NATIONAL NATIVE TITLE TRIBUNAL

***FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia*, [2009] NNTTA 91 (13 August 2009)**

Application No: WF08/31

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

- and -

IN THE MATTER of an inquiry into a future act determination application

FMG Pilbara Pty Ltd (grantee party/applicant)

- and -

Ned Cheedy and Others on behalf of the Yindjibarndi People WC03/3 (native title party)

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION

Tribunal: Daniel O'Dea, Member
Place: Perth
Date: 13 August 2009

Catchwords: Native title – future acts – applications for determination for the grant of mining lease – s 39 criteria considered – effect of act on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of act – public interest in doing of act – any other matters the Tribunal considered relevant – determination that the act may be done subject to conditions

Legislation:
Native Title Act 1993 (Cth) ss 29, 31, 35, 36, 38, 39, 238
Mining Act 1978 (WA) ss 74, 82, 84, 85
Aboriginal Heritage Act 1972 (WA)
Environmental Protection Act 1986 (WA)

Cases:
Aboriginal Legal Rights Movement Inc v South Australia (1995) 64 SASR 551

Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth (1943) 67 CLR 116

Attorney-General (VIC); Ex rel Black v The Commonwealth (1981) 146 CLR 559

Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People [2008] NNTTA 38; 218 FLR 387, Hon CJ Sumner, Deputy President

Cheinmora v Striker Resources NL & Ors [1996] 1147 FCA 1; (1996) 142 ALR 21

Fejo v Northern Territory of Australia (1998) 195 CLR 96)

FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, NNTT WF08/31, [2009] NNTTA 38 (24 April 2009) Daniel O'Dea, Member

FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia, NNTT WF08/32 and 33, [2009] NNTTA 69 (8 July 2009)

Johnson Taylor and Others on behalf of Njamal/Western Australia/Duketon Consolidated Pty Ltd, NNTT WO08/1132 [2009] NNTTA 58 (18 June 2009), Hon CJ Sumner, Deputy President

Kruger v The Commonwealth of Australia (1996) 190 CLR 1

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon CJ Sumner, Deputy President

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association and Others (1987) 17 ALR 578

Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274

Re C.I. Doxford & Ors [2003] QLRT 58

Re: Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs [1986] 11 FCR 543

The Australian Communist Party v Commonwealth (1950) 83 CLR 1

The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria) (1982) 154 CLR 120

Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia, NNTT WF03/2 [2003] NNTTA 82 (9 July 2003), Hon C J Sumner, Deputy President

Ward v Western Australia (1996) 69 FCR 208

Western Desert Lands Aboriginal Corporation/Western Australia/Kitchener Resources;Scimitar Resources [2008] NNTTA 22; 218 FLR 362 Hon C J Sumner, Deputy President

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

Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd, NNTT WF08/27, [2009] NNTTA 49 (27 May 2009), Hon C J Sumner, Deputy President

Western Australia v Ward (2000) 99 FCR 316

Western Australia v Ward and Ors (1992) HCA 28

WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333

Hearing dates:	n/a
Representatives for the native title party:	Mr George Irving Mr Simon Millman, Slater and Gordon Lawyers
Representatives for the grantee party:	Mr Ken Green, Green Legal Pty Ltd Mr Sukhpal Singh, FMG Pilbara Pty Ltd
Representatives for the Government party:	Mr Matthew Pudovskis and Barry King, State Solicitor's Office Ms Paola O'Neill, Department of Mines and Petroleum

REASONS FOR FUTURE ACT DETERMINATION

Background

[1] On 23 April 2008, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of a future act, namely the grant of mining lease M47/1413 ('the proposed lease') under the *Mining Act 1978* (WA) to FMG Pilbara Pty Ltd ('the grantee party').

[2] The proposed lease comprises some 1037.12 hectares of unallocated crown land situated 45 kilometres west of Wittenoom in the Shire of Ashburton and is 100 percent overlapped by the registered claim of the Yindjibarndi People (WC03/3, registered from 8 August 2003).

[3] The native title party in respect of these proceedings is as follows.

- Mr Ned Cheedy, Ms Mavis Pat, Ms Aileen Sandy, Ms Edie Whalebone, Mr Thomas Jacob, Ms Sylvia Allen, Mr Alum Cheedy, Mr Michael Woodley, Name Withheld for Cultural Reasons and Name Withheld for Cultural Reasons on behalf of the Yindjibarndi People (WC03/3) ('the native title party', 'the Yindjibarndi', 'the Yindjibarndi People')

[4] On 28 November 2008, being a date more than six months after the s 29 notice was given, the grantee party made an application pursuant to s 35 of the Act for a future act determination under s 38 ('the Application'). The Application was made on the basis that the negotiation parties had not been able to reach agreement within six months of the Government party giving notice of its intention to do the act.

Good faith negotiations – power of the Tribunal to make a determination

[5] The native title party challenged the Tribunal's power to make a determination on the basis that the grantee and Government parties had not negotiated in good faith (ss 31(1)(b), 36(2)). The challenge was rejected on 24 April 2009 (*FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia*, NNTT WF08/31, [2009] NNTTA 38 (24 April 2009)) ('good faith decision').

Directions for the Inquiry

[6] On 15 December 2008 the Tribunal made directions to deal with the good faith challenge and the substantive inquiry. Subsequent amendments were made at the request of the parties.

[7] In relation to the substantive inquiry the following contentions and submissions were provided:

- Government party's Statement of Contentions and supporting documents GVP1 to GVP16, lodged 14 April 2009
- Grantee party's Statement of Contentions and supporting documents GP1 to GP62, lodged 14 April 2009
- Native title party's Statement of Contentions and supporting documents NTP1 to NTP9, lodged 26 May 2009 in respect of both WF08/31 and WF09/1
- First Affidavit of Michael Woodley sworn 25 May 2009, lodged in support of the native title party's statement of contentions in respect of both WF08/31 and WF09/1
- Second Affidavit of Michael Woodley sworn 3 June 2009, lodged in support of the native title party's statement of contentions in respect of both WF08/31 and WF09/1
- Government party's Responsive Contentions, lodged 3 June 2009 in respect of both WF08/31 and WF09/1
- Native title party's further contentions in reply to the Government party's Responsive Contentions, lodged 24 June 2009 in respect of both WF08/31 and WF09/1

[8] The Tribunal's directions required the parties to confer with a view to agreeing issues before the inquiry, the facts and documents to be relied on, and procedures for the conduct of the inquiry. At the listing hearing on 8 June 2009, the representatives for the parties agreed the inquiry could be conducted on the papers. I believe it appropriate to do so in the circumstances.

Interpretation of s 38 and 39 of the Act in light of the native title party's evidence

[9] The native title party filed two parcels of submissions in relation to three proposed mining leases, one the subject of the Application and two the subject of another application lodged by the grantee party (designated NNTT WF09/1). The first is headed 'Contentions of the Native Title Party in Relation to Section 39 Criteria' on 26 May 2009 and the second being 'Further Contentions of the Native Title Party in Reply to Government Party's Responsive Contentions' on 24 June 2009. In the interim the Government party had filed some submissions headed the 'Government Party's Responsive Contentions' dated 3 June 2009. Amongst other things, the native title party's contentions argued that the evidence demonstrated that the grant of the proposed mining leases for both applications would prevent the native title party from exercising and enjoying their registered native title rights. The native title party also asserted that as they were pursuing their religious beliefs and performing their religious obligations, the Tribunal should construe s 39 of the Act so as to 'avoid the possibility of invalidity by reason of s 116' of the Australian Constitution ('Constitution'). In the view of the native title party a determination under s 38, that the acts may be done without condition, would prevent 'the Yindjibarndi People from exercising their religion.' The native title party submitted that if the Tribunal determined that the future acts could be done, a condition should be imposed requiring an agreement to be reached between the grantee party and the native title party before the grantee party could conduct activities in any of the proposed mining lease areas.

[10] Section 116 of the Constitution provides that:

> 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

[11] The native title party submits that:

> 's 116 is a general prohibition applying to all laws under whatever power those laws are made … Accordingly no law can escape the application of s. 116 simply because it is a law which can be justified under ss. 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s. 116 imposes.
>
> Section 116 applies in express terms to "any religion," "any religious observance," the free exercise of "any religion" and any "religious test". Thus the section applies in relation to all religions, and not merely in relation to some one particular religion.' (at 7.3, citing *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses case*') per Latham J (at 123 [2] - [3]).

[12] They also submit that the term *religion* as used in s 116 must be broadly construed and certainly may include an 'Aboriginal religion of Australia'. (citing *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1982) 154 CLR 120 per Mason ACJ and Brennan J, 135, 132 and Murphy J, 151; *Western Australia v Ward and Ors* (1992) HCA 28 Kirby J, 586 and also *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 per Blackburn J, 167 and *Aboriginal Legal Rights Movement Inc v South Australia* (1995) 64 SASR 551 per Debelle J, 555). I accept that the spiritual beliefs and cultural practices of aboriginal people which arise from, and are given expression in, their traditional laws and customs, may well constitute a religion for the purposes of s 116. Whether the requirement that Yindjibarndi must enter into agreement with outsiders before those outsiders can enter Yindjibarndi land is a religious belief or practice is not an issue I have to determine unless I decide that the implementation of ss 38 or 39 of the Act, through a decision of the Tribunal, might offend s 116 of the Constitution.

[13] The Government party submits that the authoritative understanding of s 116 was set out by the High Court in *Kruger v The Commonwealth of Australia* (1996) 190 CLR 1 ('*Stolen Generations* case') per Brennan CJ at 40, Toohey J at 86 and Gummow J at 160-161 to the effect that (in Brennan CJ's words):

> 'To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids.'

The native title party responded by noting that there is uncertainty attached to the law in relation to s 116, citing sections of Murphy J's decision in (*Attorney-General (VIC); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 ('*Black*') and Gaudron J's decision in *Stolen Generations* case. They conclude by submitting that the decision of Pincus J (in *Re: Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* [1986] 11 FCR 543, at 558) is the correct approach; and that the question to be answered is whether the true nature of the operation of a decision (under the legislation) will infringe the guarantee (at 2.5-2.12). They contend that the view of Pincus J in relation to the use of the word 'for' in s 116 and particularly, in relation to the third limb of that provision which relates to 'a law for prohibiting the free exercise of any religion', should be confined to its 'legal effect'.

> 'If a law, whatever the reason for its passage, has the legal effect of prohibiting the free exercise of any religion that will, in general, necessitate examination of its conformity to s 116. Otherwise, much activity central to the life of religion in this country could be brought to an end by legislation whose purpose is, for example, defence, or control of entry of aliens.'

[14] However, the decision of Pincus J in the Federal Court was overturned unanimously by the Full Federal Court of Australia in the *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association and Others* (1987) 71 ALR 578 (‘*Lebanese Moslem’)* on the basis as set out in the header:

> ‘that the decisions were not made with the intention of prohibiting the free exercise of religion, nor were they designed to prohibit the free exercise of their religion by the members of the first respondent and others while there would be some disruption to worship occasioned by the decision in question there was not in terms of s 116 of the Constitution any prohibition of the freedom of religion’.

and that finding was held to follow the High Court’s decision in *Black* per Barwick J, 576–577). As Jackson J observed the question was:

> ‘rather whether the exercise of power is “for” one of the ends provided by s 116. No finding was made by his Honour that there was a contravention of s 116 in that sense and if no more appeared the appeal should be allowed on that ground’. (Jackson J, 379)

[15] In that case His Honour went on to find:

> ‘Accepting, however, that there will be some disruption of worship occasioned by the decisions in question it does not seem to me that there is in terms of s 116 any prohibition of the free exercise of religion. Section 116 states in my view not merely the broad proposition that no religion shall be established, but also that no religion shall be prohibited. The term “prohibiting” in s 116 means what it says and appears to me to mean a proscription of the right to exercise without impediment by or under Commonwealth laws any religion which is the choice of the person in question’ (Jackson J, 389).

[16] The native title party, contends that the reliance by the Government party on the *Stolen Generations* case was problematic because of the nature of the inquiry in that matter being a consideration of questions of law in the absence of a significant degree of evidence. They quote from Toohey J’s judgment at 86 to the effect that the word ‘for’ in s 116 indicates that:

> ‘the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character; however his Honour went on to say: *“Purpose” in this context refers to an end or an object which legislation may serve … it is the Court which must decide whether the measure possesses the requisite character*.’ (The Australian Communist Party v Commonwealth (1950) 83 CLR 1 Kitto J, 273.)

The native title party’s submission then quotes the balance of the paragraph 86 to the effect, in essence, that the actual effect of the ordinance in question on Aboriginal people may have been to impair or even prohibit the spiritual beliefs and practices of Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. However, the quotation does not include the final sentence in that paragraph which says:

> ‘But I am unable to discern in the language of the Ordinance such a purpose.’

[17] Further, in relation to the judgment of Gaudron J in the *Stolen Generations* matter, the native title party quote Her Honour at 131:

> 'These considerations provide powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it.'

That proposition I would understand to be held by the majority of judges in the *Stolen Generations* case. However, it is qualified later in Her Honour's judgment at 133. Her Honour notes that Barwick CJ's views expressed in *Black* in relation to the interpretation of the word 'for' apply most explicitly to that part of s 116 referring to the establishment of any religion. In that matter, Barwick CJ emphasised the importance that the law must have the object (of establishment) as its express and single purpose (*Black,* 579). Her Honour took the view that the other limbs of s 116 and specifically in relation to the issue of 'prohibiting the free exercise of religion' is more appropriately interpreted by acknowledging that:

> 'its terms are sufficiently wide to encompass any law which has a proscribed purpose. And the principles of construction to which reference has being made require that, save, perhaps, in its application to laws "for establishing [a] religion", s 116 be so interpreted lest it be robbed of its efficacy.' (at 133)

[18] It is notable in the *Stolen Generations* case at 124-125 that Her Honour made the following observation:

> 'By its terms, s 116 does no more than effect a restriction or limitation upon the legislative power of the Commonwealth. It is not, "in form, a constitutional guarantee of the rights of individuals"' (citing Stephen J in *Black,* 605). 'It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the *Constitution* clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation of Commonwealth legislative power. More precisely, it cannot be construed as impliedly conferring an independent or free-standing right which, if breached, sounds in damages at the suit of the individual whose interests are thereby affected.'

[19] In any event, the fact that a number of the judges in the *Stolen Generations* case take the view that in construing whether or not a piece of legislation offends against s 116 of the Constitution, particularly in ways other than the establishment of a religion, involves looking not only at the precise terms of the legislation, but their potential affect, is in my view uncontroversial. As Toohey J indicated, he could see nothing in the ordinance before him that would offend in a manner which might suggest that the practical effect would be the prohibition on the exercise of religious activities (at 86).

[20] One point of debate between the Government party and the native title party in their competing contentions related to the question of whether or not s 116 'applied' to ss 38 and 39 of the Act. There can be no argument that s 116 'applies' to all Commonwealth legislation in the sense that the Commonwealth does not have the power to legislate in a manner contrary to its requirements. However, in this matter, I take the proposition as raised by the Government party to, in effect, mean that s 116 of the Constitution did not apply to s 38 and 39 of the Act in the sense that it was not relevant to ss 38 or 39 because the requisite test of purpose was not apparent on the face of the wording of the sections.

[21] In my view, the central issue is whether or not ss 38 or 39 of the Act were passed with the intention, design, purpose or effect of prohibiting the free exercise of the religion of the native title party. An administrative decision is one which is subject to regulation by s 116 of the Constitution (*Lebanese Moslem* per Fox J, 374 of his judgment and Jackson J, 378, 379, and 388 of his judgment). A decision by the Tribunal to the effect that the act may be done without conditions, or conditions which don't require the agreement of the native title party, is not one which would have the intention, design, purpose or effect of interfering with the free exercise of the native title party's religious beliefs. The asserted religious beliefs of the native title party are characterised by the requirements that it enter into agreement with other parties before those parties enter onto the land of which they have been given custody by their ancestors and by their law. Religious belief and religious based aspiration to virtue must not always be fully realised in order to achieve compliance with that religious system or orthodoxy. Religious freedom does not involve a compulsion upon a non-believer to accept the religious beliefs of a believer, or to abide by the consequent proscriptions imposed upon a believer. The onus is on the native title party to do their best to attempt to realise that religious stipulation. The mere fact that a religion seeks to have people behave in a particular manner, does not mean that non-believers should be compelled to observe those religious requirements. Indeed, such an interpretation of religious beliefs may, in its own way, offend s 116 of the Constitution. Further, if the expression of traditional laws and customs which underpin native title rights and interests are to be construed as the exercise of religious freedom, then the effect of s 116 is likely to make it impossible for the Commonwealth to regulate native title rights and interests at all.

[22] As the native title party has conceded, in *Western Australia v Ward* (2000) 99 FCR 316 at 348 [104], Justices Beaumont and von Doussa in the Full Federal Court of Australia said:

> 'In our opinion references to enjoyment of rights and interests in respect of the land, and to use of the land in these passages, (which was a reference to the decision of the High Court in *Fejo v Northern Territory of Australia* (1998) 195 CLR 96), confirm that the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices. (See also *Mabo (No 2)* at 188 per Toohey J.) Whilst the relationship of indigenous people with their traditional home land is "primarily a spiritual affair", or as Blackburn J described it in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167, a "religious relationship", the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.'

[23] The critical factors to be taken into account from the native title party's perspective is the effect upon native title parties' rights and interests and these effects must be characterised as predominantly physical or physically calculable impacts. Having said that, the physical manifestations of the act may well cause deep offence to cultural, spiritual or religious feelings and beliefs.

[24] I do accept s 116 applies to ss 38 and 39 but cannot agree that the sections have the intention, design, purpose or effect of prohibiting or seeking to prohibit the free exercise of religion. Therefore I do not accept that, on those grounds alone, my discretion is limited to the two potential outcomes proposed by the native title party.

[25] In relation to the submissions made by the native title party in relation to the use of international instruments applicable to the rights of Indigenous people in the interpretation of ss 38 and 39, I agree and adopt the findings of Deputy President Sumner in *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd,* NNTT WF08/27, [2009] NNTTA 49 (27 May 2009) at [46]. In particular, I agree with his view that there is no relevant ambiguity in s 39 of the NTA. Thus those international instruments do not directly impact on the Tribunal's deliberation in this enquiry.

Government party's evidence

[26] Government party documentation establishes the underlying tenure of the proposed lease to be unallocated crown land. Two underlying exploration licences held by the grantee party since 2 June 2007 completely overlap the proposed lease (E47/1447 and E47/1334). There is no history of any other mining or exploration activity over the area.

[27] There are no Aboriginal communities identified within the subject area or in the near vicinity of the proposed lease.

[28] Department of Indigenous Affairs ('DIA') documentation provided by the Government party reveal no registered sites under the *Aboriginal Heritage Act 1972* (WA) ('AHA') within or in the vicinity of the proposed lease.

[29] The *Mining Act 1978* (WA) entitles the grantee party to exercise the rights set out in s 85 of that Act subject to the covenants and conditions referred to in s 82 and such further conditions and endorsements that the Minister may at any time impose under s 84.

[30] The Government party proposes the following endorsements on the grant of the proposed lease:

> '1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
> 2. This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of:
>   - Uranium ore;
>   - Iron, unless specifically authorised under Section 111 of the Act
> 3. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.'

[31] The standard conditions applicable to mining leases are proposed:

> '1. Survey.
>
> 2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
>
> 3. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Industry and Resources (DoIR). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DoIR.
>
> 4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
>
> 5. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operation and separately stockpiled for replacement after backfilling and/or completion of operations.
>
> 6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DoIR for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.'

[32] The Government party also proposes four extra conditions:

1. 'Any right of the native title party (as defined in Sections 29 and 30 of the *Native Title Act 1993*) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.
2. If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial and cultural data), on the native title party.
3. Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental/productive mining or construction activity, the grantee party must give to the native title party a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.
4. Upon assignment of the mining lease the assignee shall be bound by these conditions.'

[33] I have addressed the circumstances of the imposition of these extra conditions recently in *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia*, NNTT WF08/32 and 33, [2009] NNTTA 69 (8 July 2009) at [23]-[24] and I adopt the same approach here as I did in that matter. If I come to the view that the imposition of the extra conditions are appropriate, I will make the imposition a condition of the doing of the act, rather than assume they are to be imposed as a matter of course upon grant.

The Grantee Party's Evidence – Submissions

[34] The grantee party's evidence includes documentation of the history of negotiations with the native title party which has previously been described in the good faith decision at [53]-[54] and [68]. Included in its submissions are two preliminary archaeological reports of surveys which appear to have been conducted for the purpose of work program clearances on the grantee party's underlying explorations licences E47/1447 and E47/1334:

- *Preliminary Advice on the Results of an Archaeological Work Program Clearance Survey of nominated drill lines at Firetail and Valley of the Kings in FMG's Solomon Prospect, Central Pilbara, Western Australia for Yindjibarndi Aboriginal Corporation,* by Viviene Brown, dated April 2008 (GP57)
- *Preliminary Advice on the Results of an Archaeological Work Program Clearance Survey of Nominated Drill Lines, Access Tracks and Camp Areas located within Firetail (E47/1447) and Solomon Prospects (E47/1334), Central*

Pilbara, Western Australia for Yindjibarndi Prescribed Body Corporate Represented by Yindjibarndi Heritage Management Team Juluwarlu Group Aboriginal Corporation, by Ian Ryan, dated July 2007 (GP59)

[35] Also included in the documentation is an archaeological site survey report conducted within the area of the proposed lease identifying six archaeological sites described as rockshelters with stone arrangements or caches which may contain further evidence of occupation:

- *Report of an Archaeological Survey of a Mineral Exploration Project within block 1, Firetail North Project Area, Hammersley Range Prepared for Fortescue Metals Group Ltd,* by Western Heritage Research Pty. Ltd., dated March 2009 (GP60)

The report advises the grantee party to 'apply for and be granted consent to disturb the rockshelter sites from the Minister for Indigenous Affairs under Section 18 [of the Aboriginal Heritage] Act prior to the commencement of any disturbance' (ii).

[36] The grantee party's documentation includes a map (GP61) which the grantee party contends shows the location of each of the 13 sites identified by the above reports (9.4). All are located within the proposed lease.

[37] The grantee party proposes to develop iron ore mines on the proposed lease and include in their submissions the Mineralisation Report and Mining Statement prepared in accordance with s 74 of the *Mining Act 1978* (WA) (GP32). Both documents were forwarded to the native title party on 13 May 2008, in anticipation of the Government party's standard initial negotiation letter (sent 20 May 2008) requesting that such information be provided to the native title party for it to respond. The Mineralisation Report identifies a target of approximately 100 million tonnes with an expectation that the target will be exceeded. It is located in drainage valleys on Brockman Iron Formation rocks in the Hammersley Range which vary in thickness from a few metres up to 60 metres or more in a few cases. The Mining Statement sets out information about the mining operations that are likely to be carried out in, on and under the land the subject of the proposed lease. The project will employ open pit mining methods using mining strips at a minimum width of 100 metres, with a staged pit design and pit walls up to 60 metres. Over the duration of the project low and high grade stock piles will, at some stages, be required. Within the first three years it is

estimated that 50 percent of waste material will be dumped externally, and some will be used to backfill once operations are completed. Mapping attached to the Mining Statement show the proposed mining operations are likely to create significant ground disturbance to the majority of the area of the proposed lease.

Native title party's evidence

[38] The native title party's evidence comprises two affidavits of Michael Woodley sworn 25 May 2009 and 3 June 2009. As noted previously, the affidavits were submitted in respect of three proposed mining leases the subject of two s 35 applications involving the grantee party, one the subject of this determination (WF08/31), and two of another application (designated WF09/1). The affidavits are set out in full below:

First affidavit of Michael Woodley, sworn 25 May 2009:

1. Introduction

1.1. I am a member of the *Yindjibarndi People*, the society of Aboriginal people whose native title rights and interests were recognised in the Determination of the Federal Court of Australia (in *Daniel v State of Western Australia* [2005] FCA 536 [the "Yindjibarndi Native Title Determination"]) and upheld, on appeal, in *Moses v State of Western Australia* [2007] FCAFC 78), in an area of land and waters in the Pilbara region of Western Australia ("Yindjibarndi Determination Area").

1.2. I am also one of the applicants for the Yindjibarndi #1 Native Title Determination Application and I am authorised to make this affidavit on behalf of the Native Title Party and the Yindjibarndi People, in relation to the Inquiry by the National Native Title Tribunal ("Tribunal") about whether or not Mining Lease applications M47/1409, M47/1411 and M47/1413 ("Tenements") should be granted by the State of Western Australia ("Government Party"), either with or without conditions, to FMG Pilbara Pty Ltd ("Grantee Party").

1.3. Except where I say otherwise, the facts set out in this affidavit are within my own knowledge and belief; and, to the best of my knowledge and belief, they are true and correct.

1.4. I have spent many years learning about Yindjibarndi Law and culture. My old people have taught me everything, and now, thanks to them, I am a senior Lawman and a leader for "*Yindjibarndi*" which, for us, means: Yindjibarndi Law, Yindjibarndi Language, Yindjibarndi Country and Yindjibarndi People.

1.5. I am also the Chief Executive Officer of the *Yindjibarndi Aboriginal Corporation* ("YAC"), the Prescribed Body Corporate under the *Native Title Act* 1993 (Cth), which holds (in trust, for the benefit of the *Yindjibarndi People*) the native title rights and interests that were given legal recognition in the Yindjibarndi Native Title Determination; and, the Chief Executive Officer of Juluwarlu Group Aboriginal Corporation ("*Juluwarlu*"), which is the Law and Culture arm of Yindjibarndi.

1.6. Juluwarlu's mission is *Ganyjagayi Mirnu* (keeping knowledge): to collect, record, document and broadcast the language, history, and culture of *Yindjibarndi. Juluwarlu* owns and operates a community television station, JTV34, which is situated in Roebourne, and produces documentaries and films about our history and culture. *Juluwarlu* also publishes books and pamphlets depicting the importance of our country our language and our Law. *Juluwarlu* aims to use the most effective methods and technologies, to educate and train Yindjibarndi children in our Law and culture; and to create employment opportunities that allow us to maintain our connection with our country and to carry out our obligations, under our Law, to look after Yindjibarndi country and the Yindjibarndi People.

1.7. I am aware that the Government Party and the Grantee Party ("FMG") are arguing that the Tenements should be granted subject only to the conditions that are set out in the Government Party's Statement of Contentions (dated 14 April 2009) but I want to make it absolutely clear that the Native Title Party does not agree with, nor consent to, that happening, and neither do I.

1.8. Yindjibarndi People belong to the country that will be affected by the Tenements. We do not see, or feel, ourselves as being separate from that country because we were put into that country and we remain in it. Each year we visit the area where FMG wants the Tenements to collect the sacred rocks and stones that we use in our ceremonies; and, each year we sing that country in our ceremonies, to keep it alive. This is the way it has always been.

1.9. Under Yindjibarndi Law we are responsible for everything that happens in that country and we are obliged to make sure that whatever happens, accords with Yindjibarndi Law. I am *Ngurrara* (kin) for that country and if something happens that is not right under Yindjibarndi Law, I will suffer; the country will grab me. It's the same for all Yindjibarndi.

1.10. I will say more about the particular areas where FMG want to put these tenements later, but first it is important to say something about Yindjibarndi Law because it is this Law that should govern how people behave in Yindjibarndi Country.

2. The Creation of *Yindjibarndi*

2.1. In the time of creation, which we call *Ngurranyujunggamu*, the world was soft; and the creation spirits, which we call *Marrg*a, walked over the land and made the world as we see it today. Throughout Yindjibarndi country you can see pictures of the *Marrga*, which they carved in rocks and left behind as proof that they are still here.

2.2. During the *Ngurranyujunggamu*, laws were given to the *Marrga* by *Minkala*, the sky god. However the *Marrga* foresaw their own passing, and so they gathered together all the *Ngaardangarli* (Pilbara Aborigines), at *Gumunha*, in the heart of what is now Yindjibarndi country. In those times, all the *Ngaardangarli* in the area spoke a common language, were of the one group, and carried no responsibility for any particular country or Law. The *Marrga* divided the *Ngaardangarli* into groups - Yindjibarndi, Ngarluma, Banyjima, Gurruma, and others - and put each group into the domain the *Marrga* chose for their language and Law. Each group was commanded by the *Marrga* to speak and look after their domain in accordance with the language and Law of that domain.

2.3. Yindjibarndi country is acknowledged by all *Ngaardangarli* as being a holy place, the centre where all Law began; and the Law carried by Yindjibarndi, which is called "*Birdarra*", is referred to as *Thudungu*, as the big sister 'sitting on top' of all other Law. Yindjibarndi do not say this; instead, we refer to the Law of our neighbours, which is called "*Wallijingha*", as the "top Law". In this way, we each show our respect for the other's Law.

2.4. The original common language of the *Ngaardangarli* is preserved in the *Burndud*, the song cycle we sing each year in the *Birdarra* Law ceremonies. I have transcribed over eighty of those songs – word for word: its name; what it is; and what it means – because this is the foundation of all the *Ngaardangarli* languages.

3. The *Birdarra*

3.1. The Birdarra is like our Bible: it contains not only the commandments of Minkala and the Marrga but also the history and culture of Yindjibarndi.

3.2. In accordance with the *Birdarra*, I, and the other *Yindjibarndi Ngaarda*, believe that Yindjibarndi people, Yindjibarndi language and Yindjibarndi country (and all that is within, from both past and present) are not different things, but related parts of one thing, called "*Yindjibarndi*", which has existed since the *Ngurranyujunggamu*. This is why I, and the other *Yindjibarndi Ngaarda*, believe that we must continue to look after Yindjibarndi country, in the way the *Birdarra* says we must, because we don't just belong to Yindjibarndi country, we are Yindjibarndi country, and if our Law is not followed we are punished and we suffer. It doesn't matter if we were unable to stop the Law from being broken, it is our duty to ensure it is not. For us, Yindjibarndi country is alive and connected to us, and it can be grab us in a way that makes you very sick. I have felt this - it's like being pulled into the ground. My old people told me about it. It's a warning that something is wrong and you have to find out what's going on and fix it.

3.3. Looking after country means performing the *Birdarra* ceremonies, doing the rituals, speaking and singing to Yindjibarndi country in Yindjibarndi language, using the country, sharing its resources and maintaining its heartbeat - the *Birdarra*. The *Birdarra* is the country's energy.

3.4. I, and the other *Yindjibarndi Ngaarda*, believe that the *Marrga* remain in Yindjibarndi country, in our rivers, creeks, springs, and hills; and that they see and feel everything that happens. They keep an eye on us to make sure that everything happens in the way we have been told it should. This is why it is essential for us to continue to practice our religious beliefs, rituals and ceremonies.

The Wuthurru (Introduction) Ritual:

3.5. For example, I and the other *Yindjibarndi Ngaarda* frequently visit different areas in our country, including the area where FMG wants the Tenements; and, there are countless water places in our country: rivers, creeks, springs, and permanent pools. Whenever I approach a water place, including those in the area where FMG wants the Tenements, I must always perform the *Wuthurru* ritual because this is what our Law requires. This ritual introduces me to the *Barrimirndi* (the water serpent that created all the water places in Yindjibarndi Country) and to the other *Marrga* in the area. The requirement under our Law to perform the *Wuthurru* ritual applies to all other *Yindjibarndi Ngaarda* and to *Manjangu* (strangers) although strangers must be introduced by the *Yindjibarndi Ngaarda*. First, we must talk to the country, in its language:

> Ngurra gangnagarrinha yingu buluyugayi birbiwarni wanngayi thurdud, mirda nhantharri bayarri…
> *Country we come here today to visit you and talk straight please don't get angry and harm us…*
> Ngurra nhantharri wanggayi jujungu ngarringu nhurla yindangga mirdawa nhantharri bayarri...
> *Country we also ask you to let the Barrimirndi snake who lie here in this permanent pool know that we are here and ask him don't harm us...*
> Juju yinda yambali gangnagarrinha buluyugayi barni yala nyinguwayi margurra barni mirda nhantharri bayarri...
> *Barrimirndi great snake and boss of this permanent pool we come to visit you, to sit by your side in respect of your laws don't harm us...*

3.6. Then we pick up a handful of water, from the pool, river or creek, take a sip and spray it back into the water. When *Yindjibarndi Ngaarda* perform this ritual the *Barrimirndi* and the *Marrga* recognise us, as *Yindjibarndi Ngaarda*, and the *Manjangu*, as our related visitors. This keeps us all safe. If we don't do this, we will all be in danger. There are water places in each of the Tenements.

The Thalu Ceremonies:

3.7. It is also my duty, and the duty of the other *Yindjibarndi Ngaarda* to regularly visit different parts of Yindjibarndi country to perform *Thalu* ceremonies to let country know that we are not gone, that we haven't forgotten our country, and that it should not forget us. Those of us who work the *Thalu* must be from the correct *Galharra* for the particular *Thalu* and must get painted up with local ochre. We must also ask the *Marrga* in the area for permission to break the leaves off a tree, which we then use to brush the Thalu from side to side, while at the same time talking and calling out in Yindjibarndi language.

3.8. There is a *Maliya* (honey) *Thalu* located not far from the area where FMG wants the Tenements, and each year this Thalu is worked by men from the *Banaga* and *Burungu Galharra* groups. The ochre that we need to work this Thalu comes from the ochre quarry that is located in the area covered by M47/1409. Under our Law we cultivate *Maliya* in Yindjibarndi country, by telling the *Maliya Thalu* to fill the trees, the Snappy Gum, the River Gum, the Ghost Gum, and the small caves with honey.

3.9. There are *Thalu* for everything in Yindjibarndi country and we, the next leaders, were told and taught by our grandfathers how to work them. This is how I, and the other Lawmen, have to protect fish in the rivers, the birds in the trees and animals in the country that belong to *Yindjibarndi*. It is how we cultivate the things we need in our country and if we don't do this they will become harder and harder to find, until there are none left.

3.10. Working the *Maliya Thalu in* Yindjibarndi country requires that we access and use the ochre quarry which located in the area covered by M47/1409. If FMG is allowed to use the tenements in the way that it plans to, there will be no ochre left at that place and we will not be able to work the *Maliya Thalu*.

The Birdarra Initiation Ceremonies:

3.11. Every year before we put our boys through the *Birdarra* initiation ceremonies, I and other Lawmen must travel to the various *Ngurra* (kin places) in Yindjibarndi country, to collect *Gandi* (sacred stones). These stones were put in the country by *Minkala*, and the *Marrga* told us that these are the only stones we can use in the ceremonies. There are four songs that we sing, to get permission from the *Marrga* to find, take and use the *Gandi*. Those particular songs are secret so I can't write them down.

3.12. One of the places where we go each year to collect *Gandi* is in the area that will be affected by the M47/1413 Tenement that FMG wants and if FMG is allowed to mine that Tenement in the way it says it will destroy the *Gandi* that are located there. The important point I want to make is that, even though that is our country, we can't just go and dig up the *Gandi*; we must first get permission from the *Marrga*. And it's the same for FMG; it can't just go there and mine that country without first getting permission, through the *Yindjibarndi Ngaarda*, from the *Marrga*.

3.13. I, and the other *Yindjibarndi Ngaarda*, believe that Yindjibarndi country talks through us, that we are the voice for what he thinks best for *Yindjibarndi*. If we are chained up or left out of the decision making process then the country doesn't function properly and provide for the *Yindjibarndi Ngaarda*, and then the *Yindjibarndi Ngaarda* don't function properly. This is what has happened in the past and the proof, for us, is the ongoing suffering of many *Yindjibarndi Ngaarda*, in the village, in our communities, and in the hospitals and prisons.

3.14. I, and the other *Yindjibarndi Ngaarda*, believe that in return for us looking after Yindjibarndi country (by properly performing the rituals and ceremonies) and its people (by properly sharing the resources) as required by our Law, Yindjibarndi country must, as *Minkala* and the *Marrga* commanded, look after the Yindjibarndi People (by providing the resources we want). This is the promise that was given to the Yindjibarndi People by *Minkala* and the *Marrga* when they put us into our country.

4. *Yindjibarndi Galharra*

4.1. The most important part of the *Birdarra* Law is *Galharra*.

4.2. *Galharra* is the system of Law that governs all our relationships. *Yindjibarndi* has a kinship system which tells me, and the other *Yindjibarndi Ngaarda*, how we are all related to each other and to country, as kin, and we have *Galharra*, which divides all things into four groups: *Banaga, Burungu, Garimarra and Balyirri*. Every animal, every plant and water place, the sun, the moon and the stars; fire, wind and water; every *Ngurra*, and every Yindjibarndi child that is born – everything that is *Yindjibarndi* belongs to one of these groups.

4.3. *Galharra* tells us how a person in one group must behave in relation to all people and things in that same group and in relation to all people and things in the other three groups. *Galharra* is the centre of everything: it tells each of us what we must do and what we must not do in our relationships with each other and in our relationships with our country and its resources.

4.4. *Galharra* sets the rules for sharing work, responsibilities and resources in Yindjibarndi country. For example, the *Galharra* of each man and woman determines their roles and responsibilities at *Birdarra* initiation ceremonies and at funeral ceremonies. These roles and responsibilities change, depending on the *Galharra* of the initiate and so on. Galharra tells us who will be the bosses, and who will be the workers at these ceremonies.

4.5. *Galharra* also tells us who we can may marry and who we must avoid; who we must care for and who must care for us; who we must defer to and who must defer to us.

4.6. In Yindjibarndi country, *Galharra* determines who should first approach a particular *Yinda* (permanent pool), depending on its *Galharra*; and who should drive any particular Thalu site. If a man wants to work with wood, he will make sure that the tree shares his *Galharra*; otherwise it will be very difficult for him. On the other hand a person should not eat the meat of an animal that has the same Galharra, because that animal is his or her brother or sister, and eating its meat will make you sick.

4.7. I, and the other *Yindjibarndi Ngaarda*, visit Yindjibarndi country all the time; and whenever we can, we travel with members of each of the four Galharra groups. This is because there are parts of our country that require members of particular Galharra groups in order to collect things and to work *Thalu* sites. More importantly we keep the country in balance by having these four groups present.

The Binjimagayi and Binga Rituals:

4.8. When *Ngaardangarli Manjangu* (Aboriginal strangers) from neighbouring countries wish to come into Yindjibarndi country, we must under our Law find out who they are and what they intend to do. If their intentions are worthy, we will then do the *Binjimagayi* ritual and work out how their *Galharra* fits into our *Galharra* system. If there is any doubt about their intentions, I and the other Lawmen will insist that they do the *Binga* ritual and we will impose a duty to test their character. For example, they might be asked to hunt for, kill, and cook a particular animal for the elders. If they fail to do this the proper way, they might be required to do it again or they might be sent back to their own country. Going through the *Binjimagayi* ritual and, if necessary, the *Binga* ritual, guarantees that they are fully accepted by *Yindjibarndi* as related visitors to our community for as long as they stay; they are now part of our system and must follow our rules; they now have fathers to watch over them and guide them in Yindjibarndi country and make sure they are safe; and, because they have shown us that they know and accept the *Galharra Law*, we are assured that they will honour the reciprocal rights and obligations under our Law.

4.9. Nowadays, these rituals are still performed during our law time; outside of law time *Ngaardangarli* who wish to visit Yindjibarndi country ring us and let us know what they wish to do. If they are just passing through there’s no problem, but if they want to use the resources of Yindjibarndi country we still need to find out who they are and what they intend to do; and they still need our permission and have to share what they get with us.

4.10. Sometimes, fitting someone into our Galharra system can more be difficult. For example, nine years ago, my sister, Roxanne, and my cousin, Jenny, got married – and both of their husbands are whitefellas. Their marriages created a lot of discomfort in the Yindjibarndi community because under our law the boys were *Manjangu* and should not have been with our women, and in such circumstances no one knows how to relate to them.

4.11. Every year, after they got married, the Lawmen would discuss the two boys and what to do about their status within our community. In the past, the boys could have been killed, but nowadays we are more reasonable about these sorts of things. Concerns were raised by the initiated men in the *Galharra* group that has marriage rights with the two women; they complained about how the two white boys had robbed them of the possibility of marriage and they wanted to see justice done by being *Mangagji* for the boys (which means allowing them to initiate the boys). This would result in the men who were robbed feeling contented in allowing that relationship to continue.

4.12. Their desire was not to hurt the boys, but to set things right in the community by fitting them into our social structure so that they then come under the same rules as everybody else. However, the Lawmen wanted to make sure that the boys were fully committed to the women they had married and that they respected our community and our Law. So we waited.

4.13. The boys themselves were very keen to go through the Law and each year they attended the ceremonies and worked hard on the side to help out. Finally, last year, we put these two boys through the law. Now, under the *Birdirra* Law, they belong to a *Galharra* group and we have to treat them accordingly. This does not mean that these boys now have rights in Yindjibarndi country - their wives and children have rights – but what it does mean is that everyone in the community is confident that they will not break our Law, and so the community is at ease.

4.14. The Yindjibarndi *Galharra* Law today is the same law given by *Minkala* to the *Marrga*. It was passed down to us, by the *Marrga* and our old people, and we are obliged to keep it going. That is what we have done, even through the hardest of times, and it is what we must keep doing. *Galharra* is a relationship system, based on respect and reciprocity - it binds us together as a community and ensures that resources of our country are shared by the present generation and preserved for future generations.

4.15. The survival and wellbeing of *Yindjibarndi* depends on each of us following the Law that was given to us and ensuring that *Manjangu* do the same. As I said above, this can be done with

other *Ngaardangarli* because they have their own *Galharra* and we can easily fit them into our system; it can also be done with people who are not *Ngaardangarli* and who don't have *Galharra*, so long as they prove intentions are worthy and we are confident they will not break our law. But with mining companies, like FMG, it is not possible to include them in our *Galharra* system and the only alternative is an agreement which sets the rules about how they must relate to *Yindjibarndi*.

4.16. FMG accused the Yindjibarndi People of trying to use Yindjibarndi heritage as leverage for commercial gain. FMG is wrong. We don't expect FMG, the Government, or anyone else, to believe what we believe, but we do expect them to respect our religious beliefs. Our old people and the *Marrga* still occupy our country; they oversee the country and make sure we are looking after our country so that our future generations get their proper inheritance. This is why we do our Birdarra Law ceremonies each year. It is three months of hard work, but we have no choice. We have to follow our Law or we will be punished.

4.17. I, and the other *Yindjibarndi Ngaarda*, believe that we have both a right, and a religious obligation to manage and control how Yindjibarndi country is used by *Manjangu*; and we exercise this right all the time over all our country, including the area where FMG wants the Tenements. In doing so, I, and the other *Yindjibarndi Ngaarda*, carry out our religious beliefs by performing the religious observances and practices that are required of us under the Birdarra Law. Under that Law Yindjibarndi country is obliged to produce and share its resources with us, only if we continue to follow the Law by caring for our country and people in accordance with that Law; and, *Yindjibarndi Ngaarda* are obliged to share the resources of Yindjibarndi country with *Manjangu*, only if they too follow the Law by caring for our country and us in accordance with that Law.

4.18. Allowing the Tenements to be granted and used by FMG in the way that FMG has described will prevent us from exercising our native title right, and our religious obligation, to manage and control how Yindjibarndi country is used by *Manjangu*. In the absence of an agreement based on the *Galharra* Law, I and the other *Yindjibarndi Ngaarda* believe that we must have an agreement with FMG that sets out our reciprocal rights and obligations.

5. The Effect of the Tenements on the Enjoyment of our Native Title Rights

5.1. The area where FMG wants the Tenements is called *Gambulanha*.

Our Occupation Use and Enjoyment of Gambulanha

5.2. Under our Law *Yindjibarndi Ngaarda* have both a right and a religious obligation to occupy, use, possess and enjoy the land, waters and resources of *Gambulanha* to the exclusion of all others, except for those who we invite to enter in accordance with our Law. This is what we have always done, and continue to do, as and when we please. *Gambulanha*, including the areas where FMG wants the three Tenements, is an important area for the Yindjibarndi People, for a number of reasons.

5.3. I and the other Yindjibarndi Ngaarda believe that our old people still occupy, use, possess and enjoy the Tenement areas, as spirit people. We call them Ngiyalunha, Murdangarli, Nhugangarli, Junangarli, Barringarli, Wandangarli and Marlunghungarli.

5.4. *Gambulanha Jawi*, is a Dreaming song that we sing for this area. This song was given to an Yindjibarndi elder called *Bambardu* (the blind one) by the *Wanda* (the dreaming spirits). Bambardu was taken on a journey in his dreaming and he came back with this song and then gave it to the Yindjibarndi community. We now carry this song from one Yindjibarndi generation to the next, so that we keep in our hearts, mind and culture the importance of *Gambulanha*:

mangga warrurninyba wawardu ngarri Gambulanha lawangga birndirri

mardamardarri

Like the moon in its halo nesting in a dark cloud

I travel over Gambulanha under the stars of a red sky

birndirri mardamardarri

Jirdangga marndagu wangga bayimarri binkariwa birdi Tharamarrala

At Jirdangga two spirit travelers argue and wrestle -

I steal their songs, their racket stops, twisting and circling through the sky

birdi Tharamarrala

murli ngayinygarra mirli warndurarri garrwiri jirdanggarra yirna Barnarrarala

I take flight from the trap in the hill of cries, skipping from one hill to the next, all in a line until the way spreads out

yirna Barnarrarala

yindilirri ngurra wirluwirlu ngarri malu bunggamara Thardiwarngu yindimala

To Barnarrarala Hill, soft and shimmering like a heat haze I set down on the ground, I rest.

Thardiwarngu yindimala

ngurriraragi Jimawurrada nawa yidimilbidila ganggurnji wangga

A shadow falling across Thardiwarngu Pool coming down from up on high circling around Jimawurrada Hill.

dila ganggurnji wangga

Yaralarna warnku wanbina wuragurdu ngurndirri warradila marnda malumalu

I see the half-circle markings of the kangkurnji bird who calls

I come around the bend at Yaralarnha country and hit the ground

marnda malumalu

waralanhibarlu Bangarru yirrawirdi barni malura ngurra wunggurlinybala

From flat country to hill, shadow climbing and falling over Bangarru there between twin peaks cloud shadow resting I take shelter in the shaded gorge

5.5. When I and the other *Yindjibarndi Ngaarda* sing the *Gambulanha Jawi* the singing puts us in *Gambulanha*, so the country can feel us, and we can feel it. This is how we massage that country to keep it and us alive. Singing that country means we are using, occupying, possessing and enjoying it in accordance with our Law.

5.6. *Ganyjingarringunha* is a river that runs through *Gambulanha*, and *Ganyjingarringunha Yaayu* is the eastern part of this river which runs straight through the middle of the proposed mining tenement M47/1413. Overlooking the *Wundu* (riverbed) are numerous *Yamararra* (caves), which we also sing each year in the *Burndud*:

Jilali ngarrguma yamayamadula

Soft white eating this in a cave of comfort

Bulingajuwarri ngajuwarri

In Pleasure of myself-of-myself

5.7. Some of these *Yamararra* contain the physical remains of our old people; others contain their sacred gear, which they used in ceremonies (in nearby law grounds at *Garliwinyjinha* and *Wilumarranha*), and others contain relics, demonstrating their use, as shelters for our old people over thousands of years.

5.8. This particular area of the Ganyjingarringunha Yaayu Wundu is where, each year, we collect the sacred Gandi for use in our Birdarra Law ceremonies.

5.9. A branch of Ganyjingarringunha Yaayu also runs through the proposed mining lease M47/1409. Located in this lease area are ochre quarries that we mine each year and use in the Maliya Thalu ceremony and in our other Birdarra ceremonies.

5.10. This lease area also has burial sites, numerous artefact scatters, scar trees and spear trees.

5.11. Proposed lease area M47/1411 is also located within *Gambulanha.* Within this Lease area is *Barngkawyinha Marnda*, a registered sacred site where two Marrga fought over a woman. In the course of that fight a boomerang was thrown and it hit the Marnda (hill) causing it and the surrounding country to crack and split. My great grandfather was given the story and the Dreaming song for this place a long time ago and we still sing it today:

Wirrwi tharrwanha Barnkawirnangu wangangarra
Wind blowing through Barnkawirnha hill long clouds
Wirrwi tharrwanha Barnkawirnangu wangangarra
Wind blowing through Barnkawirnha hill long clouds
Wangangarra wirrwi tharrwanha Barnkawirnangu
Wind blowing through Barnkawirnha hill long clouds
Wangangarra mawirriwa wirlumarrangu
Long clouds winds slowing down at Wirlumarranha creek
Gulalarra mawirriwa wirlumarrangu
Idoling winds approaching at Wirlumarranha creek
Gulalarra mawirriwa wirlumarrangu
Idling winds approaching very slowly at Wirlumarranha creek
Gulalarra Jiliwirri balganharra
Idling winds approaching at Jilinjilin hill clouds are disappearing
Warduwarranuyi jiliwirri balganharra warduwarra
At Warduwarranha and Jilinjilin hill clouds are disappearing here warduwarranha hill
Warduwarranuyi jiliwirri balganharra warduwarra
At Warduwarranha and Jilinjilin hill clouds are disappearing here warduwarranha hill
Ngiyarribungka gujarnbangu
Affection of the body falling at Gujarnbanha
Mulumulurri ngiyarribungka gujarnbangu
Cloud shades rushing over the affection of the body falling
Mulumulurri ngiyarribungka gujarnbangu
Cloud shades rushing over the affection of the body falling
Mulumulurri ngiyarribungka gujarnbangu
Cloud shades rushing over the affection of the body falling

5.12. Again, when we sing the Dreaming song for *Barngkawyinha Marnda*, it puts us in that area and we are then using the area in accordance with our Law.

5.13. Allowing the Tenements to be granted and used by FMG in the way that FMG has described will prevent us from exercising our right, and our religious obligation to occupy, use, possess and enjoy the three areas, to the exclusion of all but those that we invite to share with us in its use.

5.14. As a leader I am also concerned that the particular fruits that we collect from the area where the Tenements would be located, especially the *Gayawayi* (wild orange) and the *Jirrwirliny* (split jack) will become lost to the Yindjibarndi.

Our Right to Manage and Control the Use of the Land

5.15. Under our Law *Yindjibarndi Ngaarda* also have both a right, and a religious obligation, to manage and control the use of the land in *Gambulanha* (including the area where FMG wants the Tenements) in the way that is required under our Law. Making decisions about managing and controlling the use of *Gambulanha* is an important job; and for us it is a community activity that we spend a lot of time on, because our religious obligations require us to do so. The Yindjibarndi Aboriginal Corporation and *Juluwarlu* help the Yindjibarndi People to do this.

5.16. In the past, a lot of *Manjangu* have come into Yindjibarndi country without being invited. They were not properly introduced to our country, no agreement was reached, Yindjibarndi country was damaged, special places were destroyed, and Yindjibarndi people suffered. The Yindjibarndi People do not want this to continue happening.

5.17. To prevent this from continuing, the Yindjibarndi People, as a community, now carefully manages and controls the use of Yindjibarndi country (including the area where FMG wants the Tenements) in the way that we are obliged to under our Law. We do this by overseeing any *Manjangu* who want come into, and use, Yindjibarndi country and by insisting that they can only do so if they agree to show respect for Yindjibarndi country, and for us, by looking after our country and us in the way that accords with our Law.

5.18. Allowing the Tenements to be granted and used by FMG in the way that FMG has described means that we will be prevented from exercising our native title right, and our religious obligation to manage and control Yindjibarndi country, including the areas where FMG wants the Tenements in the way that our Law and our religious beliefs require us to do.

Our Right to Manage & Control the Use of Sacred Sites & Areas

5.19. Under our Law *the* Yindjibarndi People also have both a right to manage and control all the sacred sites and significant areas that are important to us under our Law. Managing and controlling the use of sacred sites and significant areas, (including those in the land where FMG wants the Tenements), in accordance with our Law is also religious obligation that the Yindjibarndi People must comply with. If we do not, we will suffer. I, and the other *Yindjibarndi Ngaarda*, believe that the whole of Yindjibarndi country is a sacred site because it is the sacred domain of the Marrga and *Yindjibarndi*. However it seems that the native title law and the heritage laws will not protect the whole of Yindjibarndi country but only those sites and areas that are of particular significance. There are then many places, areas and sites that are of particular significance, including those I have mentioned that are in the Tenements.

5.20. Managing and controlling the use of the sacred sites and significant areas under our Law is a community activity that the Yindjibarndi People have always done, as and when required, in accordance with our religious beliefs. If this community activity of managing and controlling the use of the sacred sites and significant areas, including those that are in the Tenement areas, is not done or is done badly then bad things can happen and the people who are meant to look after those places are punished.

5.21. Allowing the Tenements to be granted and used by FMG in the way that FMG has described means that we will be prevented from exercising our native title right, and our religious obligation to manage and control the sacred sites and significant areas, in the Tenements in the way that our Law and our religious beliefs require us to do.

6. The Effect of the Tenements on our way of life, culture and traditions

6.1. I, and the other *Yindjibarndi Ngaarda*, believe that our way of life, our culture and our traditions depend entirely on our ability to maintain our religious beliefs and to carry out our religious practices under the Law that was given to us by *Minkala* and the *Marrga*.

6.2. Like most of my countrymen today I live in Roebourne, because this is where the *Yindjibarndi Ngaarda* were forced to move to, many years ago, and nowadays, Roebourne is about as close as we can be to our country and still have our children go to school, as required by Australian Law. Today, as in the past, the majority of the *Yindjibarndi Ngaarda* continue to live in the most dreadful conditions of poverty, with overcrowded housing, poor health and poor education, and with too many of our young ones in prison. There have been plenty of studies about just how bad things are for us. This way of life robs my countrymen of all hope for their future.

6.3. It is very hard for people like me who are trying, with very few resources, to lift the spirits of the *Yindjibarndi Ngaarda* by maintaining Yindjibarndi Law and culture, while at the same time having to try to keep up with developers who have no respect for our Law and culture and seem intent on destroying our sites, rivers, trees, hills and *Yindjibarndi*.

6.4. I grew up with all my old people who believed that following Yindjibarndi Law, by maintaining our religious beliefs and practices, was the single most important thing in life and that the inheritance of *Ngurra* was the birthright of all *Yindjibarndi Ngaarda*.

6.5. Allowing the Tenements to be granted and used by FMG in the way that FMG has described, without the agreement and consent of the *Yindjibarndi Ngaarda* will demonstrate once again to my countrymen that our rights, and our religious beliefs and practices, are not equal to the rights, and the religious practices and beliefs, of those who rule us, and are not worthy of their protection. It will add to the sense of despair I, and the other *Yindjibarndi Ngaarda*, already feel about the survival of our way of life, our culture and our traditions.

7. The Effect of the Tenements on the Development of our social, cultural and economic structures

7.1. I, and the other *Yindjibarndi Ngaarda*, believe that, under our *Birdarra* Law the development and use of Yindjibarndi country and its resources by *Manjangu* should be balanced by the development of the Yindjibarndi People. This is because we are one with our country, and what affects it, also affects us. To date the only development that has come to us, from developments on our country, has been negative deveopment. We would like to turn this around so that developments on our country bring positive development to us.

7.2. There are many positive developments that I, and the other *Yindjibarndi Ngaarda*, wish to bring to our people: better health, better education and better lifestyles, but they aren't going to happen through handouts from *Manjangu*, like FMG. What was offered to us during the so called good faith negotiations with FMG was not a right to negotiate but a right to accept whatever offer was made by FMG. That offer was a pittance compared with the profits FMG stands to make from using our country. FMG, like other mining companies, appears to believe that I, and the other *Yindjibarndi Ngaarda*, should be grateful: for a small hand out, which allows no real development of our social, cultural and economic structures; and, for a promise that FMG will train our people so they can be employed in FMG's mines on our country. As far as we are concerned, this is just another form of assimilation. The Yindjibarndi People do wish for greater development of our social, cultural and economic structures than we have seen in the past forty or so years but such development must be of the kind that works for us rather than for mining companies like FMG.

7.3. Allowing the Tenements to be granted and used by FMG in the way that FMG has described, without the agreement and consent of the *Yindjibarndi Ngaarda* will in my opinion result in further negative development for the Yindjibarndi People.

8. Effect of the Tenements on our Freedom of Access and Use, to carry out Rights, Ceremonies and Other Activities of Cultural Significance

8.1. As I have suggested above, our main concern here is our right and our religious obligation to manage and control the use of Yindjibarndi country so that it accords with our religious beliefs.

8.2. Allowing the Tenements to be granted and used by FMG, in the way that FMG has described, without the agreement and consent of the *Yindjibarndi Ngaarda* will prevent us from carrying out our religious obligations to ensure that FMG agrees it will not break our *Birdarra* Law.

9. Effect of the Tenements on Areas or Sites of particular significance

9.1. I have already set out how allowing the Tenements to be granted and used by FMG in the way that FMG has described, without the agreement and consent of the *Yindjibarndi Ngaarda* will affect our sacred sites and significant areas. Taking control of our religious obligations to manage and control the use of Yindjibarndi country and the areas in that country that are of particular significance to us, will prevent me, and the other *Yindjibarndi Ngaarda* from exercising our right to practice our religion.

10. Our Interests, Proposals, Opinions and Wishes in Relation to the Management, Use and Control of the Land and Waters

10.1. The opinion of the Yindjibarndi People in relation to the management, use and control of the land, which I also hold, is that even though the Yindjibarndi People belong to Yindjibarndi Country and have a right, and a religious obligation, to manage and control the use of Yindjibarndi country by *Manjangu*, Yindjibarndi country is currently managed, by both the Commonwealth and the State Governments, in a way that discriminates against us and denies us our freedom to practice our religion by carrying out our religious observances, ceremonies and rituals.

10.2. I and the other members of the Yindjibarndi People wish to manage, use and control the land in accordance with our religious beliefs, and our most fundamental religious belief requires us, in community with each other, to manage, control and use Yindjibarndi country (including the land where FMG wants the Tenements) in accordance with the Law that was given to us by *Minkala* and the *Marrga*. That Law requires us to share the resources of Yindjibarndi country with strangers (including FMG) but allows that to happen only where there is agreement about how the strangers will relate to Yindjibarndi country and Yindjibarndi people so as to ensure they do not break our *Birdarra* Law.

10.3. I understand that we do not have the right to veto any development on our country, but what about our consent? What I and the Yindjibarndi People wish in relation to the management, use and control of the land is to be treated in the same way as any Western Australian farmer who cultivates their land. FMG could not go and mine their land without their consent and it should be the same for our land. The fact that we don't use farm implements shouldn't matter because cultivation for the farmer doesn't require that; it is enough if he has a few cows walking around where the minerals are located. I, and the other Yindjibarndi Ngaardangarli, cultivate everything that lives in Yindjibarndi country through the religious rituals and

ceremonies that we are required to perform under our Law. The Yindjibarndi People and I wish our relationship with Yindjibarndi country to be treated with the same respect as the relationship between farmer and he land he cultivates.

10.4. I, and the other *Yindjibarndi Ngaardangarli* believe that we are entitled, in community with each other, to practice our religion and our religious observances free of any interference, so long as in doing so we do not infringe the human rights of others. FMG has no human right to come into our country to mine its resources in a way breaks our Law by denying us our right to practice our religion in, what to us, is the sacred domain of the *Marrga* and *Yindjibarndi*. What I, and the other *Yindjibarndi Ngaardangarli*, wish in relation to the management, use and control of the land is that the Government will allow each of us, in community with each other to practice our religion by managing and controlling the use of our country in accordance with our Law and our religious beliefs. We therefore ask the Tribunal to determine either that the grant of the Tenements cannot be made; or, if they must be made that a condition be attached which prevents FMG from mining without the consent of the Yindjibarndi People.

Second affidavit of Michael Woodley, sworn 3 June 2009:

1. Introduction

1.1. Further to my Affidavit of evidence in this matter, which was sworn by me on 25 May 2009, I wish to add the following.

2. *Yindjibarndi*

2.1. I know the full history of *Yindjibarndi*. I learnt it straight from my grandfather and from other old people, like Cheedy Ned and the others who were around when I was growing up and going through the Law. I left school after sixth grade and went to live full-time with my grandfather at the *Ngurrwanna* community via Millstream. I lived with him there on our country for the next seven years and then, after I started work, I would visit him there.

2.2. My Grandfather taught me everything he knew about *Yindjibarndi*. He and the other old people taught me all the *Ngurra*; all the songs; and all the stories for *Yindjibarndi*; and today I am one of the leaders for the Yindjibarndi People, for our Law, our language and our country.

2.3. In 1994 I secured a fulltime position with Hamersley Iron; however, during the three and half years I worked with this company I would constantly find myself longing to be on Yindjibarndi country with my grandfather and my old people until I realised this was the only thing in my heart and mind. Then, in 1997, we put my youngest brother through *Birdarra* Law. All my family was out in the law camps while I was back at work. One afternoon I was standing on top of an Iron Reclaimer, washing off the iron ore dust, when I saw a dust storm in the distance near the law camp; and, suddenly I just knew that was where I wanted to be and had to be, with my family and my culture, in my country. Right then and there, I decided to walk away from the culture of industry and go back home, to my culture. I later found out from my grandfathers that the *Warlu Barrimirndi* had created the dust storm because one of the initiates had done something which is not allowed under *Birdarra* Law.

2.4. I have spent the past 12 years working with our Elders, passed and present, documenting *Yindjibarndi* history through the Juluwarlu Group Aboriginal Corporation. Juluwarlu's Vision is to 'enable *Ngaarda* to sustain a cultural life in contemporary society'. Juluwarlu also runs training programs to help our local people gain fulltime employment in community organisations. During this period I have also worked as the Chairperson of a local foundation, where I focussed on policies to better develop the community in terms of health, education, culture, housing, training, employment, business and aged care. I have also assisted in putting together a scholarship program, through Woodside Energy, for young people to further their education in Perth, at Guilford Grammar and Perth College. One of my other passions is the development of a Young Leadership Program for our community, to foster the confidence and decision-making skills needed to tackle the on going issues faced by our people.

2.5. *Yindjibarndi's* main objective is to take control of our own destiny through the direct management of our land, culture and traditions, and through the development of businesses and jobs that add value and meaning to *Yindjibarndi*. We want to educate our kids, in both

cultures, to provide better health and housing for our people; and, we want to be free, to live and travel in our own country and to practice our own religion.

2.6. The Federal Court has said that *Yindjibarndi is a s*ociety; a society which has continued to exist, since before sovereignty, as a community of people bound together under our own system of Law. The Court said that as a result of all that had done to us, our society had almost been washed away by the tide of history, but that we had managed to hang on. I, and the other *Yindjibarndi Ngaarda*, are determined not only to hang on but to make our society stronger; to make our kids value our Law and culture; and to make our old people proud again.

2.7. I, and the other *Yindjibarndi Ngarda*, do not really understand why the Federal Court decided that our right to exclusively occupy, use possess and enjoy the Yindjibarndi Determination Area, had been completely extinguished (even in areas where the Native Title Act says that previous extinguishment is to be disregarded); or why all our rights had been completely extinguished in more than 80% of the Yindjibarndi Determination Area.

2.8. I have heard people say that Yindjibarndi Law might have suffered for a while, after we were pushed off our country by the pastoralists, but I know that the *Yindjibarndi* kept our Law. We live under that law today in the same way as we always have. Yindjibarndi Law has never stopped.

2.9. These days, even though we live in town, we are in our country all the time: we hunt, we collect Yindjibarndi fruits and medicines; we camp where we want, whenever we want; we use the waters as we have always used them, for ceremony, for drinking, for swimming and for fishing; we drive all the Thalu; we collect what we need each year from the different Ngurra for Law ceremonies; and, more importantly for us, each year when we do our Law ceremonies, we sing every place in Yindjibarndi country, as we believe we must do under our Law and as we were taught to do by our old people and as they did before us.

2.10. I, and the other *Yindjibarndi Ngaarda*, do all this because it doesn't matter where we are born, whether in Roebourne or on Yindjibarndi country; it doesn't matter, because I, and the other *Yindjibarndi Ngaarda* know we come from Yindjibarndi country; and that we are *Yindjibarndi*; and therefore we must keep Yindjibarndi country alive, to keep ourselves, our Law and our culture alive. This is what I was taught to do by my grandfather and my other old people and this is what today's other leaders were taught.

2.11. I have seen a map that shows the different areas in the Yindjibarndi #1 claim that are called "unallocated Crown land" and I know that each of these areas has important places that we sing each year, and each has things that we regularly collect and use:

- Garliwinyjinha – law ground, campsite and burial ground.
- Wilumarranha – law ground and campsite.
- Barnkawirnanha – sacred site and meeting ground with other language groups.
- Ganyjingarrimunha – Gorge with river, spring and permanent pool.
- Gatharramunha – Gorge with river, spring and permanent pool.
- Burranha – Hill and meeting ground with other language groups.
- Ngurrbanha – Spring and meeting ground with other language groups.

2.12. I, and other *Yindjibarndi Ngaarda*, Thomas Jacobs, Stanley Warrie and Angus Mack were using these areas around the time when the Yindjibarndi #1 claim was lodged. The same goes for Yandeyarra Aboriginal Reserve. In each of theses places we collect sacred stones and red, white, black and yellow ochre, which we use in our Law ceremonies; bush flora for artefacts, medicines and provisions; we camp in these areas and hunt and gather food; we fish in the rivers and collect mussels from the springs; and visit sacred sites; we check and clean the pools, waterholes and soaks; and light fire for country rejuvenation; and, we teach young men, after their initiation ceremonies, about the country, law, stories and songs for those areas.

2.13. We do this every year to let country know that we are still Yindjibarndi on our country and we haven't forgotten about our duties to manage and protect Yindjibarndi country.

2.14. I, and the other *Yindjibarndi Ngaarda* believe that the Yindjibarndi People are entitled to a determination which recognises all of our native title rights and interests in the Yindjibarndi #1 claim area, as well as our right to use the surface and underground water in that area for all our needs and purposes. I, and the other *Yindjibarndi Ngaarda* believe we are entitled to this

> because we have kept our Law alive and we have kept our connection to those areas under our Law alive.
>
> 2.15. This is why the Yindjibarndi #1 Claim area is so important to us. So far there has been no real mining in that part of our country and it is the only area left for *Yindjibarndi* where we can hope to get recognition of our full ownership. I, and the other *Yindjibarndi Ngaarda* were not happy with the three Exploration Licences that were granted to FMG in that area under the Regional Standard Heritage Agreement and that is why *Yindjibarndi* sacked PNTS as our lawyers.
>
> 2.16. I and the other *Yindjibarndi Ngarda* believe that we have the right to govern the internal affairs of *Yindjibarndi*, as a distinct society of people, sharing one language and one country, under the Laws that were laid down by our God, *Minkala*, and passed on to us by the *Marrga*. Under those Laws, today's *Yindjibarndi Ngaarda* are the custodians for all future generations of *Yindjibarndi*; we alone have the right to decide what can happen in the areas where FMG wants the mining leases. For the reasons I have already said, those areas are very important to us; however I, and the other *Yindjibarndi Ngaarda*, have been willing, and remain willing, to consider the development of those areas, but only if there is an agreement that will make a real difference to the lives of our future generations.

[39] The evidence of Mr Woodley is uncontested and I accept it. I accept that as a Yindjibarndi senior lawman and a named applicant for the native title party, Mr Woodley has authority to speak on behalf of the native title party.

Legal principles

[40] I rely on the principles enunciated in the following Tribunal future act determinations:

- *Western Australia v Thomas and Others* [1996] NNTTA 30; (1996) 133 FLR 124 (*'Waljen'*)
- *WMC Resources v Evans* [1999] NNTTA 372; (1999) 163 FLR 333 ('*WMC/Evans*')
- *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd,* NNTT WF08/27, [2009] NNTTA 49 (27 May 2009) ('*Holocene*')

[41] Section 38 of the Act sets out the types of determination that can be made and relevantly are:

> *'38 Kinds of arbitral body determinations*
>
> (1) Except where section 37 applies, the arbitral body must make one of the following determinations:
>
> (a) a determination that the act must not be done;
> (b) a determination that the act may be done;
> (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

Determinations may cover other matters

...

Profit-sharing conditions not to be determined

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

(a) the amount of profits made; or
(b) any income derived; or
(c) any things produced;

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

[42] Section 39 lists the criteria for making such a determination:

'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.'

[43] The making of a determination involves the exercising of discretionary power by reference to the criteria in s 39. The Tribunal's task was explained in *Waljen* (at 165-166).

> 'We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of 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 enable by virtue of s 39(1)(f) to take into account any other matter we consider relevant.
>
> The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.'

[44] The Tribunal's inquiry function is summarised in *Waljen* (at 162-163) and involves, among other things, the Tribunal making a determination based on logically probative evidence and application of the law.

[45] Regardless of whether the registered native title rights and interests are determined or claimed, there is still a need for evidence on how those native title rights and interests are actually enjoyed or exercised in the particular locality of the future act, and of all the other matters in s 39(1)(a) of the Act (*WMC/Evans* at 339-341). While there is no onus of proof as such it is ordinarily the responsibility of a native title party to produce evidence on these matters as for the most part they are peculiarly within their knowledge (*Waljen* at 154-163; *Ward v Western Australia* (1996) 69 FCR 208 at 215-218). This approach has been endorsed by the Land and Resources Tribunal, Queensland (*Re C.I. Doxford & Ors* [2003] QLRT 58 at [7]-[12]).

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

[46] The underlying tenure (unallocated crown land with no history of mining activity other than the grantee party's underlying exploration licences) strongly suggests that the free excise of registered native title rights and interests have not been interfered with by the activities of

other parties in the past or at present, and that the native title party has enjoyed, for the main, unrestricted access to the area the subject of the proposed lease. The only possible exception may be the recent exploration activities of the grantee party. However, there is no evidence before me that these activities have impacted on the native title party and the Tribunal has found on numerous occasions that the nature of exploration activities are temporary and occur over a small area at any one time (most recently in *Johnson Taylor and Others on behalf of Njamal/Western Australia/Duketon Consolidated Pty Ltd*, NNTT WO08/1132 [2009] NNTTA 58 (18 June 2009), Hon C J Sumner, at [35]).

[47] The affidavit evidence of Michael Woodley deals with the traditional law and customs of the Yindjibarndi People and the nature and manner of exercise of their native title rights and interests across the whole of the Yindjibarndi country, including the area of the proposed tenement. It also deals specifically with the impact of the grant of three proposed mining leases, two the subject of another application (WF09/1) and one being M47/1413, which is the subject of these proceedings. In these reasons I will confine my remarks to the general matters and those dealing specifically with M47/1413, the proposed lease as far as possible.

[48] In his affidavits, Mr Woodley gives eloquent testimony to the sincerity and depth of the attachment of the Yindjibarndi People to the country, including the area of the proposed lease. He explains, in a comprehensive fashion, the foundation of the Yindjibarndi People's ownership of Yindjibarndi country, telling some of the stories which led to the creation of the country and recounting the laws which are imposed upon the Yindjibarndi in the maintenance of their religious obligations to the creation spirits (Marrga) the sun god (Minkala) and their ancestors. In his first affitdavit he makes the fundamental point that the Yindjibarndi

> 'do not see, or feel, ourselves as being separate from that country because we were put into that country and we remain in it' (1.8)

Mr Woodley goes on to recount the creation story of the Yindjibarndi, to outline the law or Birdarra of the Yindjibarndi and the obligations that it imposes upon the Yindjibarndi. The fundamental obligation according to Mr Woodley is to protect that country and ensure that strangers do not enter the country without acknowledging the law and ancestors of the Yindjibarndi. This obligation is absolute:

> 'It doesn't matter if we were unable to stop the Law from being broken, it is our duty to ensure it is not.' (3.2)

[49] Mr Woodley describes the ritual practices associated with the Birdarra, including the Wuthurru (Introduction) Ritual and Thalu initiation ceremonies which include the collection of sacred stones and ochre, Binjimagayi and Binga Rituals. He describes the Yindjibarndi Galharra or section system arrangements and their significance to day-to-day life. These practises provide the foundation of Yindjibarndi life and impose burdensome obligations upon the Yindjibarndi who

> 'have both a right, and a religious obligation to manage and control how Yindjibarndi country is used by *Manjangu* (strangers) or (white fellas); and we exercise this right all the time over all our country, including the area where FMG wants the Tenements.' (4.17)

[50] In his first affidavit Mr Woodley illustrates the impact and effect of the grant of the three proposed mining leases on the various limbs of s 39(1)(i)(a) by reference to sites and practices which take place on the land in general and in some of the leases in particular. In relation to the question of the specific impact upon the areas subject of the grantee party's three proposed mining leases, the following references are made:

a. That the Yindjibarndi visit the areas of the three proposed mining leases each year to collect sacred rocks and stones and to sing in the country to keep it alive (1.8, 3.11, 3.12)

b. They collect ochre and perform ceremonies (3.7, 3.10, 5.9)

c. That they visit the water holes within the areas of the three proposed mining leases frequently in order to perform the Wuthurru ritual (3.5)

d. There are water places in each of the three proposed mining leases (3.6)

By inference, all these things happen on the proposed lease the subject of these proceedings.

[51] Mr Woodley believes that by allowing the three proposed mining leases to be granted and used by the grantee party in the way that is proposed, without agreement or consent of the Yindjibarndi People, will demonstrate to the Yindjibarndi, once again, that they are powerless to protect their religious practices and beliefs and are, consequently, not worthy of the country that has been entrusted to them.

> 'It will add to the sense of despair I, and other Yindjibarndi Ngaarda, already feel about the survival of our way of life, our culture and our traditions.' (6.5)

[52] Mr Woodley also makes specific references to the impact of the grant of the proposed lease M47/1413. He says that the Ganyjingarringunha is a river that runs through Ganbulanha and that the Ganyjingarringunha Yaayu, is the eastern part of this river which runs through the middle of M47/1413. Overlooking the riverbed of this river are numerous caves (Yamararra) which are sung about each year in the Burndud. These caves often contain the physical remains of old people, as well as other sacred gear which is used in ceremonies (5.6 - 5.7). These areas within M47/1413 are used each year to collect the Gandi (sacred stones) for use in our Birdarra Law ceremonies (5.8).

[53] Mr Woodley deposes that one of the places where the Yindjibarndi go each year to collect Gandi is within the area of the proposed lease and that if the grantee party was allowed to mine there, they would destroy these areas. The important point that is made in the affidavit is that even the Yindjibarndi cannot collect these stones without requesting the permission of the Marrga (3.12).

[54] Some of this evidence will be useful in assessing the other limbs of s 39(1)(a) other than occupation use and enjoyment, but I believe that it is relevant to that matter as well.

[55] Mr Woodley concludes at 5.13 of his first affidavit by stating that the grant of the proposed lease would prevent the Yindjibarndi from

> 'exercising our right and our religious obligation to occupy, use, possess and enjoy the three areas to the exclusion of all that those that we invite to share with us in its use'

[56] In its submission the Government party emphasises the fact that s 39(1)a)(i) deals with the question of the physical enjoyment of rights, not purely religious or spiritual relationships with land (at 33 citing *Western Australia v Ward* (2000) 99 FCR 316 at [348] and *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People* [2008] NNTTA 38; 218 FLR 387, [36]–[39]). The Government party recognises that there will be limited interference with the native title party's right of exclusive possession and its right to control the access of others to the area if the proposed lease is granted. The Government party also acknowledges that there will be a limitation on the right of the Yindjibarndi to make decisions about the use of the area. However, they submit that any such interference is significantly mitigated by the imposition of the extra conditions proposed in document GVP16, which would require the grantee party to allow access to the area of the proposed lease, except in circumstances where the exclusion is based on mining and exploration operations or for safety or security reasons. Secondly, they indicate that the

second extra condition requires the grantee party, should it entertain a s 18 application, to notify the native title party and provide information relating to such an application.

[57] The grantee party, in its submissions, has not responded to the affidavits of Mr Woodley and simply makes reference to the fact that it believes, on the basis of the submission provided, (the s 31(1)(a) submission) (NTP4) that the grant of the proposed lease will have little effect on the physical enjoyment of the native title rights and interests which can be exercised on the relevant land.

[58] There is no dispute that at law the non-extinguishment principle applies to the grant of a mining lease (s 238 of the Act).

[59] I think it clear from the evidence of Mr Woodley that, notwithstanding the significant religious or spiritual enjoyment of the area that will be disrupted by the grant of the proposed lease, there will indeed be a significant physical interruption to access and enjoyment of the area and their exclusion from a substantial part of it for a significant period of time. Setting aside the matters I need to address in relation to s 39(1)(a)(ii) – (v) which will be dealt with below, the evidence before the Tribunal is that the native title party visit the area of the proposed lease on an annual basis, largely for the purpose of collecting the Gandi and ochre and to conduct Wuthurru ceremonies. The evidence of this access and use is sketchy and general compared to the evidence given by Mr Woodley relating to the cultural affront and religious offence the Yindjibarndi feel because of the access and use of the area without their sanction. I do accept that the first of the extra conditions proposed by the Government party will mitigate the impact of the interruption to the exercise of native title rights, but that interruption will be substantial.

Section 39(1)(a)(ii) – way of life, culture and traditions

[60] Most of the evidence provided by the native title party in respect of s 39(1)(a)(i) is also relevant to s 39(1)(a)(ii). At paragraph 6 of Mr Woodley's first affidavit he deals specifically with the effects of the grant of the three proposed mining leases on the Yindjibarndi's way of life, culture and traditions. He says

> 'I, and the other *Yindjibarndi Ngaarda*, believe that our way of life, our culture and our traditions depend entirely on our ability to maintain our religious beliefs and to carry out our religious practices under the Law that was given to us by *Minkala* and the *Marrga*. (6.1)

Mr Woodley then goes on to depose that most Yindjibarndi People, despite living in Roebourne in poor conditions, continue to try to maintain their attachment to their country, despite their lack of resources, and the lack of respect with which they are confronted by resource developers, such as the grantee party (6.2). As has been indicated above, Mr Woodley comes to the conclusion that if the Yindjibarndi are again denied their capacity to practice their culture as they see fit, in accordance with their religious beliefs, they will be seen as being unworthy of the protection of their ancestors and creation being and that this will lead to a sense of despair within their community about the capacity of their culture and traditions to survive. The native title party, in its submission provided to the Government party earlier, at paragraph 7.8 of what is NTP4, contend along similar lines to what was contained in paragraph 6 of Mr Woodley's first affidavit to the effect that

> 'The grant of a Mining Lease to a stranger without the agreement of the Yindjibarndi would prevent the Yindjibarndi from carrying out their religious obligation to ensure they are asked about the entry of strangers, prior to such entry, and their religious obligation to convey a right of access through the proper performance of a ritual. It would also prevent them from carrying out their religious obligation and responsibilities to protect the country and the visitors'.

[61] The grantee party and the Government party submit, simply, that there will be no adverse impact on way of life, culture and traditions (Grantee party's contentions at 6) (Government party's contentions at 37 and 38).

[62] In my view, the grant of the proposed lease will have an effect on the way of life, culture and traditions of the Yindjibarndi People. That impact largely relates to the Yindjibarndi's perception of their capacity to impose those aspects of what is required of them under their traditional law and culture upon those who also seek to utilise land within Yindjibarndi country. The difficulty, however, is that if it be the case that such lack of acknowledgement by the broader society of the overriding authority of Yindjibarndi Law was dramatically destructive of the Yindjibarndi Law, Yindjibarndi Law could not have survived to the present time. As I indicated, in relation to the question of s 116 of the Constitution and the religious obligation upon which the Yindjibarndi feel themselves bound, they are still in a position to continue to seek to reach agreement with the grantee party about the conduct of activities on Yindjibarndi country, albeit that the processes of the Act have been exhausted. As with a number of other factors which will be dealt with in this determination, the question, ultimately, is one of balance. In this circumstance, it is my view that the evidence suggests that there will be some disruption or 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.

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

[63] At the listing hearing held on 8 June 2009, no party disputed the native title party's contention that the socio-economic conditions of the Yindjibarndi People residing in Roebourne and the surrounding communities are poor. The Tribunal has previously accepted that mining can have an adverse impact on Aboriginal communities, and I accept that this is the case (*Townson Holdings Pty Ltd and Joseph Frank Anania/Ron Harrington-Smith & Ors on behalf of the Wongatha People; June Ashwin & Ors on behalf of the Wutha People/Western Australia*, NNTT WF03/2 [2003] NNTTA 82 (9 July 2003), Hon C J Sumner, at [87]).

[64] In his first affidavit, Michael Woodley deposes to the fact that the Yindjibarndi People are affected by any development on their country and so far, the only development that they have experienced has been negative development. The essential argument seems to be that the only way positive improvements can be achieved is if the Yindjibarndi People are in control of the process of development. In the view of the Yindjibarndi, the grantee party "appears to believe" they "should be grateful" for its strategies for improvement of their living conditions, which they consider to be "just another form of assimilation" (7.2). There is also reference which is addressed by the Government party in its submissions (Government party's submission at 39) to the comments made by Dr Mary Edmunds in her report (NTP5), AIATSIS Institute Report *They Get Heaps – A study of Attitudes in Roebourne Western Australia*. The essential thesis of this document is that mining developments have had a negative impact on the living conditions and quality of life of Aboriginal people in the Pilbara region, including the Yindjibarndi People. The Government party makes the pertinent point that neither the Edmunds report nor the general nature of the comments in Mr Woodley's Affidavits make any specific reference to the impact of the grant of the proposed lease upon the native title party's social, cultural and economic structures.

[65] The only direct evidence in relation to the effect of s39(1)(a)(iii) upon the proposed lease is from the grantee party which contends that they have established a Vocational Training and Employment Centre to provide training to Aboriginal people with the guarantee of employment following successful completion of the course and have set a target of a minimum of 20 percent Aboriginal employees (grantee party's contentions at 7.4). No

information is provided as to what proportion of Aboriginal people benefitting from the initiative will belong to the native title party.

[66] The evidence in relation to these matters from all parties is very general. I accept that mining may have, in the past, in general terms, had some adverse impact on Aboriginal communities in the Pilbara. I do not accept that there is any specific evidence to suggest that there will be an adverse effect upon the native title party as a result of the grant of the proposed lease. On the contrary, there would appear to be some evidence to suggest that it is likely that there will be employment opportunities available to members of the native title party. However, because that evidence is so lacking in specificity and the percentages discussed are not expressed to be confined to the native title party, but rather to Aboriginal people in general, my view is that there will be little impact one way or the other.

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

[67] The evidence provided by the native title party in respect of s 39(1)(a)(iv) is listed in s 39(1)(a)(i) above. As I have discussed in [52] and [53] above, Mr Woodley, in his first affidavit, makes reference to the fact that the Yindjibarndi access the area of the proposed lease on an annual basis to gather Gandi for the purposes of ceremonies and that the grantee party's use of the area is likely to destroy those areas where the Gandi is collected. There is no specific reference in Mr Woodley's affidavit as to whether or not the ceremonies themselves are conducted within the area of the proposed lease, only that the Gandi are collected from that area for use in Birdarra Law ceremonies. Whilst I accept the Government party's contention (at 44) that "freedom of access" is ensured subject to the first extra condition which may be imposed on the proposed lease, I again note the proposed mining operations will impact the majority of the area of the proposed lease.

[68] The grantee party has provided, in its documents GP57 – GP59 three reports for archaeological surveys of the area which were conducted with the assistance of the Yindjibarndi People. I have read those reports carefully and I do not believe that there is any reference within them to the Gandi talked about in Mr Woodley's affidavits. It might well be argued it is not surprising that no reference has been made to the stones in those reports, as the Gandi Mr Woodley refers to appear to be scattered at random across the landscape and the Yindjibarndi People participating may not have been required to volunteer all information about areas that they were not specifically requested to address. It also might well be argued that as the purpose of the reports were archaeological rather than ethnographic, the

Yindjibarndi's current use of the area may have been beyond the scope of the reports. The reports do identify a significant number of areas which are both of archaeological and ethnographic importance and recommend that certain sites be avoided or to the extent that they are to be interfered with, that prior consultation take place between the Yindjibarndi and the grantee party. Significantly, a map produced by the grantee party outlining areas where Aboriginal heritage has been identified, has been attached to material provided by the grantee party (GP61). A further report discussed below deals with other sites within the proposed lease area which is the subject of consideration in relation to sites of particular significance later in this determination, being 'ACHM Project Advice' dated 21 May 2009 (NTP9).

[69] The Government party contends that there is little evidence provided by the native title party to the effect that there will be an impact on freedom of access and the conduct of ceremonies. It again refers to the native title party document, NTP4, being the s 31 submission to the Government party, where at 9.1 it is suggested

> 'the grant of the mining leases without a negotiated agreement concerning the terms of access by a stranger to their religious domain, will prevent the Yindjibarndi People from carrying out their religious obligations and will thus undermine the sacred principle of reciprocity.'

The Government party contends that even if this did establish that there was some affect on the freedom of access and interference with the conduct of ceremonies, there is no specific evidence in relation to that impact on the area of the proposed lease. The Government party also contends that the first of the extra conditions will ensure that the Yindjibarndi will be able to continue to maintain access to the area of the proposed lease, except insofar as it interferes directly with mining operations. My impression of the evidence from the native title party is that Gandi can be found throughout Yindjibarndi country, including those areas within the proposed lease, but by no means limited to that area. If the Gandi were to be destroyed or interfered with there may well be impact on the capacity of the native title party to conduct ceremonies. However, in my view such destruction or interference is highly unlikely. I have come to that view because the grantee party has conducted comprehensive surveys of the land which has resulted in a considerable amount of information relating to the location of sites and artifacts within the area of the proposed lease and which recommends that no interference could occur without compliance with the AHA requirements and in consultation with the Yindjibarndi. I have been provided with no evidence to suggest that the grantee party will not continue to ensure that it abides by the recommendations that have previously been provided to it, including the need for further consultation with the

Yindjibarndi before any mining activities are undertaken. The discussion below relating to s 39(1)(a)(v) is, in my view, directly linked to the question of access for ceremonial purposes and needs to be considered before I can reach conclusions about the extent of the impact of the grant of the proposed lease.

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

[70] The question to be considered here is whether there are areas or sites of particular significance (i.e. of special or more than ordinary significance to the native title party) that will be affected by the future acts (*Cheinmora v Striker Resources NL & Ors* [1996] 1147 FCA 1; (1996) 142 ALR 21, 34–35 and repeated in *Holocene,* 99). The Tribunal will have to make a value judgement about whether, from the native title party's point of view and according to their traditions, the area or site is special or different from other land in which the native title party has, or claims to have, native title rights and interests.

[71] The first affidavit of Michael Woodley evidences the following sites:

- Numerous caves along the river which runs through M47/1413. Some 'contain the physical remains of our old people; others contain their sacred gear, which they used in ceremonies... and others contain relics, demonstrating their use, as shelters for our old people over thousands of years.' (5.6 - 5.7)
- One of the collection places for *Gandi* (sacred stones) used each year in the initiation and other ceremonies 'is in the area that will be affected by the M47/1413' (3.11 - 3.12)

[72] The caves, as well as a number of other sites and archaeological scatters, have been identified in the three reports that have been provided by the grantee party in its documents (GP57, GP58 and GP59). The place where the Gandi stones are collected has not been documented in those reports. Mr Woodley, in his first affidavit, says at 3.12

> 'One of the places where we go each year to collect *Gandi* is in the area that will be affected by the M47/1413 Tenement that FMG wants'

If there is a specific place where the Gandi stones are found, that place should have been identified in at least one of the three reports conducted by the archaeological consultants on behalf of the grantee party and with participation from members of the native title party. If it was not, it should be in the future and, presumably, it will be protected. As I have said earlier, it appears that the Gandi are found across the Yindjibarndi land. It is not clear to me

whether they are scattered randomly across that country, or found in individual localised pockets which can be identified and protected. If it is the former, there may be significant difficulties for the grantee party in overcoming the requirements of the AHA. However, the evidence before me currently, specifically in relation to the proposed lease, is that there is one place within that area where the Gandi are collected. I am concerned about the anomaly created by Mr Woodley's evidence of the collection of the Gandi on various areas, including the proposed lease, but there being no mention of Gandi in any of the reports. I am prepared to conclude that the numerous caves that Mr Woodley talks about are sites of particular significance to the native title party. The evidence in relation to the Gandi on the proposed lease is insufficiently specific for me to make a determination one way or the other as to their locality, albeit that I accept that if there are Gandi in the vicinity, they are no doubt of particular significance to the Yindjibarndi.

[73] The native title party also provided a copy of a further survey report, NTP9, which is an archaeological survey of the Firetail area of the proposed lease. In that survey a number of areas were identified, including rockshelters and quarries which were the source of ochre, which were acknowledged by the consultants as being of particular significance to the native title party in the conduct of ceremonies. Not only were these sites identified, but a number of drill lines which the grantee party sought to have cleared, were not cleared as a result of their proximity to those areas. In particular, it identifies and precisely locates four ochre sources or quarries being:

- Ochre source/rockshelter YIN_09_05
- Ochre source/rockshelter YIN_09_05
- Ochre source/artefact quarry YIN-09_11
- Artefact scatter/quarry YIN_09_15

The Government party acknowledges, in its responsive contentions at paragraph 11, that that survey supports Mr Woodley's evidence in relation to the existence of ochre quarries and ethnographic sites in at least part (Firetail work area) of the proposed lease area. The native title party, in its further contentions, takes issue with the Government party in relation to the suggestion of the Government party (paragraph 13 of those contentions) that there is no evidence to suggest that ochre or sacred stones collected from the land in question cannot be obtained from other sites. I think, in fact, that suggestion is made by the Government party at paragraph 16(c) of its responsive contentions and another point has been made at paragraph 13. In any event, the native title party goes on to suggest that when

> 'Mr Woodley states that ochre and stones have to be collected annually from specific areas, for specific purposes, he implicitly states that they are required to be collected from those areas and no other areas'.

In my view, that is a submission that cannot be sustained. In his first affidavit, Mr Woodley states that in the conduct of Thalu ceremonies, people conducting those ceremonies must be painted up in 'local ochre' (3.7). Mr Woodley deposes that the Maliya (honey) Thalu located not far from where the grantee party wants the three proposed mining leases, is an area where each year the Thalu is worked by men from the Banaga and Burunga Galharra groups. The ochre for this Thalu comes from an ochre quarry that is located in M47/1409 which is to the southwest of the proposed lease (3.8). Mr Woodley goes on to say

> 'Working the *Maliya Thalu in* Yindjibarndi country requires that we access and use the ochre quarry which [is] located in the area covered by M47/1409.' (3.10)

Further, Mr Woodley deposes to the fact that every year before the Birdarra initiation ceremonies the Law men

> 'must travel to the various *Ngurra* (kin places) in Yindjibarndi country, to collect *Gandi* (sacred stones)' (3.11)

Mr Woodley then says specifically

> 'One of the places where we go each year to collect *Gandi* is in the area that will be affected by the M47/1413' (proposed lease) (3.12)

Mr Woodley identifies the Ganyjingarringunha Yaayu Wundu, which is inside the proposed lease area, as an area where

> 'we collect the sacred Gandi for use in our Birdarra Law ceremonies.' (5.6, 5.8)

Mr Woodley also makes reference that the Ganyjingarringunha Yaayu runs through the proposed mining lease M47/1409.

> 'Located in this lease area are ochre quarries that we mine each year and use in the Maliya Thalu ceremony and in our other Birdarra ceremonies.' (5.9)

[74] However, with the exception, in my view, of the Maliya Thalu ceremony which is conducted in the area the subject of the proposed mining lease M47/1409, there is no evidence to suggest that there are any particular ceremonies which must be conducted within the area of the proposed lease, or that it is mandatory to use the ochre from that area for those ceremonies. The balance of the evidence, however, suggests that the areas where the ochre quarries and Gandi are located are within the proposed lease and are areas of particular

significance to the native title party. The extensive nature of the grantee party's activities on the proposed lease may make it difficult to access these areas, even though there is no evidence to suggest that the grantee party would attempt to deliberately exclude them. The ochre sites seem largely to be located in the cliffs above the riverbed which is not an area the grantee party could utilise, given the extraction methodology it intends to adopt. Ensuring access to ochre sources would significantly mitigate the impact of the grant of the proposed lease on the native title party's capacity to protect sites and conduct ceremonies. Although they are unidentified, it would seem, if the areas where Gandi are collected within the proposed lease can be identified, they could be protected also.

[75] I must consider the mitigating effect of the statutory regime of Western Australia in relation to the protection of Aboriginal heritage.

[76] The Tribunal has, on numerous occasions, considered the protective provisions of the AHA. I adopt the Tribunal's findings in *Waljen* on this topic (at 209-211). I also adopt the findings of the Tribunal in *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner at [33]-[38], [40]-[41] and other cases referred to therein which describe the regulatory regime for the protection of sites. In summary, the AHA provides for the protection and preservation of a wide range of Aboriginal sites (s 5) and objects (s 6). It is an offence to excavate, destroy, damage, conceal, or in any way alter any Aboriginal site (whether on the Register or not) (s 17) without authorisation (s 18), and that offence is punishable by fine, imprisonment, or both. If Ministerial consent to disturb a site is sought under s 18 of the AHA, the Aboriginal Cultural Materials Committee ('ACMC') requires the applicant to outline the nature and extent of consultation with key Indigenous stakeholder groups (which include native title parties), outline strategies to minimise impacts on sites and complete a declaration that it has read and understood any heritage survey report tendered in support of the application. Applications will not be considered by the ACMC until sufficient information has been submitted by the applicant.

[77] It is a defence to a prosecution under the AHA if the person charged can prove that he or she did not know, and could not reasonably be expected to have known, that the place was a site covered by it (s 62). Obviously, this defence would not be available to the grantee party. Whilst the Register of Sites kept under the AHA does not identify any sites on or in the vicinity of the proposed lease, the grantee party submitted three archaeological site survey

reports commissioned by them (GP57, 59 and 60) and a map of the proposed lease (GP61) which locates the 13 rockshelter sites identified by the reports within the proposed lease. Furthermore, the first affidavit of Michael Woodley identifies a further site or sites within the proposed lease – notably the area containing the *Gandi* or sacred stones which are central to the native title party's ceremonial obligations and are utilised by the native title party each year. The standard endorsement on mining leases draws the grantee party's attention to the AHA and if imposed, the second and third extra conditions proposed by the Government party would require the grantee party to give to the native title party a copy of its proposal to undertake developmental/productive mining or construction activity and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes; and requires notice of any s 18 application. The native title party would be in a position at this point to consider their attitude to the proposal and decide to support or oppose it, check that it is in conformity with previous understandings, inform the grantee party of any areas of concern and make submissions to the ACMC.

[78] I accept that the grantee party fully understand their obligations under the AHA and has complied with them to date. I am satisfied they will continue to do so and take whatever action is necessary to avoid interference with sites of particular significance to the native title party in accordance with their traditions.

[79] Notwithstanding my satisfaction as to the likelihood of the grantee party continuing to abide by its obligations at law, on the face of the uncontested, and in the case of the Government party conceded, evidence it did appear to me appropriate to impose a specific condition relating to the protection of the four ochre sites identified in document NTP9 and referred to in [73]. The reason I was inclined to make such a condition was because of my conclusion on the evidence that interference with those four sites, or denial of access to them, would have a particularly injurious effect on the native title party's capacity to continue to practice its traditional laws and customs and religious obligations. In addition, it appeared from the evidence that those sites were precisely located within the proposed lease area and from what I could glean from the evidence of the grantee party's intentions, was not likely to interfere with the grantee's proposed operations. In those circumstances I considered that it was appropriate to impose a condition which would require the grantee party to forbear from any interference with those four sites without the consent of the native title party and to ensure that they were capable of being accessed at all times, save when the safety of the

native title party or the grantee, or its employees would be imperilled by permitting such access. However, after requesting the Tribunal's geospatial unit to use the data contained in NTP9 to map the sites, it became apparent that all four of the sites were located outside and to the south of the proposed lease area. I attach a copy of the memo and map from the Tribunal geospatial unit at Annexure 1.

[80] The location of these sites outside the area of the proposed lease has two consequences. Firstly, I do not have the power to impose such a condition in relation to the grant of the proposed lease area and secondly, the existence of those particular sites, as identified in NTP9, is only of peripheral relevance to my consideration as to whether the proposed lease should be granted. As a result of the mapping information, I am now quite unclear as to whether, in his affidavits, Mr Woodley is referring to the four particular sites identified in NTP9 or some other ochre sites which have not been identified, which may exist within the area of the proposed lease. There may be ochre sites within the proposed lease area but they are not the sites identified in NTP9. I am not prepared, in any event, to make specific conditions in relation to sites within a proposed lease area which are not precisely located. The additional conditions proposed by the Government party will assist the native title party in ensuring that any such area is protected.

[81] The native title party takes issue with the Government party's submission (paragraph 21 of their responsive contentions) which notes that some of the sites, including the ochre sites, were not identified in the NTP4 or in negotiations. To the extent that that submission can be taken to suggest that the reference to these matters is some form of 'recent invention' as is suggested by the native title party in its further contentions at paragraph 5.5, it is utterly without merit. I do not believe that there would be any occasion, either in the initial submission or during the course of the negotiations, to specifically mention matters such as those referred to here. Secondly, as the native title party rightly points out, Mr Woodley's evidence was not challenged and is accepted by me insofar as it is factually based.

[82] However, I do accept the Government party's submission that this matter, on the evidence, can be clearly distinguished by the factual circumstances which led to the finding of the Tribunal in *Holocene*. The significance of the entirety of that site was established by an abundance of evidence provided by the Martu native title party in that matter. Albeit, that they too were prepared, in certain circumstances, to contemplate some form of mining activity on the area.

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

[83] The evidence provided by the native title party in respect of s 39(1)(b) is listed in s 39(1)(a)(i) above, save for one matter. The considerations relevant to this criteria, apart from that matter have, in my view, been subsumed in the discussion that has been set out above in relation to s 39(1)(a). The one matter that I refer to above is the suggestion by Mr Woodley in paragraph 10.1 – 10.4 in his first affidavit that, in his belief, the Yindjibarndi ought to be given the same treatment as a Western Australian farmer. I take the point being made there to relate to the fact that a farmer's freehold land is treated as private land for the purposes of the *Mining Act 1978* (WA) and consequently, at least on the surface of the land, provides the farmer with certain prerogatives including a right approaching a veto and entitlements to compensation. The fact is that native title holders are not farmers and do not hold the sorts of tenure that farmers hold. Nevertheless, they are treated as the holders of native title rights and interests, irrespective of whether they have been determined or not, and are treated accordingly under the terms of the Act. I note also, that in relation to the question of compensation, native title holders are entitled to be treated as owners and occupiers of the land pursuant to the *Mining Act 1978* (WA) and are therefore entitled to compensation under that Act. (see *Western Desert Lands Aboriginal Corporation/Western Australia/Kitchener Resources/Scimitar Resources* [2008] NNTTA 22; 218 FLR 362 at [39] - [44]).

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

[84] In their contentions (at paragraphs 51 and 11 respectively), the Government and grantee parties contend the grant of the proposed lease will assist the local economy through the development of local resources and by it providing services to the grantee party's project; the State economy through the payment of royalties; and the Nation through the earning of foreign capital and contributing to the national tax base. I accept the grant of the proposed lease will create considerable positive economic effect for the State and the Nation, and that some positive economic effect may be experienced by the local economy including local Aboriginal people.

Section 39(1)(e) – public interest

[85] I adopt the findings of the Tribunal in *Waljen* (at 215-216) on matters relating to the public interest. There is no need to repeat the findings in full. The Tribunal accepts that the

mining industry is of considerable economic significance to Western Australia and Australia. I conclude that the public interest is served by the grant of the proposed lease.

Section 39(1)(f) – any other matter – environmental protection

[86] The effect on the natural environment is no longer a specific factor to be taken into account under s 39(1) of the Act but the Tribunal is entitled to consider the effect on the natural environment as a relevant factor where that effect is related to other factors in s 39(1)(a) (*WMC/Evans* at 341). In this case there is no evidence which falls into this category.

[87] I adopt the findings in *Waljen* (at 212-214) relating to the effect of proposed acts on the natural environment and *Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274 (at 292-296 [53]-[62]) regarding the provisions of the *Environmental Protection Act 1986* (WA). Again, there is no need to repeat the findings in full. They relate to environmental protection legislation and procedures in Western Australia.

Section 39(2) criteria – existing non-native title rights and interests and use of the land

[88] As noted previously, the area of the proposed lease is unallocated crown land with the exception Mt Florence Pastoral Lease 3114/465 which overlaps M47/1409 at 14.9 percent. Other than the grantee party's underlying exploration licences and miscellaneous licence, which pursuant to s 238 are subject to the non-extinguishment principle, there are no other non-native title rights and interests in the area the subject of the proposed lease.

Conclusion

[89] The task of the Tribunal in inquiries such as this is to thoroughly analyse the evidence and submissions which are placed before it by the various parties in relation to the criteria set out in s 39. In coming to a conclusion in relation to the granting of the proposed lease in accordance with s 38(1), the Tribunal must take into account the evidence presented by the various parties of the impact upon those parties of the doing of the act. In this matter the native title party has submitted that the Tribunal should find that the act must not be done or, in the alternative, that it may be done but subject to a condition that requires an agreement between the grantee party and the native title party having been reached. The Government party contends that the Tribunal should find that the act may be done subject to no conditions other than those that it proposes to impose itself. The grantee party agrees with the Government party's position.

[90] After analysing the evidence, I have come to the view that the grant of the proposed lease, without condition, would have a significant impact on the capacity of the native title party to access and use the area within the proposed lease for a variety of purposes, including general access, as well as to the conduct of ceremonies and the protection of sites. A determination that the act may be done will also have a significant impact on Yindjibarndi morale by undermining their belief in their capacity to protect their country in accordance with their traditional laws, customs and religious beliefs. On the other hand, I find that the grantee party and the Government party have demonstrated a willingness to cooperate fully in ensuring that, as far as the law requires, that the native title party's rights and interests will be affected as little as possible in the circumstances. The proposal of the Government party to impose the four extra conditions will significantly mitigate the impact of the grant of the proposed lease on the interests of the native title party. As discussed earlier, it is my view that the Tribunal ought to make the determination on condition that these four extra conditions are imposed. I come to this conclusion by way of the information that has been collected in the various heritage surveys which have been conducted on behalf of the grantee party and of which the grantee party now has actual notice. The imposition of the first and, to a lesser extent, the second and third extra conditions, which the Government proposes to impose on the grant of the proposed lease will have an additional protective effect.

Determination

[91] The determination of the Tribunal is that the act, namely the grant of mining lease M47/1413 to FMG Pilbara Pty Ltd, may be done, subject to the imposition of the extra conditions listed in document GVP16 and set out in paragraph [32].

Daniel O'Dea
Member
13 August 2009

National Native Title Tribunal

ANNEXURE 1

Memorandum

To: Angie Underwood

CC : Sara Burke, Jeff Harris

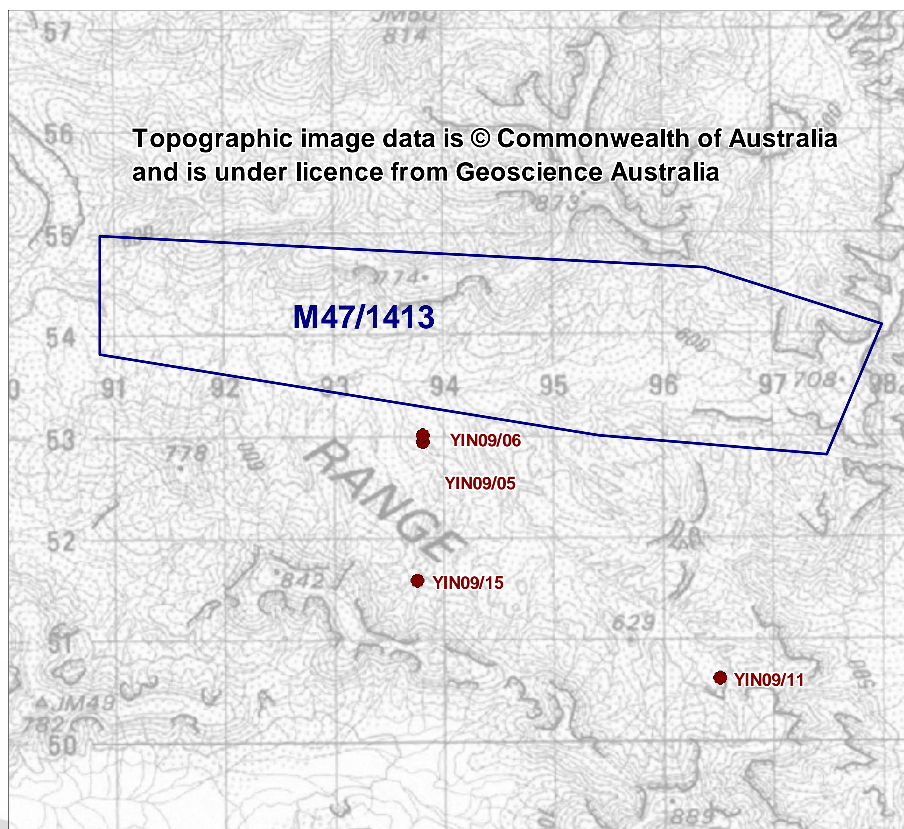
From: Barry Miller

Date: 13 August 2009 Reference: GeoTrack: 2009/1513

Subject: **WF08/31 – Determination**
Geospatial overlap analysis

Angie

This analysis is based on the spatial data for M47/1413 as sourced from Dept of Mines and Petroleum, WA (dated August 2009) and coordinates for each of the ochre sites (YIN09/05, YIN09/06, YIN09/11 and YIN09/15) identified in document NTP9 submitted by the native title party entitled "Project Advice" prepared by Australian Cultural Heritage Management.



Ochre Site Sketch.

As shown in the sketch above, the centroids of the four ochre sites (YIN09/05, YIN09/06, YIN09/11 and YIN09/15) do not fall within the external boundary of tenement M47/1413. The centroid of ochre site YIN09/06 is located about 400m south of the southern boundary of M47/1413. Tenement data was sourced from Dept of Mines and Petroleum, (July 2009).

Regards
[Sent by email]
Barry Miller