NATIONAL NATIVE TITLE TRIBUNAL

Maitland Parker and Others on behalf of the Martu Idja Banyjima People/Western Australia/Iron Duyfken, **[2010] NNTTA 60 (04 May 2010)**

Application No: WO09/343

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

- and -

IN THE MATTER of an inquiry into expedited procedure objection application

Maitland Parker and Others on behalf of the Martu Idja Banyjima People (WC98/62) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Iron Duyfken Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS NOT AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Neville MacPherson, Member
Place: Melbourne
Date: 04 May 2010

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites of particular significance – whether act likely to cause major disturbance to land or waters – access agreement required with native title party – conditions imposed on the grant of the exploration licence – s 237 interference or disturbance to land is likely and expedited procedure not attracted

Legislation: *Native Title Act 1993* (Cth), ss 26(2), 29, 31, 148, 151(2), 155, 237
Mining Act 1978 (WA), ss 63
Aboriginal Heritage Act 1972 (WA), ss 5, 17, 18
Aboriginal Affairs Planning Authority Act 1972 (WA)
Land Act 1933 (WA)

Cases:

Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd, NNTT WO04/89, [2007] NNTTA 15 (1 March 2007), Daniel O'Dea, Member

Cheinmora and Others v Heron Resources Ltd and Another [2005] NNTTA 99; (2005) 196 FLR 250

Dann v Western Australia [1979] FCA 332; (1997) 74 FCR 391

Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia, NNTT WO02/451, [2004] NNTTA 31 (7 May 2004), Daniel O'Dea, Member

Kevin Peter Walley & Ors Ngoonooru Wadjari People/Western Australia/Allan Neville Brosnan, NNTT WO00/427, [2001] NNTTA 78 (17 August 2001), John Sosso, Member

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, Deputy President

Little & Others v Oriole Resources Pty Ltd [2005] FCAFC 243; (2005) 146 FCR 576

Moses Silver, Ishmael Andrews & Sammy Bulabul/Ashton Exploration Australia Pty Ltd/Northern Territory, NNTT DO01/13, NNTTA 18 (1 February 2002), John Sosso, Member

Paddy Neowarra & Others on behalf of the Wanjina Wunggurr Willinggin Native Title Claimant Group/Western Australia/Garry Evan Same, NNTT WO01/461, [2002] NNTTA 157 (2 August 2002), Hon C J Sumner, Deputy President

Parker on behalf of the Martu Idja Banyjima People v State of Western Australia [2007] FCA 1027

Parker v State of Western Australia [2008] FCAFC 23; (2008) 167 FCR 340)

Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd, NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), John Sosso, Member

Rosas v Northern Territory (2002) 169 FLR 330

Silver v Northern Territory of Australia [2002] NNTTA 18; (2002) 169 FLR 1

Smith v Western Australia [2001] FCA 19; (2001) 108 FCR 442

Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Adelaide Prospecting Pty Ltd, NNTT WO02/281, [2003] NNTTA 120 (27 November 2003), (Hon E M Franklyn QC

Walley v Western Australia [2002] NNTTA 24; (2002) 169 FLR 437

Representatives of the native title party:	Mr Paul Sheiner, Gadens Lawyers Mr Rowan Gallagher, Gadens Lawyers
Representatives of the Government party:	Mr Timothy Sharp, State Solicitor's Office Mr Greg Abbott and Mr Clyde Lannan Department of Mines and Petroleum
Representative of the grantee party:	Angela Blackmore, Tenement Administration Services Pty Ltd

REASONS FOR DETERMINATION

[1] On 22 April 2009, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant the exploration licence E47/1841 ('the proposed licence') to Iron Duyfken Pty Ltd, and included in the notice a statement that it considered the grant attracted the expedited procedure (that is, one which can be done without the normal negotiations required by s 31 of the Act).

[2] The proposed licence comprises an area of 221.35 square kilometres located 44 kilometres south east of Wittenoom in the Shire of Ashburton. It is 100 per cent overlapped by the registered claim of the Martu Idja Banyjima (WC98/62 – registered from 29 September 1998).

[3] On 27 May 2009, Maitland Parker and Others, on behalf of the Martu Idja Banyjima Native Title Claimants (WC98/62) ('the native title party'), made an expedited procedure objection application to the Tribunal. On 21 August 2009, the Innawonga Bunjima also lodged an objection. This objection was withdrawn by agreement on 11 March 2010.

[4] On 30 June 2009, Deputy President Sumner (also referred to throughout this determination as "Hon C J Sumner") was appointed as the Member for the purposes of the conduct of the inquiry, and, on the same day, the expedited procedure objection application was accepted by the Tribunal.

[5] In accordance with standard practice in expedited procedure objection matters, the Tribunal gave directions to the parties to provide contentions and documents for an inquiry to determine whether or not the expedited procedure is attracted. These directions allow a four month period, after the s 29 closing date, for the lodgement of objections, for parties to discuss the possibility of reaching an agreement which could lead to disposal of the objection by consent.

[6] At an adjourned Status Conference held by the Tribunal on 20 January 2010, in the absence of a resolution by agreement, the grantee party requested the application proceed to inquiry. The Government party also requested that directions remain as set. This request was supported by all parties. An additional two requests to amend the directions were made by the parties. The first request was made on 18 November 2009, which Deputy President Sumner approved on 23 November 2009, and the second request was made on 16 December 2009, which Hon CJ Sumner approved on 21 December 2009.

[7] The Government and native title parties have lodged contentions and evidence, and the grantee party indicated at the adjourned Listing Hearing on 25 February 2010 that it would rely on Government party submissions. All parties have agreed that the inquiry can be heard 'on the papers', that is, without holding a further hearing.

[8] On 22 February 2010, I was appointed by Deputy President Sumner as the Member for the purposes of the conduct of the inquiry. I am satisfied that the objection can be adequately determined on the papers (s 151(2) Act).

[9] **Legal principles** Section 237 of the Act provides:

> ***'237 Act attracting the expedited procedure***
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> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
>
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.'

[10] In *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 ('*Walley*'), the Tribunal considered the applicable legal principles at [7]–[23] and the nature of exploration and prospecting licences and conditions to be imposed including what activities are permitted by it and what limits are placed on those activities at [24]–[35]. I adopt those findings for the purposes of this inquiry, while noting that Standard Condition (2) to be imposed on the exploration licence (*Walley* at [34]) now contains an additional requirement that backfilling and rehabilitation of the land must be carried out no later than six months after excavation unless otherwise approved by the Environmental officer, Department of Industry and Resources (now the Department of Mines and Petroleum ('DMP')). Further, s 63 of the *Mining Act* (s 63(aa)) has been amended to require the approval of a program of work by the Environmental Officer of the Department of Industry and Resources (now DMP) for the use of ground disturbing equipment.

[11] With respect to issues arising under s 237 (b), 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

('*Maitland Parker*') at [31] –[41]. In *Parker on behalf of the Martu Idja Banyjima People v State of Western Australia* [2007] FCA 1027, the Federal Court (Siopis J) dismissed an appeal by the native title party from the Tribunal's decision in *Maitland Parker*. This decision was then appealed to the Full Federal Court and, in separate judgments, was dismissed on 7 March 2008 (*Parker v State of Western Australia* [2008] FCAFC 23; (2008) 167 FCR 340).

Contentions of the Government party

[12] In general, the Government party contends that the proposed licence will not give rise to any of the issues raised by s 237 (a), (b) and (c) of the Act.

[13] The Government party contends that the grant of the proposed licence is not likely to interfere directly with the carrying on of community or social activities of the objectors in relation to the proposed licence for the following reasons:

(a) 'There are no Aboriginal communities situated on the proposed tenement;

Reserves

(b) In relation to pastoral leasehold included within the proposed tenement, section 20(5) of the Mining the land subject of Reserve No. 30082, section 24 of the *Mining Act* 1978 provides that mining on reserve land requires the written consent of the Minister for Mines and Petroleum, who may refuse his consent or give his consent subject to such terms and conditions as specified in the consent;

(c) Before giving his consent the Minister must, pursuant to subsections 24(3) – 24(7) of the *Mining Act* 1978, consult with and obtain either the concurrence or the recommendation of the Responsible Minister and the body or person in which the control and management of the reserve is vested;

(d) Section 26 of the Mining Act 1978 provides for terms and conditions that may be imposed pursuant to section 24 of the Mining Act 1978 by the Minister for Mines and Petroleum on the consent for mining;

Pastoral Lease

(e) In relation to pastoral leasehold included within the proposed tenement section 20(5) of the *Mining Act* 1978 provides that, unless the written consent of the occupier is obtained or unless the warden by order otherwise directs (other than in relation to land referred to in section 20(5)(c)), the holder of a mining tenement is not entitled to prospect, fossick on, explore, mine on or under or otherwise interfere with my Crown land that is:

(i) for the time being under crop, or which is situated within 100 metre thereof;

(ii) used as or situated within 100 metres of a yard stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield;

(iii) situated within 100 metres of any land that is in actual occupation and on which a house or other substantial building is erected;

(iv) the site of or situated within 100 metres of any cemetery or burial ground;

(v) land subject of a pastoral lease within the meaning of the *Land Administration Act* 1997 which is the site of, or situated within 400 metres of the outer edge of, any water works, race, dam, well or bore, not being an excavation previously made and

used for mining purposes by a person other than the lessee of that pastoral lease and;

General

(f) section 63 of the *Mining Act* 1978 deems every tenement of the type proposed to be granted subject of the holder fulfilling certain conditions set out in the said section, ie. reporting discoveries of minerals, making safe any holes, pits, trenches, etc, and preventing damage to property and livestock.'

[14] The Government party contends that the grant of the proposed licence is not likely to interfere with areas or sites of particular significance to the objectors according to their traditions due to the protective provisions of ss 5, 17 and 18 of the *Aboriginal Heritage Act 1972* (WA) ('the AHA'). The Government party refers to provision s 63 of the *Mining Act 1978* (WA) and the conditions which are to be imposed on the grant of the proposed licence to assert that the proposed licence is not likely to involve major disturbance to the land or create rights, the exercise of which is likely to involve major disturbance to the land.

Contentions of the native title party

[15] The native title party contends, in para 5 of its submission, that the grant of the proposed licence will be a future act attracting the expedited procedure if, and only if, all of the following conditions in subsections (a), (b) and (c) of s 237 of the Act are met, namely, the grant of the proposed licence is not likely to interfere directly with the carrying on of community or social activities; not likely to interfere directly with areas or sites of significance; and not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land and waters concerned.

The native title party contends that:

- The proposed licence will directly and physically interfere with community and social activities.

- The proposed licence will interfere with the physical, spiritual and emotional well being of the community.

- The Willul Aboriginal Community seasonally inhabits the area, commonly known as Windell Block, or 5 Mile, which is situated within the boundary of the proposed tenement.

- The grant of the tenement will interfere with the integral community and social activities of the native title party in and around 5 Mile which include the collection of bush tucker, medicines and plants of ceremonial importance, hunting of game, observance of traditional law and ceremony.

- The rights conferred on the grantee party upon grant would result in more non-Fortescue Banyjima people accessing the area. There are two overlapping native title parties – Martu Idja Banyjima and Innawonga Bunjima and individuals speaking for country for which they do not have proper authority to do so under traditional law may give rise to conflict between the two native title parties.

- The AHA does not guarantee protection of Aboriginal cultural heritage.

- Not all sites are registered and an absence of registered sites within the proposed tenement does not equate to an absence of sites of significance to the native title party.

- The proposed licence is one of the few areas left in the claim area that has not been subject to extensive exploration activity.

- The proposed licence is likely to cause a major disturbance to land and waters within the Martu Idja Banyjima claim area.

- There are plans for parts of the proposed licence area to be included in a new conservation reserve to protect the unique flora and fauna that inhabit the area.

Evidence of the Government party

[16] The Government party's documentary evidence establishes the underlying tenure of the proposed licence to be as follows:

- Crown Reserve (79.5 per cent overlap);
- Pastoral Lease (Juna Downs) 3114/1191 (20.5 per cent overlap)

[17] The government party's documentation identifies the area comprising of the pastoral lease exclusion area of 20.5 per cent as a Notice of Intention to take land pursuant to s 170 (8) of the Western Australian Land Administration Act 1997 which is active until January 2012.

[18] Searches of the Department of Indigenous Affairs ('DIA') Register of Aboriginal Heritage Sites under the AHA provided by the Government party reveals that there are 6 registered sites. They are identified as follows:

(a) Ashburton 06, Site ID 549, camp, permanent register, open access, no gender restrictions.

(b) Mt Windell, Site ID 550, mythological, permanent register, open access, no gender restrictions.

(c) Bardulanha, Site ID 6042, ceremonial, permanent register, closed access, no gender restrictions.

(d) Buddunmurra, Site ID 8038, water source, insufficient information, open access, no gender restrictions.

(e) Mt Bruce Sacred Area, Site ID 21603, ceremonial, permanent register, closed access, male access only.

[19] The map provided by the Tribunal's geospatial unit, which was circulated to all parties on 24 March 2010 and is uncontested, confirms that there are the six heritage sites within or overlapping the proposed licence area, as listed in para 18 of this determination. However, the following sites are within 10 kilometres of the boundaries of the proposed licence:

- Dales Gorge, painting/engraving, Site ID 12058, permanent register, open access, no gender restrictions.

- Mundalla, ceremonial, Site ID 8036, permanent register, open access, no gender restrictions.

- Kurramandu Tjippalpa, Site ID 8037, ceremonial, permanent register, open access, no gender restrictions.

- Frypan Gorge, modified tree/painting/artefacts, Site ID 10046, permanent register, open access, no gender restrictions.

- Old Tank, Site ID 10380, painting/artefacts, permanent register, open access, no gender restrictions.

- Munjina Claypan, Site ID 8894, artefacts/scatters, permanent register, open access, no gender restrictions.

- Solomons Soak [restricted], Site ID 8040, permanent register, closed access, male access only.

- Ashburton 05, Site ID 548, ceremonial, permanent register, closed access, no gender restrictions.

- Ashburton 4, Site ID 547, ceremonial/mythological, insufficient information, open access, no gender restrictions.

Tribunal mapping also reveals a large number of registered sites within 20 kilometres of the boundaries of the proposed licence.

[20] The evidence of the Government party does not establish extensive exploration activity over the proposed licence. One 'live' tenement application, AML 70/252, was granted on 6 June 1974 to Mount Bruce Mining Pty Ltd, which encroaches on the proposed licence by 3.9%. There were 15 temporary reserves active between 1959 and 1974 which are cancelled or expired and 4 exploration licences which were never granted.

[21] The grant of E47/1841 will be subject to the standard conditions imposed on the grant of all exploration licences in Western Australia (see *Maitland Parker* at [21] Conditions 1–4). Additional conditions, as evidenced by the Government party, will be as follows:

> 5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.
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> 6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
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> - The grant of the Licence; or
> - Registration of a transfer introducing a new licensee;
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> advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.

7. No interference with Geodetic Survey Station Mount Bruce 263, 316, 317, 318, 319 and 320, Roy hill 62, 131, 142, 143, 144 and 144T and SM 9, 9T, 9TI, and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

8. Mining within a radius of 150 metres of any Australian Telecommunications Commission microwave repeater station being confined to below a depth of 60 metres from the natural surface.

9. No interference with the Australian Telecommunications Commission microwave repeater station ray-line.

[22] The following Endorsements will be imposed:

- The licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations there under.

- The licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulation 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

Evidence of the native title party

[23] The submissions of the native title party included the sworn affidavit evidence ('AF') of Mr John Parker lodged with the Tribunal on 19 February 2010 and the sworn affidavit of Mr Maitland Parker lodged with the Tribunal on 30 March 2010. The unsworn versions of Mr John Parker's and Mr Maitland Parker's statements were initially lodged with the Tribunal on 17 February 2010. Parties did not contest the late provision of this evidence, nor its admissibility for the inquiry.

The sworn affidavit of Mr John Parker is made in the following terms:

'1. I am an elder of the Fortescue Banyjima people and a senior law person.

2. I have been employed by the Pilbara Native Title Service for many years and before that I worked as a ranger in the Karijini National Park.

3. I have been shown a map of the area of tenement application E47/1841.

4. The application area covers a place called Bardulanha also known as Willul, Windell Block or 5 Mile. This was a very special place for my late father and is very important to my family, my brothers and sisters, our children and grandchildren.

5. We have a law ground at 5 Mile and conduct law ceremonies there during law time. I have put my nephews through the law at this ground. A lot of people attend these ceremonies and we live at Bardulanha and the surrounding bush for long periods of time.

6. Bardulanha is also a living area for my family. A place where we can go and live on our country undisturbed by other people.

7. My father fought for many years to establish 5 Mile as a living area. Our family have also had physical confrontations with other Aboriginal people from the IB claim group to protect our rights to live in this area and our right to exclude strangers and other Aboriginal people from living and using this area.

8. Under Yandi Land Use Agreement with Rio Tinto in 1996 it was agreed to excise 5 Mile from the Juna Downs pastoral lease and lease the area to my family through the Gumala Aboriginal Corporation. I have seen a copy of the proposed lease application which is still being processed by the Department of Lands.

9. My sister and I have been pursuing funding for many years to develop the infrastructure for the living area to the point where we can live there permanently. We are hopeful that we will get this funding this year.

10. Even when we are not living at 5 Mile, my sisters, brothers and I and our families visit the area from our homes in Tom Price regularly to check on the area, ensure that it is not been disturbed and to hunt and collect bush foods.

11. My country from my father includes Bardulanha (Mount Windell) also in the application area and back to Poodanmaya, Dale's Gorge and up to Munjina Station. These are all very important places to us.

12. There are also very secret places in and around this area associated with men's law business. I can't even talk about these places and only a few very senior men in the Fortescue Banyjima law know about them. I would be breaking our laws and customs if I was to talk about these places or reveal their locations to other people even to anthropologists.

13. It is very important that we are able to visit and look after these sites in privacy. There would be serious consequences under our traditional law and custom if we allow these sites to be visited or disturbed by other people.

14. When we stay at 5 Mile we use all that application area to hunt for bush foods like kangaroo and turkey. We use this for food and also as an important part of our ceremonies we put boys through the law. We also collect bush foods and medicines from this area.

15. The use of heavy machinery and exploration activities in or around the 5 mile community including the land south to Mount Windell and east to the Highway would disturb our ability to use and enjoy our living area at 5 Mile. It would also interfere with our ability to carry out ceremonies which are private and often at some distance from the law ground.

16. I am concerned that if the country around 5 Mile is disturbed then it will make it much harder for our community to come together to practice our ceremonies. If we cannot maintain the natural environment it will interfere with our well being, physically and spiritually.

17. The opening up of country through drill tracks and access roads will also encourage tourists into the area, particularly as it is so close to the National Park. If other people are camping and using the area we won't be able to carry out our traditional laws and customs and ceremonies or enjoy our right to live on and enjoy the area.

18. My family is responsible for making sure the application area is looked after and introducing strangers going into that country and making sure they look after it. We have laws and customs such as signing out to country so that it knows and recognises who we are and to introduce strangers to the land. We can't do this if the mining company is just given rights to go into this area.'

The sworn affidavit of Mr Maitland Parker is made in the following terms:

'1. I am a Fortescue Banyjima elder.

2. I retired last year after working for 20 years as a Park ranger living and working in the Karijini National Park.

3. I have been shown a map of the tenement application E47/11841(sic).

4. The tenement is in the Karijini National Park and an area just outside the current boundaries which is part of Juna Downs. This area will be resumed from Juna Downs in 2015 and become part of the conversation reserve associated with the National Park. It should have always been in the National Park as the Park boundary should have followed the Great Northern Highway.

5. The 5 Mile community and law ground is within the boundaries of the tenement application. There are also very secret and sacred places associated with our men's law in this area. I can't talk about these places under our law or custom or reveal their location.

6. Over the last 20 odd years, I have spent a lot of time working on and travelling throughout our country and have observed a lot of changes.

7. I grew up respecting our Aboriginal culture. We were taught about it by all the relatives but mainly the mother and father and grandparents.

8. As you get to your teens as a male, you are put through men's business or cultural law. The learning covers such things as what you can eat, what you can't eat, what you can kill and what you can't kill. What you can track and how to tell what tracks mean or what fruits are, what is this tree, what are the medicines, bushes or plants and what are their uses. In addition, we had to know the structure of skin relations, proper manners, respect and the significance of our land and its sites. When we went bush as kids we basically lived off the fruits of the land.

9. We have taught our children and are teaching our grandchildren all these things. To be able to teach them properly though we need to be able to take them out onto country to show them the environment, animals and plants. They also need to know that our knowledge and law and culture is acknowledged and respected by other people.

10. Our Fortescue Bunjima (sic) law is very strong law with ceremonies at Youngalina and Cane River and Five Mile. Men and women have strong business. For old people, it is to look after country and our songs are a cycle moving through the country.

11. A person's songs and stories are very important to that person and when the person dies it is very important their songs are still carried on. The songs and stories help and teach our young people about the country and how to look after it.

12. We the Fortescue Banyjima people are responsible for making sure the lore that is connected with the claim area is respected and the country is looked after. When we visit the country and waterways in particular we call and sing out so that the spiritual beings know we are there. For example at waterholes we blow water and sing out "Ngurra". Under our lore we need to introduce strangers to the land in the same way.

13. Mining companies often don't listen to the right people and don't respect our law and culture. The (sic) need to come and sit down and talk to us before they start interfering with the country. If the mining companies don't talk to us first we can't look after our country by practicing our law. How can we really teach our grandchildren about the country and look after it if mining companies don't talk to us before they start disturbing the country? We can't even practice our culture by welcoming and introducing strangers to the country.

14. Most of the members of the overlapping native title claim group are Milyarnpa or Top End Banyjima. They have a different law to Fortescue Banyjima people and can't speak for the tenement area – they don't have authority to talk about the law for that country. If Iron Duyfken engage the overlapping claim group to do surveys on the tenement and not MIB it will cause conflict between the two groups and communities.

15. I often go hunting in and around the tenement area (hunting is banned within the Park), as it is accessible from Tom Price and the Ranger's station where I live. Game is hard find in other areas where there has been a lot of drilling and exploration activity. There is other bush tucker in that country as well.

16. Recently I flew over the MIB claim area in a helicopter and observed how much of the country had been disturbed by mining and exploration and in particular the disturbance caused by the drill pads and access tracks for exploration. This has happened all over the claim area in the last 10 years. The country has been devastated and cut up just for drilling. The drill lines are visible from the air like scars on the country. The access roads allow not only the mining company but other mine workers and tourists to access the area for camping. I have seen this happen time and time again.

17. There are a lot of mines near the tenement area including BHP Marillana Creek mine and the RTIO Yandicoogina Mine. These mines are expanding all the time and eventually the whole of Marillana and Yandicoogina Creeks will be mined for Channel Iron Ore (CID). Companies like Iron Duyfken are taking up all the small bits that have

not already been taken by BHP and RTIO and conducting large drilling programs to find small reserves of ore left over or ignored by BHP and RTIO.

18. It is increasingly important to Fortescue Banyjima people to protect and preserve these small areas of land, outside the Karijini National Park where native title has been extinguished, that are still relatively undisturbed by mining and exploration. These are all we have left and unless we can do this there will not be any land where we are able to teach our grandchildren in an undisturbed environment. Exploration in the tenement will constitute a major disturbance given the importance of these remaining areas to Fortescue Banyjima people. Protection of these non-disturbed areas should also be important to non-Aboriginal people concerned about the extent of mining activity all over the Pilbara.'

[24] The Tribunal has held in the past that it is important for a deponent to an affidavit to specify whether that person is a member of the relevant native title group; the position the person holds; on what basis the person can speak for the country; and such other information as might allow the Tribunal to assess what is being deposed as a proper reflection of the traditions of the native title party (see *Dora Sharpe and Others on behalf of the Gooniyandi native title claimants/Ashburton Minerals Ltd/Ripplesea Pty Ltd/Western Australia*, NNTT WO02/451, [2004] NNTTA 31 (7 May 2004), Daniel O'Dea, Member at [20].

[25] The evidence of Mr John Parker and Mr Maitland Parker is uncontested and I accept it. They are some of the group's senior people and I accept they have authority to speak on behalf of the native title party.

[26] In addition, the native title party has submitted the anthropological report of Dr Neale Draper, entitled, 'MIB Ground of Objection – Substance Evidence'. The native title party requested that the Tribunal make a confidentiality order with respect to this report, restricting its use to those persons directly concerned with the inquiry. Such an order has been made pursuant to section 155 of the Act.

[27] Dr Neale Draper holds (inter alia) a PhD in Anthropology. Dr Draper cites 30 years experience in the practice of anthropology, archaeology and heritage management. Dr Draper also cites expert knowledge and experience in relation to Indigenous cultural heritage and management in the Pilbara region of Western Australia, with eight years of conducting and supervising heritage consultancy projects and native title research in that region, as managing director and principal consultant for Australian Cultural Heritage Management Pty Ltd. The report is concerned with the potential impact of mining operations on archaeological and ethnographic sites in the Martu Idja Banyjima claim area and how that impact might be ameliorated.

Community or social activities (s 237(a))

[28] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken pursuant to them are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk) (see *Smith v Western Australia* [2001] FCA 19; (2001) 108 FCR 442 (‘*Smith*’) at 449-450 [23]). Direct interference involves an evaluative judgment that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or social activities (*Smith* at 451 [26]). The assessment is also contextual, taking into account other factors which may already have had an impact on a native title party’s community or social activities (such as mining or pastoral activity) (*Smith* at 451 [27]). The relevance and weight to be given to such evidence will depend on the circumstances of the case (*Western Australia v Smith* (2000) 163 FLR 32, NNTT WO99/511, Hon E M Franklyn QC at 51 [35]; *Kevin Peter Walley & Ors Ngoonooru Wadjari People)/Western Australia/Allan Neville Brosnan*, NNTT WO00/427, [2001] NNTTA 78 (17 August 2001), John Sosso, Member (now Deputy President Sosso), at [14]-[19]; *Moses Silver, Ishmael Andrews & Sammy Bulabul/Ashton Exploration Australia Pty Ltd/Northern Territory*, NNTT DO01/13, NNTTA 18 (1 February 2002) John Sosso, Member (as noted above, now Deputy President Sosso), at [25]-[32].

[29] The native title party contends that the proposed licence covers a place called Bardulanha also known as Willul, Windell Block, or 5 Mile. The native title party further contends that the native title party carries out community and social activities of men’s business or cultural law, learning of and collecting bush food and medicine for ceremonial purposes which will be directly interfered with by the future act now contemplated at Bardulanha. Mr John Parker states at AF4, ‘The application area covers a place called Bardulanha also known as Willul, Windell Block or 5 Mile’. Mr John Parker further states at AF5, ‘We have a law ground at 5 Mile and conduct law ceremonies there during law time...A lot of people attend these ceremonies and we live at Bardulanha and the surrounding bush for long periods of time.’ Mr Maitland Parker confirms this information at AF5, stating ‘The 5 Mile community and law ground is within the boundaries of the tenement application. There are also very secret and sacred places associated with our men’s law in this area. I can’t talk about these places under our law or custom or reveal their location.’ According to the Tribunal’s geospatial mapping, Bardulahna, also known as 5 Mile, is located within the boundaries of the proposed licence. The affidavit evidence of Mr John Parker and Mr

Maitland Parker relating to community and social activities is sufficient to sustain a finding that the exploration activity is likely to interfere with the conduct of ceremonies.

[30] The native title party contends that 5 Mile is inhabited by members of the native title party's native title claim on a seasonal basis; that upon the provision of adequate funding the native title party will establish a permanent community at 5 Mile; and that the grant of the proposed tenement will authorise exploration activity which is likely interfere directly with the carrying on of community and social activities of the native title party conducted in and around 5 Mile. Mr John Parker states at AF9, 'My sister and I have been pursuing funding for many years to develop the infrastructure for the living area to the point where we can live there permanently. We are hopeful that we will get this funding this year.' Mr John Parker further states at AF17, 'The opening up of country through drill tracks and access roads will also encourage tourists into the area, particularly as it is so close to the National Park. If other people are camping and using the area we won't be able to carry out our traditional laws and customs and ceremonies or enjoy our right to live on and enjoy the area.'

[31] Mr John Parker states at AF14, 'When we stay at 5 Mile we use all that application area to hunt for bush foods like kangaroo and turkey. We use this for food and also as an important part of our ceremonies when we put boys through the law. We also collect bush foods and medicines from this area'. Mr Maitland Parker further states at AF10-12, 'For old people, it is to look after country and our songs are a cycle moving through the country. A person's songs and stories are very important to that person and when that person dies it is very important their songs are still carried on. The songs and stories help and teach our young people about the country and how to look after it. We the Fortescue Banyjima people are responsible for making sure the lore that is connected with the claim area is respected and the country is looked after. When we visit the country and waterways in particular we call and sing out so that the spiritual beings know we are there. For example at waterholes we blow water and sing out "Ngurra". Under our lore we need to introduce strangers to the land in the same way.' The evidence is sufficient to support a finding of sustained community or social activities on the proposed licence areas which are likely to be interfered with by exploration activities.

[32] In making a contextual assessment, the issue now turns to other factors. The evidence establishes that this is not a case where there has been extensive prior mining or exploration activity. In terms of current exploration activity, the Tribunal has often found that the relatively limited and temporary nature of exploration activity is not likely directly to

interfere with community and social activities except in an incidental and insubstantial way. The Tribunal also has regard to the fact that generally an exploration licence area is a small part of the overall claim area and the community and social activities occur over that larger area *(Cheinmora and Others v Heron Resources Ltd and Another* [2005] NNTTA 99, (2005) 196 FLR 250 (‘*Cheinmora*’), at [31], citing *Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd,* NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), John Sosso, Member (now Deputy President Sosso) at [43]-[44]).

[33] The evidence adduced in this matter by the native title party provides a basis for suggesting that there are significant community or social activities carried out by the native title party within the proposed licence – particularly when linked to the underlying tenure and to the considerations canvassed under s 237 (b) which follow. The evidence of the native title party in terms of s 237 (a) is significantly less extensive than that produced in *Paddy Neowarra & Others on behalf of the Wanjina Wunggurr Willinggin Native Title Claimant Group/Western Australia/Garry Evan Same*, NNTT WO01/461, [2002] NNTTA 157 (2 August 2002), Hon C J Sumner (see discussion at [21]-[22]). However, the evidence does establish more than a general reference to ceremonial activities and hunting in the MIB claim area by the native title party. In these circumstances, I find that the grant of the proposed licence **is likely to interfere** with the community or social activities of the native title party within the requirements of section 237(a) of the Act.

[34] The grantee party relies on the submissions of the Government party, I must therefore determine these matters on the basis that the rights given under the *Mining Act 1978* (WA) will be exercised to the full *(Western Australia v Smith* [2000] NNTTA 239; (2000) 163 FLR 32 at 50-51 [34]-[35]). What can be said with confidence is that even soil sampling has the capacity to interfere with sites, and the exercise of the full rights accorded by a prospecting licence certainly does. In the absence of evidence of the grantee party’s intentions, the question of direct interference must be assessed by reference to the relevant aspects of the Government party’s regulatory regime under the *Mining Act 1978* (WA), including the provisions of s 63 and the conditions to be imposed on exploration licences (*Walley*) at [9]. The native title party’s evidence is uncontested. It is taken into account in this determination. In making the predictive and contextual assessment as to the likelihood of interference with the community or social activities, I must also assume that the grantee party will fully utilise its statutory prerogatives in circumstances where the tenement is granted. The Tribunal must also have regard to the fact that the grantee party’s access to the area would be temporary and limited to the areas in which exploration is taking place as significant ground disturbing

exploration will only occur at any one time over a small area. Government party documentation reveals that the size of the proposed licence is 221.95 square kilometres. The area of the Martu Idja Banyjima claim is approximately 9554.42 square kilometres, much larger than the area of the proposed licence, thus making it less likely that exploration on the area of the proposed licence will impact on any community and social activities of the native title party, as contemplated in s 237(a) of the Act, which I can infer are likely to be carried out over a broader area (*Cheinmora* at 262 [31] citing *Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd*, NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), John Sosso, Member (as previously noted, now Deputy President Sosso) (at [43]-[44])).

[35] In relation to evidence from the native title party statement of contentions at para 15 and para 18, that the proposed licence is likely to affect the spiritual and emotional well being of the community, and thereby directly interferes with the carrying on of social and community activities, the Tribunal, on balance, accepts this evidence. However, the Tribunal has dealt with similar situations in other determinations (*Walley* at [13]-[21] citing *Silver v Northern Territory of Australia* [2002] NNTTA 18; (2002) 169 FLR 1 at [50]-[62]) when considering the amendments to s 237(a) made in 1998 where the words 'community or social activities' were substituted for 'community life'. The Tribunal has held that the amendment narrowed the scope for contentions of the kind made here to be successful as the requisite interference is no longer with the broader notion of community life but is now more restricted by reference to activities. As Deputy President Franklyn said in *Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Adelaide Prospecting Pty Ltd*, NNTT WO02/281, [2003] NNTTA 120 (27 November 2003), (Hon E M Franklyn QC at [12]): 'That there may be obligations in respect of land does not of itself translate into a community or social "activity" of the claimant group.' I adopt Deputy President Franklyn's findings for the purposes of this inquiry, but have not had regard to this aspect of the evidence. The evidence of actual physical activities is sufficient to uphold the objection without taking account of the fears which are provoked by the grant or feelings of sadness which would arise from exploration activities on the land but which do not translate into interference with the community or social activities of the native title party.

Sites of particular significance (s 237(b))

[36] The issue the Tribunal is required to determine under section 237 (b) is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (i.e., more than ordinary) significance to the native title party in accordance with their traditions.

There are 6 registered sites within the proposed licence area, but this does not mean there may not be other sites or areas of particular significance over the area of the proposed licences or in the vicinity. The Register does not purport to be a record of all Aboriginal sites in Western Australia and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. The AHA protects all Aboriginal sites, whether on the Register or not.

[37] The Government party relies on ss 5, 17 and 18 of the AHA to contend that the grant of the proposed tenement is unlikely to interfere with areas or sites of particular significance. The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal (see *Maitland Parker* at [31]-[38], [40]-[41]). While the Tribunal has usually found that the site protection regime based on the AHA is sufficient to ensure that interference with sites of particular significance is unlikely, each matter must be considered on its own facts (see *Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd*, NNTT WO04/89, [2007] NNTTA 15 (1 March 2007) at [81]-[91]). The Tribunal must consider, based on the facts of particular cases and the nature and extent of sites of particular significance, whether this protective regime is sufficient to make it unlikely that there will be interference with sites of particular significance found to exist.

[38] The evidence provided by the native title party in the statement by Mr John Parker, Mr Maitland Parker and in Dr Neale Draper's report is uncontested, and I am satisfied that there are likely to be sites of significance to the native title party in accordance with their traditional laws and customs within the claim area. The statement of evidence by Mr John Parker, Mr Maitland Parker, and the report by Dr Neale Draper, refers to Bardulanha as a special and important area or site. Mr John Parker states at AF4-5, 'This was a very special place for my late father and is very important to my family, my brothers and sisters, our children and grandchildren. We have a law ground at 5 Mile and conduct law ceremonies there during law time. I have put my nephews through the law at this ground. A lot of people attend these ceremonies and we live at Bardulanha and the surrounding bush for long periods of time'. Mr Maitland Parker supports this by stating at AF5, 'The 5 Mile community and law ground is within the boundaries of the tenement application' and also at AF10, 'Our Fortescue Bunjima (sic) law is a very strong law with ceremonies at Youngalina, Cane River and 5 Mile'. The Tribunal's geospatial mapping demonstrates that Bardulanha, or 5 Mile, is located wholly within the boundaries of the proposed licence. The Tribunal's geospatial mapping also demonstrates that Youngalina is located 20 kilometres north of the proposed

licence, while Cane River is approximately 200 kilometres north east of the proposed licence. Based on Dr Neale Draper's report, I am prepared to infer that Bardulanha is a site that may be of particular significance to the native title party; however, Youngalina and Cane River appear to be located sufficiently beyond the proposed licence to ensure that interference with them is unlikely. The native title party argues that the MIB claim group (known as Fortescue Banyjima) is quite distinct from the members of the overlapping native title party – Innawonga Banyjima, otherwise known as the Top End Bunyjima. On this basis, the native title party argues that Martu Idja Banyjima are the right people to speak for country and it is only through consultation with them that sites of particular significance can be adequately protected.

[39] The native title party is required to provide sufficient detail and specificity in order to allow the Tribunal to make the predictive assessment in accordance with s 237 (b) of the Act. On the face of it, the evidence in this matter establishes, in my opinion, that there is at least one site of particular significance that is located within the boundaries of the proposed licence, and, it leads to my conclusion that there is sufficient evidence to establish that there is at least one site of particular significance within the area of the proposed licence. I find that, on the face of the evidence, in accordance with s 237 (b) of the Act, **it is likely** that sites of particular significance may be interfered with, within the requirements of section 237 (b) of the Act.

[40] As already stated, the grantee party has not provided definitive evidence of its exploration intentions and so the matter is therefore to be determined on the basis that the rights given under the *Mining Act 1978* (WA) will be exercised to the full.

Presumption of Regularity

[41] I must now consider whether the presumption of regularity and the protective provisions and procedures of the AHA make it unlikely that there will be interference with any areas or sites of particular significance. The grantee party has not submitted into evidence a brief or general work program and, indeed, has relied on the government party's contentions (which, as I have stated in other determinations, causes me some difficulty). In my opinion, however, I find it apparent that if the area is found to be prospective then more intensive activity will be involved, details of which have not been given, perhaps understandably, because this cannot be known until the preliminary investigations are concluded. I must therefore determine these matters on the basis that the rights given under

the *Mining Act* will be exercised to the full (*Western Australia v Smith* [2000] NNTTA 239; (2000) 163 FLR 32 at 50-51 [34]-[35]).

[42] I am satisfied that the grantee party is aware of its responsibilities under the AHA and that it will comply with the AHA. However, the grantee party has provided no specific evidence of what it intends to do about the protection of sites, including whether it will conduct a heritage survey or otherwise consult with the native title party about them. It would be helpful in making this determination if the grantee party could submit an independent and discrete contention giving some background. Whether the grantee party elects to do this is, of course, entirely a matter for it, but having such information from the grantee party would be of assistance to the Tribunal. On balance, however, I am satisfied that this is a case where the **expedited procedure should not apply**. Unless there are the negotiations contemplated by s 31 of the Act, there seems to me to be a real risk of interference with sites, even if inadvertent. As previously noted, the proposed licence is largely within the Karijini National Park, a large portion of such licence seemingly affected by a number of registered DIA sites, including the 6 registered sites of Ashburton 06, Mt Windell, Bardulanha, Buddunmurra, Tjurruruna and Mt Bruce Sacred Area, which have been identified. Consultation will need to occur with the native title party to ensure that they are avoided. If this does not occur there is a real risk of interference with them.

Major disturbance to land and waters (s 237(c))

[43] In relation to the third limb of s 237 of the Act, an evaluative judgment is required on whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it). This is from the point of view of the entire Australian community, including the Aboriginal community, as well as taking into account the concerns of the native title party (*Little & Others v Oriole Resources Pty Ltd* [2005] FCAFC 243; (2005) 146 FCR 576 at [41]-[57]; *Dann v Western Australia* [1979] FCA 332; (1997) 74 FCR 391).

[44] The native title party contends that the grant of the proposed licence is likely to cause major disturbance to land and waters within the MIB claim area. The Tribunal's geospatial mapping does not identify any major watercourses within the boundaries of the proposed licence. The Government's quick appraisal indicates that there is one waterhole within the boundaries of the proposed licence. Mr Maitland Parker states, in AF13, that 'Mining companies don't often listen to the right people and don't respect our law and culture. The (sic) need to come and sit down and talk to us before they start interfering with the country. If the mining companies don't talk to us first we can't look after our country by practicing our

[45] I accept that the presence of strangers on the subject area may be upsetting to the native title party. However, the starting point and the precondition of enquiry in matters relating to s 237 (c) is evidence of physical disturbance that the proposed act will have on the land and waters concerned (see *Rosas v Northern Territory* (2002) 169 FLR 330 at 359). In other words, cultural concerns about unauthorised access, in terms of the native title party's traditional laws and customs, alone, cannot form the basis of the finding of major disturbance. There must be some physical disturbance over and above that which it has been judged will be prevented or made unlikely by the protective provisions and remedial regimes of the jurisdiction concerned. The only activities in this matter that could be pointed to, will be the exploration activities to be conducted by the grantee party. There is no evidence that there will not be compliance by the grantee party with the Government party's regulatory regime governing exploration activities; and the conditions imposed on the exploration licence dealing with ground disturbing activities include the standard requirement for rehabilitation of the land (Standard Conditions 1 – 4). In the absence of any other evidence of physical disturbance, the concerns expressed by the native title party are not sufficient to establish that major disturbance is likely to occur. Accordingly, I find, in my opinion, that there will **not** be major disturbance to land or waters in this case, as contemplated by s 237 (c) of the Act.

Determination

[46] The determination of the Tribunal is that the grant of exploration licence E47/1841 to Iron Duyfken Pty Ltd **is not an act attracting the expedited procedure because of my findings in relation to s 237 (a) and (b)**.

Neville MacPherson
Member
04 May 2010