consider in making a determination, in context it must be relevant to the determination in the sense that it could have some bearing on the decision-making. The native title party's representative did not submit material, thus did not ask for a determination

that the act must not be done and Mr Burragubba refers to the fact that the representative was informed not to participate in proceedings. To that end, the position of the native title party is clear and unambiguous.

Whilst in a narrow sense Mr Burragubba's statement is capable of relevance (in the sense that it is connected to the subject tenements as they are encompassed by the project he speaks of), whether the statement is in fact relevant is perhaps a matter of weight and authority. I note that:

- Mr Burragubba's statement was received after the native title party had indicated no submissions would be made, and after the compliance date was passed; his comment/s about his statement were also received after the closing time for such comments.
- Mr Burragubba's statement is headed 'on behalf of the Wangan and Jagalingou people' and on the last page 'on behalf of the Wangan and Jagalingou Families Representative Council', however, there is no confirmation of support from the other members of the Applicant or the members of the Families Representative Council. The statement was sent to various recipients, not inclusive of the other two registered claimants Ms White and Mr Malone. Noting those circumstances, it raises questions of authority.
- Mr Burragubba's updated comment says that his position, which he also believes is in the interests of the Applicant to adopt, is that 'the W & J applicant doesn't have a position of [on] the Family Representative Council's statement submitted by Adrian Burragubba, and takes the view that it is entirely a matter for the Tribunal to consider and respond to the statement'.

Considering the statement and comments from Mr Burragubba, the statement is capable of relevance, but considering the weight to be attached to it, and its failing in terms of authority (i.e. the manner it was submitted and with no proof of support from the other members) I do not consider it to be relevant.

I also note that all parties have indicated their agreement for the matter to proceed on the papers. Having considered s 151(2), I confirm that the matter will proceed on the papers and the tentative listing hearing and hearing are vacated.

[31] As noted within that email, parties were advised of my decision to determine the matter on the papers and I confirm that, having considered the material before me, I am satisfied it is appropriate to do so.

[32] On 2 April 2015 correspondence, including a letter, was received from Ms Linda Bobongie, 'Chairperson Organisational Committee, Wangan & Jagalingou Family Group', on letterhead of the 'Wangan & Jagalingou Family Council'. This correspondence was also sent to representatives of the grantee party and the Government party. The letter purports to support the authority of Mr Burragubba to correspond on behalf of the 'Wangan and Jagalingou People' and that he is an 'Applicant appointed by the Wangan and Jagalingou Family Representative Group' who hold decision making authority 'subject to the decisions authorised by the Wangan and Jagalingou Native Title Claim Group'. I note that Mr Burragubba's correspondence was on behalf of the 'Wangan and Jagalingou Families Representative Council'. The letter goes on to say that the claim group rejected the proposed

indigenous land use agreement with Adani Mining and at a Family Group meeting on 22 November 2014 a resolution was passed to object to Adani's application to the Tribunal. The letter refers to a continuing opposition to the Adani mining lease. I can't be completely certain that the Wangan and Jagalingou Family Group, Family Council, Family Representative Group, and Family Representative Council are indeed all the same body although the representations made are similar. In any case I don't believe that this most recent correspondence adds anything to my understanding of the group's opposition to the grant of the mining leases and to their rejection of the indigenous land use agreement. I accept that if there was agreement to the grant of the mining leases (subject perhaps to an indigenous land use agreement or an ancillary agreement) then the matter would not be before the Tribunal. I accept that the native title party has not made submissions in support of the grant of the mining leases, nor have they consented to the grant of the mining leases.

Information about the Project and intended activities for the proposed leases

[33] The grantee party describes the proposed leases as 'key components' of its Carmichael Coal Mine and Rail Project which is located in the north Galilee Basin approximately 160 kilometres north west of Clermont in Central Queensland. Information within the grantee party's contentions and the Executive Summary to the Environmental Impact Statement (Annexure K) indicate that:

- (a) The mine component to the project involves developing a greenfield coal mine over EPC 1690 and the eastern part of EPC 1080, covering approximately 44 700 hectares in total; this involves open-cut and underground thermal coal mines, with associated mine infrastructure;
- (b) The rail component to the project has a track length of approximately 189 kilometres. It involves a greenfield rail line, running from the mine to the Goonyella rail system (an existing part of National rail structure) so the coal can be exported via the Port of Abbott Point and/or the Port of Hay Point;
- (c) at peak production, the coal mines are expected to produce approximately 60 million tonnes per annum of product coal;
- (d) the project will have an operating life of approximately 90 years.

[34] The Project has been categorised in various ways under State and federal legislation. An Environmental Impact Statement was required because the Coordinator-General declared the project to be a significant project under s 26(1)(a) of the State Development and Public Works Organisation Act 1971 (Qld) (‘SDPWOA’) by way of Government Gazette on 26 November 2010. The project is also a controlled action and thus requires assessment and approval under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBCA’). The grantee party explains that ‘the Commonwealth Government has accredited the EIS process, to be conducted under the SDPWO Act, under a bilateral agreement between the Commonwealth and Queensland governments’ and confirms that conditional approvals under both the SDPWOA and EPBCA have been given, on 7 May 2014 by the Queensland Coordinator General and 24 July 2014 by the Commonwealth Minister for Environment (conditions were varied on 21 November 2014) (paragraphs 3.18-3.20 GP Contentions).

Overview of underlying tenure and usage

First proposed lease (ML 70505)

[35] For the first proposed lease, the mining lease report and contentions provided by the Government party indicate that, as at the date of contentions (i.e. after the area reduced, as explained at [16] above), the underlying tenure comprises:

- (a) Grazing Homestead Perpetual Lease (Lot 1 on SP164918) for agricultural purposes;
- (b) Pastoral Holding (Lot 662 on PH1491) registered to the grantee party for a thirty year term expiring 31 December 2046;
- (c) Two unnamed roads across Lot 662 on PH1491;
- (d) Moray Carmichael Boundary Road Reserve.

[36] The grantee party states its understanding that native title has been extinguished in respect of (a) above, and that native title may continue to exist in respect of (b) above. The grantee party makes no comment regarding (c) and (d), except I note that the Lot in (c) is the same as that listed in (b).

[37] Apart from the tenure listed in [35] above, the grantee party states that the first proposed lease is also subject to other non-native title interests, with comments as follows (as at the date of contentions, i.e. post reduction of ML70505 area):

- (a) EPC 1080 wholly underlying it, held by Waratah Coal Pty Ltd;
- (b) ATP 1044 wholly underlying it, held by Queensland Energy Resources Ltd;
- (c) ML70441 sharing a common boundary, held by the grantee party (this was subject to a determination that it could be granted in *Adani Mining v Wangan and Jagalingou*);
- (d) EPC 1483 (held by Matilda Coal Pty Ltd), EPC 1957 (held by Mining Investments Pty Ltd), EPC 1528 (held by Vale Coal Exploration Pty Ltd), EPC 1078 (held by Vale Coal Exploration Pty Ltd), EPC 1690 (held by the grantee party), EPC 1105 (held by Waratah Coal Pty Ltd), which all share a common boundary with the first proposed lease but do not underlie it; and
- (e) Bygana West Nature Refuge.

[38] I note that the current tenure described in [35] and [37] above is slightly different to the tenure at the time of the future act determination being lodged (i.e. October 2014). In October 2014, in addition to (a)-(d) above, pastoral holding Lot 5091 on PH1882 (lessee: Bruce Raymond Cobb, Robert Allan O’Sullivan and Samantha Elizabeth Cobb; no purpose specified; due to expire on 31 March 2047), was underlying the first proposed lease. As noted at [16](e) above, the Government party explains it received notice under s 307 MRA on 2 December 2014 of the partial abandonment of the first proposed lease. The records referred to in [16] above explain that DNRM records were updated at least by 16 January 2015.

Second proposed lease (ML 70506)

- [39] For the second proposed lease, the Government party indicates that the underlying tenure is Pastoral Holding (Lot 662 on PH1491) registered to the grantee party for a thirty year term expiring 31 December 2046. The grantee party asserts its understanding that native title may continue to exist over this pastoral holding.
- [40] The grantee party lists the following other interests: EPC 1080, ATP 1044, ML70441, EPC 1483, EPC 1105 and EPC 1690, all held by the same entities and underlying or sharing a boundary in the same capacity as described at [37](a)-(d) above.
- [41] I note that the portion of overlap of the above tenure is not contained on the mining reports.

- [42] The grantee party observes that the areas of the proposed leases wholly overlapped by the native title party's claim cover various pastoral holdings currently used for grazing and that the majority of the land is cleared and uncleared grazing land used 'over a prolonged period' for beef cattle grazing (paragraph 3.24 GP Contentions).

General vicinity of the proposed leases

- [43] The Government party provided public enquiry reports and maps generated through DNRM's MinesOnline program showing a mixture of current, proposed and historical exploration and mining tenements in the 'vicinity of' both leases (annexure 13-59), 47 in total, comprising:
- (a) 24 current tenements: four authority to prospect tenements, 18 exploration permits for coal and two exploration permit for minerals;
 - (b) Seven pending applications: two applications for mineral development licenses and five applications for mining leases; and
 - (c) 16 historical tenements: three authority to prospect tenements, three exploration permits for coal and ten exploration permits for minerals.

Overview of cultural heritage material

- [44] The Government party provided a copy of an email from DATSIMA (now DATSIP) dated 27 November 2014 which states 'the Cultural Heritage Database and Register search has been completed and I would like to advise that no Aboriginal cultural heritage is currently recorded in your specific search area, from the data provided by you. However, it is probable that the absence of recorded Aboriginal cultural heritage places reflects a lack of previous cultural heritage surveys of the area' (Annexure 60 to the GVP Contentions). After referring to the search results, the Government party notes that it is not possible to conclusively guarantee the absence of cultural heritage sites in the areas of the proposed leases.
- [45] Within the DATSIMA email, the staff member referred to the Government party's indication that the proposed activity falls within Category 5 and went on to explain the implications and draw attention to DATSIMA's Cultural Heritage Duty of Care Guidelines.

[46] The grantee party has annexed search results from DATSIMA's cultural heritage database and register, provided in email format on 14 January 2015 (Annexure A, GP Contentions) confirming: 'no cultural heritage is recorded on the Cultural Heritage Database and Register in your specific search area, from the data provided by you' (but then going on to note that that it is probably due to a lack of cultural heritage surveys therefore the records are not likely to reflect a true picture); there is no registered cultural heritage body in the area of the proposed leases; and the Aboriginal party is the native title party.

[47] The grantee party explains that two CHMPs have been approved under Part 7 of the Aboriginal Cultural Heritage Act 2003 (Qld) ('ACHA') between the native title party and grantee party in respect of the part of project area that overlaps with the native title party's claim. This is reflected in the DATSIMA email of 14 January 2015, which states 'over all/part of the ML – 70506 and ML 70505 area: CLH11-020 Adani Mining Pty Ltd – Wangan and Jagalingou People 28/10/2011 CLH11-020 Adani Mining Pty Ltd – Wangan and Jagalingou People 16/05/2014'. The grantee party states that the entire area of the proposed leases is included within the CHMP areas.

[48] The relevant cultural heritage provisions are contained in the ACHA, key aspects of which I explained in *Hunt v Widi People of the Nebo Estate #1* at [18]-[22] as follows:

[18] I note that the Aboriginal Cultural Heritage Act 2003 (Qld) ('ACHA') repealed the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld) (s 160 ACHA). Section 169 of the ACHA has the effect that a reference to the Cultural Record (Landscapes Queensland and Queensland Estate) Act in a document may, if the context permits, be taken to be a reference to the ACHA. My opinion is that Note 21 to Condition 14 of the Code is such a document.

[19] The ACHA imposes a duty of care on the holder of a mining claim in relation to Aboriginal cultural heritage. Section 8 of the ACHA defines 'Aboriginal cultural heritage' as anything that is:

- a significant Aboriginal area in Queensland; or
- a significant Aboriginal object; or
- evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.

The term 'significant Aboriginal area' is defined in s 9 to mean an area of particular significance to Aboriginal people because of either or both, Aboriginal tradition and the history, including the contemporary history, of an Aboriginal party for the area. The term 'significant Aboriginal object' is defined in s 10 in the same manner.

[20] Subsection 23(1) of the ACHA requires a person who carries out an activity to take all reasonable and practical measures to ensure that the activity does not harm Aboriginal cultural heritage. This is referred to as the cultural heritage duty of care.

[21] Subsection 23(2) of the ACHA provides a non-exhaustive list of matters that a Court may have regard to when determining if a person has discharged their duty of care. One of the matters listed is the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and results of the consultation (s 23(2)(c)). In addition, s 28 provides that the Minister may, by gazette notice, notify cultural heritage duty of care guidelines which identify reasonable and practical measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage. Such guidelines were gazetted on 16 April 2004. The guidelines provide the holder of a mining claim with detailed information on how to properly discharge their duty of care.

I adopt these findings for the purpose of this inquiry.

Regulatory regime and proposed conditions of grant

[49] Section 276 of the MRA sets out the general conditions of a mining lease as follows:

- (1) Each mining lease shall be subject to –
 - (a) a condition that the holder shall use the area of the mining lease bona fide for the purpose for which the mining lease was granted and in accordance with this Act and the conditions of the mining lease and for no other purpose; and
 - (b) a condition that the holder must carry out improvement restoration for the mining lease; and
 - (c) a condition that the holder, prior to the termination of the mining lease for whatever cause, shall remove any building or structure purported to be erected under the authority of the mining lease and all mining equipment and plant, on or in the area of the mining lease unless otherwise approved by the Minister; and
 - (d) a condition that without the prior approval of the Minister the holder shall not obstruct or interfere with any right of access had by any person in respect of the area of the mining lease; and
 - (e) a condition that the holder shall furnish as required under this Act all prescribed reports, returns, documents and statements whatever; and
 - (f) a condition that the holder give materials obtained under the holder's mining operations to the Minister at the times, in the way and in quantities the Minister reasonably requires by written notice to the holder; and
 - (g) where the mining lease is in respect of land that is a reserve, a condition that the holder shall comply with the terms and conditions upon which the consent of the owner or the Governor in Council to the grant of the mining lease was given; and
 - (h) a condition that the holder shall maintain during the term of the lease the marking out of the area of the mining lease including any survey pegs but that boundary posts or cairns need not be maintained after the area has been surveyed; and
 - (i) a condition that the holder shall make all payments of compensation and comply with all terms of any agreement or determination relating to compensation at the time or times as agreed or determined pursuant to section 279, 280, 281 or 282; and
 - (j) a condition that the holder:
 - (i) shall pay the rental as prescribed; and
 - (ii) shall pay the royalty as prescribed; and
 - (iii) shall pay all local government rates and charges lawfully chargeable against the holder in respect of the area of the mining lease; and
 - (iv) shall deposit as required by the Minister any security from time to time under this Act; and
 - (k) a condition that the holder shall comply with this Act and other mining legislation; and
 - (l) such other conditions as are prescribed; and
 - (m) such other conditions as the Minister determines.

(1A) Without limiting subsection (1), the Minister may determine a condition of a mining lease if the Minister considers the condition is in the public interest.

(2) The Minister may grant a mining lease without the imposition of the conditions specified in subsection (1)(c) and (h).

(3) A mining lease may be subject to a condition that mining operations under the mining lease shall commence within a specified period after its grant or as otherwise approved in writing by the Minister.

(4) Conditions may be imposed in respect of a mining lease that require compliance with specified codes or industry agreements.

(5) Despite subsections (1) to (4), a condition must not be determined, imposed or prescribed if it is the same, or substantially the same, or inconsistent with, a relevant environmental condition for the mining lease.

(7) A mining lease granted after the commencement of the Mineral Resources Amendment Act 1998 is subject to a condition that the holder comply with the At Risk agreement.

[50] Part 4 of the Mineral Resources Regulation 2013 (Qld) also applies. Section 22 provides further conditions in relation to s 276(1) of the MRA; s 22 and the related items 1-4 of Schedule 1 are as follows:

22 For section 276(1)(l) of the Act, the conditions to which a mining lease is subject are the conditions stated in—

- (a) schedule 1, items 1 to 3; and
- (b) if the lease applies to occupied land—schedule 1, item 4.

Schedule 1

1 The holder, or another person acting under the authority, of a mining tenement must use, if practicable, only existing roads or tracks on the land to which the tenement applies.

2 The holder, or another person acting under the authority, of a mining tenement must take reasonable steps to ensure no reproductive material of a declared plant is moved onto, within or from the land to which the tenement applies.

3 The holder, or another person acting under the authority, of a mining tenement must not allow an animal in the custody of the holder or person to be on the land to which the tenement applies unless—

- (a) the land is fenced in a way to prevent the animal from leaving it; or
- (b) the animal is restrained.

4 The holder, or another person acting under the authority, of a mining tenement must not discharge a firearm on the land to which the tenement applies, unless—

- (a) the holder of the tenement has obtained the written consent of the owner of the land; and
- (b) the consent has been lodged with the chief executive.

[51] The environmental management of mining in Queensland is governed by the Environmental Protection Act 1994 (Qld) ('EPA'). For mining activities, Chapter 5 of the EPA requires the grantee party to apply for an environmental authority, breach of which attracts penalties under s 430 of the EPA. Section 431 EPA places a duty on the holder to ensure that persons acting under the authority comply with the conditions of the authority. One of the requirements of an environmental authority is that the grantee party must comply with the relevant standard

environmental conditions contained in the Department of Environment and Heritage Protection's Code of Environmental Compliance for Mining Lease Projects ('the Code'). This code is made under the Environmental Protection Regulation 2008 (Qld) (see Schedule 3). The Government party has included the Code as Annexure 61.

- [52] Matters dealt with in the Code include requirements that the holder of an environmental authority: must minimize disturbance to land and vegetation generally (see condition 3) and when constructing new roads or tracks or campsites (see conditions 18 and 20); must construct works to minimize the potential for water runoff to enter disturbed areas (Condition 6) and prevent or minimize erosion and sedimentation of watercourses (Condition 7); must not carry out activities within specified distances of environmentally sensitive areas (Condition 14); must comply with the prescribed rehabilitation provisions (see Conditions 29, 30, 31-36 and 38); and must not carry out activities within 100m of an identified historical, archaeological or ethnographic site (condition 15). The note to condition 15 reads as follows:

With regard to cultural heritage issues refer to the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 and the Queensland Heritage Act 1992. Prior to carrying out any activities on the mining claim, the holder of the environmental authority should consult with the administering authority if a site has the potential to be designated as a historical, archaeological or ethnographic site.

- [53] As I noted in *Hunt v Widi People of the Nebo Estate #1* (at [18]) 'the ACHA repealed the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld) (s 160 ACHA). Section 169 of the ACHA has the effect that a reference to the Cultural Record (Landscapes Queensland and Queensland Estate) Act in a document may, if the context permits, be taken to be a reference to the ACHA'.

- [54] The general environmental duties set out in s 319 of the EPA are applicable to a mining lease holder:

- (1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the **general environmental duty**).

Note—

See section 24(3) (Effect of Act on other rights, civil remedies etc.).

- (2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example -
- (a) the nature of the harm or potential harm; and
 - (b) the sensitivity of the receiving environment; and
 - (c) the current state of technical knowledge for the activity; and
 - (d) the likelihood of successful application of the different measures that might be taken; and

- (e) the financial implications of the different measures as they would relate to the type of activity.

Legal Principles

- [55] The Tribunal must make one of the following determinations under s 38: that the act must not be done, that the act may be done, or that the act may be done subject to conditions. Section 38(2) prohibits the Tribunal from imposing a condition which would have the effect of entitling the native title party to payments worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party.
- [56] The Tribunal must assess the evidence provided by each party in terms of the criteria in s 39 of the Act, which reads as follows:

39 Criteria for making arbitral body determinations

- (1) In making its determination, the arbitral body must take into account the following:
 - (a) the effect of the act on:
 - (i) the enjoyment by the native title parties of their registered native title rights and interests; and
 - (ii) the way of life, culture and traditions of any of those parties; and
 - (iii) the development of the social, cultural and economic structures of any of those parties; and
 - (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
 - (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
 - (b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
 - (c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
 - (e) any public interest in the doing of the act;
 - (f) any other matter that the arbitral body considers relevant.

Existing non-native title interests etc.

- (2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:
 - (a) existing non-native title rights and interests in relation to the land or waters concerned; and
 - (b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

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

Agreements to be given effect

- (4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:
 - (a) must take that agreement into account; and
 - (b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[57] The Tribunal must weigh the various s 39 criteria; the Act does not require greater weight to be given to some criteria over others as the weight to be attributed will depend on the evidence provided (see *Western Australia v Thomas* at 165-166 and *Western Desert Lands v Holocene* at [37]). In *Western Australia v Thomas* the Tribunal said (at 165-166):

We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of the evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.

The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.

[58] Section 36(1) of the Act requires the Tribunal to take all reasonable steps to make a determination as soon as practicable (subject to s 37 of the Act).

[59] Section 109(3) of the Act outlines the Tribunal is not bound by technicalities, legal forms or rules of evidence. Although there is no burden of proof to apply, the Tribunal relies on the evidence provided in relation to the criteria (see *Western Australia v Thomas* at 157-158). The Tribunal uses a common sense approach to evidence and the determination will be based on logically probative evidence and application of the law (see *Western Australia v Thomas* at 162-163, endorsed in *Cheedy v Western Australia* at [19]).

Section 39 Criteria

[60] Both the grantee party and Government party seek a determination that the proposed leases may be granted without conditions. The grantee party has drawn the Tribunal's attention to

some authorities on the breadth of possible conditions and states that their assessment of the s 39 criteria does not indicate the need for any particular conditions beyond those imposed by statute and related authorities, with reference to the approved CHMPs.

[61] As explained above, the native title party's representative confirmed the native title party would not be submitting contentions or evidence and as at the compliance date, no such material was received. I reiterate that, on 11 February 2015, the native title party's representative confirmed 'We advise that the earlier decision by the native title party applicant not to make a submission on the grantee party's applications for the grant of the two mining leases was unanimous as between each member of the native title party applicant'. I have explained my viewpoint in relation to Mr Burragubba's statement above and I rely on the communications received from the native title party's legal representative. Consequently there is no relevant material from the native title party before the Tribunal in respect of each section/sub section below.

[62] On many occasions, the Tribunal has been presented with either insufficient evidence or a complete lack of contentions or evidence from one or more of the parties. This occurs from time to time and the reasons greatly vary. The Tribunal's task is to make a determination under s 38 considering the s 39 criteria and the determination is to be made as soon as practicable with the expectation being that it be made within six months of the future act determination application date (see s 36(3) of the Act). This task is supported by the standard process of issuing directions to allow parties to submit material relevant to the criteria in a timely manner, and allowing replies and opportunities for comments as appropriate in order to afford procedural fairness.

[63] Many times, the Tribunal has made a determination on the material presented, even where a native title party has not submitted evidence. The Tribunal is generally not required to make out a party's case for it (see *Western Australia v Thomas* at [162], in particular the principle that 'the parties have the primary responsibility for presenting evidence and, in general, if they fail to do so, they cannot complain if the Tribunal gives little or no weight to their contentions'). As was explained in *Griffin Coal v Nyungar People* (at [8]), the 'Act imposes an obligation to consider and take into account the criteria in s 39 for the purposes of making one of the required determinations. The mandatory nature of ss 38 and 39 means that even where a native title party says before compliance by the Government party and grantee party

that it will not be making contentions or providing evidence, the Tribunal is obliged to conduct an inquiry which requires the other parties to address the issues dealt with in s 39'. The approach was also delineated in *Western Australia v Thalanyji and Gnulli* (in which case the native title party representative advised they would not be making any submission due to lack of resources), at [18]-[19] as follows:

The Tribunal must act on the basis of evidence which ordinarily will be provided by the parties. There is no onus of proof as such but a commonsense approach to evidence which means that parties will produce evidence to support their contentions particularly where facts are peculiarly within their knowledge. The Tribunal will not normally conduct its own inquiries and obtain evidence, particularly where a party is represented before the Tribunal. If a party fails to provide relevant evidence the Tribunal is normally entitled to proceed to make a determination without it.

In this matter the Thalanyji native title party have been represented throughout....In these circumstances the Tribunal has fulfilled its statutory obligations under the Act by giving the native title party an opportunity to provide contentions and evidence and proceeding to make a determination on the papers if that opportunity is not taken up.

[64] In the current matter, the native title party's representative did not provide a reason for not submitting contentions and evidence and did not seek any extension. There was ample opportunity to present its case but the native title party decided not to and notwithstanding this, my task is to proceed and make a determination.

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

Enjoyment of registered native title rights and interests

[65] The native title party's registered native title rights and interests are those that are listed on the Register of Native Title Claims as follows:

Rights and Interests

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the Wangan and Jagalingou People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
2. Over areas where a claim to exclusive possession cannot be recognised the Wangan and Jagalingou claim the following rights and interests:
 - (a) To access, be present on, move about on and travel over the area
 - (b) To camp on the area and for that purpose, erect temporary shelters on the area
 - (c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes
 - (g) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes
 - (i) To conduct ceremonies in the area

- (j) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places
- (k) Teach on the area the physical and spiritual attributes of the area
- (l) To be buried or bury native title holders on the area
- (m) To live on the application area
- (n) To move about the application area
- (p) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders
- (q) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

The native title rights are subject to and exercisable in accordance with:

- (a) The valid laws of the State of Queensland and the Commonwealth of Australia;
- (b) The traditional laws acknowledged and the traditional customs observed by native title holders.

[66] Both the Government party and grantee party state that they are unaware of whether the native title party enjoys or exercise rights and interests in respect of the proposed leases. The Government party contends that it is for the native title party to address this matter.

Effect on enjoyment of native title rights and interests

[67] The grantee party contends that the grants are unlikely to have any significant impact on the enjoyment of any registered native title rights and interests, noting it wasn't aware of whether the native title party exercises any rights or interests over the relevant land. Furthermore, the grantee party notes Queensland's legislative framework (referring to *Cameron v Gugu Badhun* at [38] and *Drake Coal v Smallwood* at [50],[78]-[79]), the existing non-native title interests and uses in the areas, and the operation of the non-extinguishment principles in ss 24MD(3),(8) and 238 of the Act.

[68] The Government party contends that the grant of the proposed leases is not likely to affect the enjoyment of registered native title rights and interests due to the following factors (paragraph 6.2 GVP Contentions):

- (a) The applicable statutory restrictions under the MRA and MRR;
- (b) The statutory restrictions under the EPA that will apply to the leases and associated activities (referring to Annexure 61 GVP Contentions);
- (c) The operation of the ACHA (referring to Annexure 62 GVP Contentions);

- (d) There being no known Aboriginal communities within or in close proximity of the proposed leases;
- (e) The comparatively limited size of the proposed leases within the area of the native title party's external claim boundary (referring to annexure 2 and 3 GVP Contentions);
- (f) The area of the proposed leases either has been, or currently is, subject to 'extensive exploration and mining activities which may have already affected the native title party's enjoyment of their registered native title rights and interests' (referring to Annexures 8 and 13-59 GVP Contentions);
- (g) The underlying tenure being subject to third party interests such as leasehold interests (referring to underlying tenure explained above) 'that would have affected either the existence of enjoyment of the Native [Title] Party's registered native title rights and interests'.

[69] The grantee party and Government party also contend that the existing non-native title use of the land by way of mining tenure would restrict the exercise of the native title rights and interests, thus the grant of the proposed leases is regarded as unlikely to have a measurable additional impact. This is relevant to s 39(2) of the Act.

Consideration of s 39(1)(a)(i)

[70] As stated at [61] above, I have no contentions or evidence before me regarding the native title party's position.

[71] As President Webb QC concluded in *Adani Mining v Wangan and Jagalingou* at [61], the 'mere assertion of an impact on native title rights and interests, in the absence of any evidence about their exercise and enjoyment, is not enough for the Tribunal to make findings that the future act will have an effect on the enjoyment of the registered native title rights and interests. A proper evaluation of the s39(1)(a)(i) criteria can only be undertaken if there is actual evidence of how the registered rights and interests are enjoyed: *Drake [Drake Coal v Smallwood]* at [77].' Evidence is preferably provided in affidavit form although the Tribunal has shown flexibility in accepting unsworn witness statements, particularly where there is no objection from the other parties and the evidence is not contested. No such evidence was received in this matter.

[72] I accept the submissions of the grantee party at paragraph 3.30 of its contentions (see [67] above) and the Government party at paragraph 6.2 of its contentions (see [68] above) to the effect that having regard to the matters set out, any enjoyment of native title rights and interests is unlikely to be significantly impacted by the grant of the proposed leases.

Section 39(1)(a)(ii) – way of life, culture and traditions of the native title party

Way of life, culture and traditions of the native title party and any effect

[73] The grantee party contends that it cannot state any likely effect of the proposed grants on the way of life, culture and traditions due to not having information about those matters. I have not had the benefit of receiving any such information from the native title party.

[74] The grantee party notes that it has entered into CHMPs with the native title party in respect of the proposed leases. On that note, it refers to the Tribunal's finding in *QGC v Iman People #2* at [63]-[65] that the evidence did not establish any negative impact on these matters, stating that the Tribunal found the grantee parties were likely to carry out activities under the terms of agreements, inclusive of CHMPs, and noted the impact of the legislative regime. The grantee party contends that it intends to conduct activities in accordance with the cultural heritage management plans and requirements of the legislative regime.

[75] The Government party states that it is not aware of information indicating grant of the proposed leases would be likely to affect the native title party's way of life. It further contends that any adverse effect is unlikely for the reasons set out at [68] above (some of which relate to s 39(2) of the Act).

Consideration

[76] An apprehension of impact in the absence of evidence is not enough for the Tribunal to make findings that the future act will affect the way of life, culture and traditions of the native title party. The relevant way of life, culture and traditions of the native title party is as it exists and is expressed today. In *FMG Pilbara v Yindjibarndi People* at [62] Member O'Dea concluded that while the evidence suggested there would be some effect upon 'the Yindjibarndi's view of the potency and strength of its culture and traditions, (but) there will be no real or tangible interference with the way of life of the Yindjibarndi'.

[77] In the absence of evidence from the native title party I cannot conclude that there will be any effect on the way of life, culture and traditions of the native title party.

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

Material provided

[78] The grantee party notes it has no information from the native title party on these matters and contends that it cannot state the effect of grant. However, the grantee party does contend that employment and commercial opportunities may arise and suggests the effect on social cultural and economic structures would therefore be positive. The grantee party refers to the Tribunal's statement in *QGC v Iman People #2* at [66] which reads as follows:

[66] The Tribunal has scant evidence before it that assists in undertaking an evaluation involving this subparagraph. Insofar as there is any material, it is material supplied by the grantee party which suggests that the grant of the tenements will have a positive impact on the native title parties by providing an income stream and possible employment opportunities. To that extent, the likely impact of the grant of the tenements would be to strengthen the social, cultural and economic structures of the native title parties.

[79] The Government party states that it is unaware of any information indicating that grant of the proposed leases would be likely to affect development of social, cultural or economic structures and contends that any adverse effect is unlikely due to the facts set out at [68] above.

Consideration

[80] There is no evidence or information before the Tribunal of any social, cultural or economic structure which could be affected either positively or negatively.

[81] The grantee party contends that employment and commercial opportunities may arise and accordingly the effect on social, cultural and economic structures would be positive.

[82] I have considered the non-native title rights and interests and the existing uses of land (see 'underlying tenure' section above and s 39(2) of the Act).

[83] There is no material before me to make a conclusion that the grant of the proposed leases will have any effect on the native title party's way of life, culture or traditions, or development of their social, cultural or economic structures.

Section 39(1)(a)(iv) – freedom of access and freedom to carry out rites and ceremonies

Access and carrying out rites and ceremonies and any effect

[84] The grantee party notes that it is unaware of any access or the extent to which rites, ceremonies or other activities of cultural significance are carried out by the native title party on the proposed lease areas.

[85] The grantee party contends that it intends to accommodate access and the exercise of registered native title rights and interests on the proposed leases in so far as that access or exercise is not inconsistent with authorised activities and statutory obligations such as workplace health and safety laws. The grantee party regards the proposed grants as unlikely to have a significant impact on the freedom to access to carry out those activities due to:

(a) The non-native title interests (see [35]-[43] above);

(b) The ‘temporal nature’ of the effect of the grant of the proposed leases; and

(c) The operation of the non-extinguishment principle in ss 24MD(3)(8) and 238.

[86] In relation to (b), I would note that each grant would allow for 30 years of mining with a further 30 year renewal option.

[87] The Government party contends that it has not been provided with any evidence to suggest any adverse effect on the freedom to access or freedom to carry out rites and ceremonies on the subject land.

Consideration

[88] As in the future act determination regarding ML70441 (*Adani Mining v Wangan and Jagalingou People*), the Tribunal has been presented with no evidence of the native title party having access to, or carrying out any rites, ceremonies or other activities of cultural significance on the area of the proposed leases.

[89] Taking into account the grantee party intentions as referred to in their contentions as summarised at [85] above and the non-native title rights and interests and existing uses of land (see s 39(2) of the Act), I am unable to conclude that there will be any (or any significant) impact on the ability of members of the native title claim group to access the area

of the proposed leases, or to carry out rites, ceremonies or other activities of cultural significance.

Section 39(1)(a)(v) – effect on areas or sites of particular significance

Material *in relation to sites of ‘particular significance’* and any effect

- [90] Under this criterion, the grantee party states that it intends to carry out its activities in accordance with the CHMPs already entered into, the terms of which cannot be divulged without the consent of the native title party. The grantee party also notes that DATSIMA from Cultural Heritage Database and Register search results dated 14 January 2015 showed no Aboriginal heritage sites within the areas of the proposed leases (see [46] above). However, the grantee party explains that some sites were identified by the native title party in the course of cultural heritage surveys of the proposed leases undertaking as part of the Environmental Impact Statement. The grantee party does not elaborate upon the sites identified apart from stating its understanding that none were of ‘particular significance’ (noting the need for special or more than ordinary significance to the native title holders in accordance with their traditions as per Carr J’s explanation in *Cheinmora v Striker Resources* at 34-35). The grantee party states that Aboriginal cultural heritage management strategies have been agreed between the grantee party and native title party due to the surveys conducted in accordance with the terms of the CHMPs.
- [91] The Government party refers to the absence of sites on DATSIMA’s register and database and that it is not aware of any area or site of particular significance to the native title party. The Government party also contends that grant of the proposed leases is unlikely to interfere with any such areas or sites due to the grantee party’s obligations under the MRA, MRR, EPA and ACHA.
- [92] Section 39(3) of the Act provides ‘taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites’. To this end, the Government party notes that the ACHA protects all Aboriginal cultural heritage and that the Government party cannot comment on areas or sites of particular significance as that is a matter for the native title party to establish.

Consideration

- [93] While the grantee party's understanding that sites identified in the course of cultural heritage surveys of the proposed leases were not of 'particular significance' is noted, it is not conclusive of the fact.
- [94] However, if an area or site is particularly significant it must be known and must be able to be located and the nature of its significance explained. An assertion that an area or a site is of 'particular' significance without an explanation as to why will be insufficient: *Drake Coal v Smallwood* at [89].
- [95] Taking into account of the grantee party's intentions to carry out its activities in accordance with the CHMPs already entered into and also taking into account the interests under s 39(2), I must conclude that any mining activities carried out under the proposed leases are unlikely to affect any areas or sites of particular significance to the native title party in accordance with their traditions.

Section 39(1)(b) – interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of land or waters

- [96] The grantee party states that it cannot assess nor state the effect of grant under s 39(1)(b) as the native title party has not made its particular interests, proposals, wishes or interests known to the grantee party in relation to the management, use or control of the areas of the proposed leases. I note that the native title party did not submit contentions or evidence to inform the parties. However, the grantee party states that to the extent that any views about the grant of the proposed leases have been made known during negotiations, they 'have related to the development of the Project and the content of the proposed agreement, rather than the threshold issue of whether an alternative use to mining should be conducted on the Subject Land' (paragraph 3.49 GP Contentions). The grantee party explains that discussions are ongoing in respect of employment and commercial opportunities. As there is no further information regarding these opportunities and possible benefits, they appear to me to be speculative in nature.
- [97] The Government party states as follows (at paragraph 6.6 GVP Contentions):

The Native Title Party does not object to, nor consent to, the grant of the ML70505 and ML70506. The correspondence made available to the Government Party suggests that the

Native Title Party and Grantee Party were close to authorising an Indigenous Land Use Agreement (ILUA) and executing a s 31 Deed concurrently with the authorisation of the ILUA, but that issues arose within the Native Title Party at the time of authorisation of the proposed ILUA.

[98] I note that the grantee party provided the Executive Summary to the Environmental Impact Statement. Part E.3 of the EIS (page 6 of Annexure K GP Contentions) explains that the grantee party undertook a social impact assessment ('SIA'). At the start of the SIA summary it states 'Adani has developed a number of management and mitigation measures and commitments in order to address both the positive and negative potential impacts of the Project'. I summarise some of the relevant measures as follows (see [109] below for full list):

- (a) recruitment and training programs 'that address skills shortages and sustainably maintain a reliable, skilled workforce, and address potential hurdles to traditionally under-represented groups joining the mining industry';
- (b) development of a workforce management plan including an employee induction plan addressing cultural awareness, among other behavioural and safety matters; and
- (c) development of a local industry participation plan to maximise opportunities for district and regional businesses.

[99] The SIA Summary states that 'stakeholder input will be critical to the implementation of these measures which will be carefully developed in collaboration with relevant organisations, agencies and individuals' (page 7 EIS).

Consideration

[100] As noted at [99] above, the grantee party says that discussions are ongoing although detail is lacking. The measures attached to the Social Impact Assessment also provide some assurance. The collaborative approach described suggests that there may be a forum by which to continue engaging in relation to the interests, proposals and wishes of the native title party. The Government party's contention suggests the native title party has a passive approach by way of neither consenting nor objecting, but there is no confirmation of this from the native title party. Without knowing the specific interests, wishes and proposals of the native title party in relation to the management, use or control of the land, it is unclear as to how the grantee party's measures and indeed, the grant of the leases themselves, would affect those

interests. In the absence of contrary evidence from the native title party, I am unable to conclude that the grant of the proposed leases would adversely affect the interests, proposals or wishes of the native title party.

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

Material provided

- [101] The Government party is of the view that the grant of the proposed leases would be economically favourable to the State, local communities and indigenous populations through the provision of ‘employment opportunities, infrastructure upgrades, improved services, royalties and economic stimulus to local towns and businesses within the proximity to ML70505 and ML70506’ (paragraph 6.7 GVP Contentions).
- [102] Broadly speaking, the grantee party contends the economic impacts of the proposed grants will be significantly positive to Australia, the State and the local region through expenditure in the community, employment, payment of taxes, State royalty and infrastructure charges and use of resources in the community, surrounding region and the State and increased spending patterns and employment in service industries. The grantee party regards the benefits as impacting internationally and it aims to maximise the benefits through the imposition of policies and measures inclusive of a focus on encouraging local participation in regional and State based industry and participation and up skilling of disadvantaged groups. There is no further information given so I may reasonably infer that these policies are an intention at this point.
- [103] For the project as a whole, the following anticipated figures in respect of the mine component are provided (as shown in the Environmental Impact Statement annexed to the grantee party’s material):
- a) For the life of the mine, \$21.5 billion in capital investment;
 - b) For the constructions years: for the Mackay region, an average \$78.2 million per year during construction years for the mine in direct and indirect benefits on the region’s Gross Regional Product; for the State, \$203 million per year; for household income and

employment levels by way of 1192 full time equivalent jobs per year for Queensland, 378 of which for the Mackay region;

- c) For the operational phase of the mine component:
 - (i) total Gross Regional Product per year at the point of full production (60 Mtpa per annum) in the Mackay region to increase by \$3795 million and in the State, \$4170 million;
 - (ii) household income benefits to reach \$372.2 million for Mackay region and \$573.5 million for the State;
 - (iii) local employment levels are expected to ‘see an increase of’ 4093 full time equivalent jobs in the Mackay region and 6789 for the State.

[104] For the project, the following anticipated benefits for the rail component are estimated by the grantee party (as shown in the Environmental Impact Statement executive summary annexed to the grantee party’s material):

- (a) For the years constructing the rail infrastructure (benefits of which are expected to be most significant for the first two years): for the Mackay region, an average \$145 million per year in direct and indirect impacts on Gross Regional Product; for the State, \$229 million per year and on average 1451 full time equivalent jobs for the Mackay region and 2481 for Queensland;
- (b) For the operational phase: impacts are expected to increase consistent with the mine’s production rates; total impacts on Gross Regional Product per year at the point of full production (i.e. 60 Mtpa) are estimated at \$176.6 million for the Mackay region and \$274.1 million for the State; household income benefits for the Mackay region to reach \$107.2 million and for the State, \$157.9 million; employment levels are expected to see an increase of 1215 full time equivalent jobs for the Mackay region and 2025 for the State.

[105] Furthermore, the grantee party notes that the port expansion works are expected to generate ‘substantial economic and social benefits for the State and local region’ (paragraph 3.59 GP Contentions).

[106] In terms of social significance, as the broad wording of s 39(1)(c) may incorporate, the grantee party states that the proposed grants will have a positive impact due to the influx of people to the regional community expected affecting the local economy.

Consideration

[107] The evaluation of the economic or other significance of the act under this sub-section requires specific evidence about the subject future act. I adopt the approach of Member Sosso in *Drake Coal v Smallwood* at [102]-[104] as follows:

[102] A few observations can be made about the statutory task required of the Tribunal. First, the paragraph focuses on the significance of the act. It is not a generalised inquiry about the importance of exploration or mining to the economy (localised or national). It is a specific evaluation about the impact of the future act the subject of the inquiry. Accordingly, the Tribunal is not required under this paragraph to look any further than the evidence of how the proposed future act will impact on the economies and persons specified. Issues about the benefits of the mining industry to the health of the local, Queensland or Australian economy are not relevant to this paragraph. The only focus of this paragraph is the act in question and the only issue which the Tribunal is required to evaluate is the significance of the future act. The symbolic, cumulative or ripple impacts of the future act fall outside the purview of this paragraph.

[103] Second, the inquiry is not limited to the economic consequences of the proposed future act – see *Western Australia v Thomas* (1996) 133 FLR 124 at 175. The term “other significance” is potentially broad and can only be sensibly dealt with in terms of the evidence produced at a particular inquiry. I do not read the term “other significance” as being limited to impacts of an economic or wealth related nature. It could be that the doing of the future act could have beneficial impacts for the advancement of medical or related research. For example, the minerals proposed to be extracted could be critical for medical research, or any other field of human endeavour. The “significance” of granting the right to mine must therefore be viewed in an expansive sense and not purely and necessarily from the quantum of money that will be generated from the extraction of the relevant material from the relevant land or waters.

[104] Finally, the Tribunal is required to evaluate the significance of the proposed act to indigenous persons living within close proximity to the proposed tenement. It should be noted that the Act is not worded to limit the inquiry to members of the native title claim group. Rather, the inquiry focuses on the significance of the act to indigenous persons generally. For example, it may be that a proposed mine will generate jobs and related benefits to indigenous Australians who live nearby whether or not they are members of the claim group. The 1998 amendments to this paragraph were designed to ensure that in any proper inquiry the interests of local indigenous persons living and having responsibilities in the general area were given proper weight.

[108] I understand the figures provided by the grantee party above to be applicable to the Project rather than the proposed grants themselves, however, I accept that the benefits to the Project will be experienced in the area of the proposed leases. On the evidence before me, I conclude that grant of the leases will have a positive economic impact.

Section 39(1)(e) – the public interest

Evidence provided

[109] The grantee party contends that the grant of the proposed leases will serve the public interest by contributing to ‘developing and maintaining a mining industry that generates very considerable export income, employment opportunities and wealth for the local, State and national economies’ (paragraph 3.64 GP contentions, with reference to the Tribunal’s finding in *QGC v Iman People #2* at [82]-[83] that it can take into account benefits associated with developing and maintaining a vibrant mining industry). In support, the grantee party sets out a number of the Project’s management and mitigation initiatives to handle impacts of the Project, as drawn from the EIS (SIA summary, page 7 of Annexure K), as follows (see paragraph 3.65 GP Contentions):

- (a) recruitment and training programs that address skills shortages and sustainably maintain a reliable, skilled workforce, and address potential hurdles to traditionally under-represented groups joining the mining industry;
- (b) development of a Local Industry Participation Plan that maximises opportunities for businesses in the district and regional areas to provide goods and services to the Project;
- (c) development of a Workforce Management Plan that includes a comprehensive employee induction programme addressing, among other things, a Code of Conduct for employees and contractors regarding behavior [sic], alcohol and drug use, cultural awareness and safety;
- (d) development of a Housing and Accommodation Strategy that provides a workers accommodation village and temporary construction camps for the construction and operations workforce and responds to housing and accommodation issues in local and regional communities;
- (e) provision of medical, security and firefighting services to minimise additional pressure on emergency services and proactive engagement with emergency services in relation to emergency response planning along with provision of information required to allow forward planning by emergency services;
- (f) entering into a road maintenance and management agreement with Isaac Regional Council for the upgrade and maintenance of local roads, along with agreements with the

Department of Transport and Main Roads regarding State-controlled roads and intersections; and

- (g) working collaboratively with Isaac Regional Council and other representative bodies, such as the Clermont Preferred Futures Group, to provide the strategic direction and investment for whole of community benefit, including establishing a community fund providing financial support targeting community activities, capacity and services.

[110] The grantee party also regards the project being declared ‘significant’ under the SDPWO Act as relevant in terms of the expected significant contribution that grant of the proposed leases and subsequent mine and railway development.

[111] The Government party refers to earlier decisions to support its contention that the grant of the proposed leases is in the public interest, noting that these extracts were included in its submission to the Tribunal in *Adani Mining v Wangan and Jagalingou* (at [110]), a determination involving the same parties for the Carmichael Project (ML70441) in which the Tribunal found that the act was in the public interest). The Government party contends that the Tribunal’s reasoning in *Carpentaria Gold v Birri People* (at [51]) that ‘it is a matter of public knowledge that the grant of exploration permits is central to the maintenance of a healthy and feasible mining industry in Queensland’ is applicable to the proposed leases. The Government party also sets out the Tribunal’s comments at [108]-[109] of *Drake Coal v Smallwood*, inclusive of stating the permissibility of taking into account the development and maintenance of a vibrant mining industry and stating that the mining industry plays a pivotal role in maintaining Australia’s economic strength.

Consideration

[112] I note the various beneficial measures described as part of the Social Impact Assessment and I am satisfied that the recruitment and training programs, development of a Local Participation Plan, road maintenance and management agreements and collaborative working relationships with the Council and other groups, indicates there are various positive plans associated with project. In addition, I note the status of the project and the specific information provided regarding employment and economic benefits associated with the project (which the proposed leases would benefit from to some extent). In the absence of contrary material from the native title party, I accept that the public interest will be served by the grant of these proposed leases.

Section 39(1)(f) – any other matter the arbitral body considers relevant

- [113] Section 39(1)(f) affords a wide discretion for the Tribunal to take into account other matters that the Tribunal considers relevant. In *Cameron v Hoolihan* the Tribunal explained the breadth of s 39(1)(f) at [82] as follows:

The term ‘any other matter’ as used in section 39(1)(f) provides the Tribunal with a broad charter to take into consideration any matter lodged with the Tribunal that may be of relevance in making a section 38 determination. There is no logical reason from the wording of the paragraph to read it down or to limit its operation by reference to either the matters outlined earlier in section 39 or to supposition in advance of what the negotiation parties actually submit. The only limiting factor is that the matter must be relevant to the inquiry. This paragraph does not give the Tribunal a charter to inquire into matters that fall outside the very narrow issue of whether a particular future act should or should not be done.

- [114] In the course of parties’ submitting comments regarding Mr Burragubba’s statement, the grantee party stated ‘in making its determination, the NNTT must take into consideration the matters specified in section 39(1) of the Native Title Act 1993 (Cth). In particular, section 39(1)(f) provides: (1) In making its determination, the arbitral body must take into account the following: ...(f) any other matter that the arbitral body considers relevant’ and went on to state ‘Adani’s position is that the NNTT must determine whether the Document is relevant to the determination’ having regard to various matters, but did not specifically state whether the grantee party thinks it is relevant. The other parties did not mention s 39(1)(f) specifically. For the reasons outlined above, I am of the view Mr Burragubba’s statement is not relevant.

- [115] Based on the material before me, I am of the view there are no further relevant matters to be addressed.

Section 39(2) existing use of land or water by persons other than the native title parties

- [116] In determining the effect of grant of the proposed leases on s 39(1)(a) matters, the existing non-native title rights and interests and existing use of the land by persons other than the native title party need to be considered (see s 39(2)(a) and (b)). I refer to the interests set out at [35]-[42] above. The grantee party contends, specifically in relation to s 39(1)(a)(i), that the interests and uses (as shown in Annexure C public enquiry reports and depicted in the maps at annexure H and I), even without the grant of the proposed leases ‘would restrict the ability of the Native Title Party to exercise and otherwise enjoy any native title rights and interests they might ultimately be determined to hold’ in relation to the proposed leases and that it is unlikely the grant of the proposed leases would have a ‘measurable additional impact’ on the

enjoyment of native title rights and interests (paragraph 3.27 GP Contentions). The Government party refers to the current tenure for the proposed leases (i.e. leasehold and road reserves for the first proposed lease, see [35] above, and pastoral holding for second proposed lease, see [39] above) and notes they ‘suggest that native title rights and interests may continue to exist, although in parts of the area subject to ML70505 native title may have been wholly or partly extinguished’ (paragraph 3.6 GVP Contentions). In relation to the first proposed lease the Government party further contends (at paragraph 3.7 GVP Contentions):

3.7 Tenure information obtained by the Government Party indicates that part of ML70505 overlapping the tenure referred to at paragraphs 3.3.1 and 3.3.4 above was subject to a historical GHPL [Grazing Homestead Perpetual Lease] originally granted on 3 July 1986 and a dedicated road across Lot 662 on PH1491. The Government party contends that the GHPL is a scheduled interests under the NTA and therefore extinguished native title under [s 23B\(2\)\(c\)\(i\)](#) of the NTA and s 20 of the Native Title (Queensland) Act 1993 (Qld) (NT(Q)A). The Government party also contends that one of the unnamed roads across Lot 662 on PH1491 is a validly dedicated road and extinguished native title under [s23B\(7\)](#) of the NTA and [s 21](#) of the NT(Q)A.

- [117] The Government party also notes Annexures 13-59 setting out various authorities to prospect, exploration permits for coal, exploration permits for minerals, mineral development licenses and mining leases in the general vicinity of the proposed leases, though without a specific contention regarding s 39(2).
- [118] I am satisfied there are a range of existing non-native title uses of the land and non-native title rights and interests, clearly established with evidence from both the grantee party and Government party. These uses and interests have had some bearing on the effect of the proposed acts on the matters in s 39(1)(a), as explained within each sub section above as appropriate.

Section 39(4) – Issues relevant to the inquiry on which the negotiation parties agree

- [119] The grantee party states that it has not reached a final agreement on any issues relevant to the determination. The Government party indicates it is unaware of any agreement to be taken into account for this sub-section. Within the evidence there is minimal information about ILUA negotiations, however they did not result in an agreement.
- [120] I note the CHMPs already entered into by the native title party and grantee party, which cover the area of the proposed leases amongst other areas, concern management of cultural heritage matters as discussed above. However, the terms of the CHMPs have not been presented (I

note the grantee party's assertion that native title party consent would be required) so their existence, while positive, can only be given little weight in this matter.

Determination

[121] The determination of the Tribunal is that the acts, being the grant of mining leases 70505 and 70506 to Adani Mining Pty Ltd, may be done.

Mr J R McNamara
Member
8 April 2015

Schedule Extract attachment:
QUD85/2004 (QC2004/006)
Map of Claim Area, Attachment
C of the Application
Page 1 of 1, A4, 21/08/2015

**PROPOSED NATIVE TITLE
DETERMINATION APPLICATION**

Wangan & Jagalingou People

- Area of Application (geographic extent)
= 30277.6 sq km
- QC97/49 Bidjara #3
 - QC98/10 Jangga People
 - QC98/25 Kangoulu People
 - QC01/25 Barada Barna Kabalbara & Yetimarla People #4
- RATSIB boundaries

NOTE: To determine areas subject to claim within the external boundary, reference to the application description is necessary.

Map created by: Geospatial Analysis & Mapping Branch,
National Native Title Tribunal (22/12/2003)

Application boundary data sourced from Dept of Natural Resources & Mines (Qld), Queensland Claim Activity Map (QCAM) dataset and NNTT. That data sourced from QCAM is used with the permission of DNR&M (Qld).

RATSIB data sourced from ATSIC, from Geoscience Australia, DNR&M (Qld) and Sinclair Knight Merz Pty Ltd.

Topographic image data is © Commonwealth of Australia and is used under licence from Geoscience Australia.
NOTE: Topographic images should be used as a guide only.

The Registrar, the National Native Title Tribunal and its staff and officers and the Commonwealth, accept no liability and or give no undertakings, guarantees or warranties concerning the accuracy, completeness or fitness for purpose of the map.



Latitude and Longitude based on Australian Geodetic Datum 1984
Non Projection
P:\GEO_INFO\Projects\Assistance to Applicants\Qld\Proposed Wangan People\2003_2268\Proposed Wangan_20031222_A3L.WOR
Geotrack 2003/2268

**Location of Wangan & Jagalingou
People within Queensland**

