NATIONAL NATIVE TITLE TRIBUNAL

***FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia*, [2011] NNTTA 107 (17 June 2011)**

Application No: **WF10/19**

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 (Yindjibarndi native title party)

-and-

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

- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION

Tribunal: Daniel O'Dea, Member
Place: Perth
Date: 9 July 2011

CORRIGENDUM

REASONS FOR DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CODUCT AN INQUIRY

Background

[1] The determination of the Tribunal in this matter was made on 17 June 2011. At [114], the Tribunal determined that E47/1398 and E47/1399 may be granted subject to, inter alia, the extra conditions which had been proposed by the State (see paragraph 44). The third of those conditions read as follows:

> iii. 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.

[2] The Tribunal further determined that M47/1431 may be done subject to conditions proposed by the State including inter alia, the extra conditions, which had been proposed by the State. The third of those conditions read as follows:

> iii. Where, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safe guard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his assessment and written approval; the grantee party must at the same time give to the native title party a copy of the proposal or addendums, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.

[3] On 1 July 2011 a solicitor from the State Solicitor's Office wrote to the Tribunal indicating that there was a difficulty with the condition imposed in [114] in that the 'State Mining Engineer' no longer existed. Consequently the condition imposed for the benefit of the native title party might not be able to take proper or full effect. The letter of the State Solicitor's Office accepted that the discrepancy in the wording between that contained in 114(iii) and 115(iii) arose as a result of an oversight by the Government party in providing the wording to the Tribunal. The State suggests the determination of the Tribunal be amended to delete the condition at 114(iii) and replace it with a condition identical to that at 115(iii). The State maintains that the change of wording would not affect the substance of that condition (4). On 1 July 2011, in response to the letter received from the State

Solicitor's Office, the Tribunal sought the views of the native title party and grantee party requesting them to provide their views on whether it was appropriate to amend the condition as proposed by the State by 4 July. On 7 July the grantee party wrote to the Tribunal indicated that it agreed to the proposed correction requested by the Government party. Despite repeated attempts to elicit a response from the native title party, no response has been received. In my opinion, the proposed correction does not alter the substance of the condition, remove any doubt that the condition will operate to the benefit of the native title party and can be simply achieved by substituting paragraph 115(iii) for 114(iii).

Decision

[4] The decision in application WF10/19 made by the Tribunal on 17 June 2011 and cited as *FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia* [2011] NNTTA 107 be amended so that the extra condition referred to in paragraph 114(iii) is deleted and replace with a condition identical to that at paragraph 115(iii)

Daniel O'Dea
Member
11 July 2011

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- and -

The State of Western Australia (Government party)

FUTURE ACT DETERMINATION

Tribunal: Daniel O'Dea, Member
Place: Perth
Date: 17 June 2011

Catchwords: Native title – future acts – application for determination for the grant of a mining lease –applications for determination for the grant of exploration licences – negotiation in good faith – authorisation of the native title party – length of negotiation period – conduct subsequent to bringing of determination application – grantee party negotiated in good faith – s 39 criteria considered – effect on registered native title rights and interests – effect of acts on sites or areas of particular significance – interests, proposals, opinions or wishes of native title party – economic or other significance of acts – public interest in doing of acts – any other matters the Tribunal considered relevant – determination that the acts may be done subject to conditions.

Legislation:

Native Title Act 1993 (Cth) ss 29, 30, 31, 35, 36, 38, 39, 62, 66, 109, 238, 253

Mining Act 1978 (WA) ss 63, 82, 84, 85

Aboriginal Heritage Act 1972 (WA) s 18

Environmental Protection Act 1986 (WA)

Wildlife Conservation Act 1950 (WA)

Cases:

Ankamuthi People v State of Queensland (2002) 121 FCR 68; [2002] FCA 897

Australian Manganese Pty Ltd v State of Western Australia (2008) 218 FLR 387; [2008] NNTTA 38

Butchulla People v State of Queensland (2006) 154 FCR 233; [2006] FCA 1063

Cheedy obh Yindjibarndi People v State of Western Australia [2010] FCA 690

Cheinmora v Striker Resources NL and Others (1996) 142 ALR 21; [1996] FCA 1147

Daniel v State of Western Australia [2003] FCA 666

Doxford, Re [2003] QLRT 58

FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 38

FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia [2009] NNTTA 69

FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia [2009] NNTTA 91

FMG Pilbara Pty Ltd v Cox (2009) 175 FCR 141; (2009) 255 ALR 229; [2009] FCAFC 49

Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corp (2005) 196 FLR 52; [2005] NNTTA 88

Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW) [2003] FCA 981

Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd (1998) 163 FLR 274

Mt Gingee Munjie Resources Pty Ltd v State of Victoria (2003) 182 FLR 375; [2003] NNTTA 125

Ned Cheedy and Others on behalf of Yindjibarndi People 1/FMG Pilbara Pty Ltd/Western Australia [2011] NNTTA 30

Placer (Granny Smith) Pty Ltd v Western Australia (1999) 163 FLR 87

Roe v Kimberley Land Council Aboriginal Corp [2010] FCA 809

Tigan v State of Western Australia (2010) 188 FCR 533; [2010] FCA 993

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 [2003] NNTTA 82

Ward and Others v State of Western Australia and Another (1996) 69 FCR 208; (1996) 136 ALR 557; [196] FCA 1452

Western Australia v Taylor and Another (1996) 134 FLR 211; [1996] NNTTA 34

Western Australia v Daniel (2002) 172 FLR 168; [2002] NNTTA 230

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

Western Australia v Ward (2000) 99 FCR 316; (2000) 170 ALR 159; [2000] FCA 191

Western Desert Lands Aboriginal Corporation v Western Australia and Another (2009) 232 FLR 169; (2009) 2 ARLR 214; [2009] NNTTA 49

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

Hearing dates:	n/a
Representatives for the Yindjibarndi native title party:	Mr George Irving, John Toohey Chambers Mr Simon Millman/Ms Kate House, Slater and Gordon
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 Simon Taylor, State Solicitor's Office Ms Paola O'Neill, Department of Mines and Petroleum

REASONS FOR DECISION ON WHETHER THE TRIBUNAL HAS POWER TO CODUCT AN INQUIRY

Background

[5] On the following dates, the State of Western Australia ('the Government party') gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act'/'NTA') of future acts, namely the grant of the following mining leases and exploration licences ('the proposed tenements') under the *Mining Act 1978* (WA) to FMG Pilbara Pty Ltd ('the grantee party'):

- 12 January 2005 – E47/1398 comprising 222.07 square kilometres located 63 kilometres south west of Marble Bar in the Shire of Ashburton;
- 18 January 2006 – E47/1399 comprising 215.65 square kilometres located 22 kilometres north west of Wittenoom in the Shire of Ashburton; and
- 26 August 2009 – M47/1431 comprising 2964.66 hectares located 45 kilometres west of Wittenoom in the Shire of Ashburton.

[6] E47/1398 is 100% within the Yindjibarndi #1 claim (WC03/3, registered from 8 August 2003). E47/1399 is 71.2% within the Martu Idja Banyjima claim (WC98/62, registered from 29 September 1998) ('the MIB claim') and 28.8% within Yindjibarndi #1. M47/1431 is 100% within the Yindjibarndi #1 claim.

[7] MIB apparently reached an agreement with the grantee party in relation to E47/1399 and did not participate in these proceedings.

[8] A reference to the native title party in these proceedings is a reference to the registered native title claimant for the Yindjibarndi #1 claim group.

[9] The future act determination application was made pursuant to s 35 by the grantee party on 25 August 2010, a point in time at least six months after the notification date (s 35(1)(a) of the NTA).

[10] On 27 August 2010, Deputy President Sumner appointed me as the Member to constitute the Tribunal for the purpose of conducting the future act determination inquiry. The original directions in this matter were set by me on 10 September 2010. Those directions accommodated the fact that the native title party contended that the grantee party and

Government party had failed to negotiate in good faith with it as required by s 31 of the Native Title Act.

[11] The protracted process of compliance with those initial directions, as extensively amended, is set out in a decision that I made in relation to some of the later amendments to the directions in *Ned Cheedy and Others on behalf of Yindjibarndi People 1/FMG Pilbara Pty Ltd/Western Australia* [2011] NNTTA 30 (1 March 2011) ('*Cheedy 2011*'), and I do not intend to repeat that history in this decision. Those reasons related to orders which were made by me on 11 February 2011. Subsequent to that, there was a further amendment sought by the grantee party in order that it might be in a position to file properly sworn affidavits, filed on behalf of the grantee party, sworn by some of the persons who formed the Yindjibarndi #1 applicant group and members of the claim group. Neither the Government party nor the native title party objected to the short extension of four days sought by the grantee party, and upon the receipt of those documents, a listing hearing was called by the Tribunal for 11 March 2010. By that stage, all the material, including the affidavits, had been provided to the Tribunal and served on the other parties. At the directions hearing, in response to my enquiry as to whether any party sought an on country hearing or to cross examine any of the witnesses that had provided evidence to the Tribunal, I was advised by the solicitor for the native title party, Ms Katharine Estelle House, that she was content for the matter to be determined on the papers, and the representatives of the other parties concurred in that view. Consequently, I determined that the matter would be determined on the papers.

[12] On 18 March 2011, the Tribunal received an email from Mr Simon Millman, a solicitor with Slater and Gordon, the solicitors for the native title party, indicating that the position adopted by the native title party at the Tribunal, to the effect that the matter could be determined on the papers was, in fact, not correct. Mr Millman stated that he would be filing an application urgently seeking to list this matter for further directions where the native title party would seek leave to file further affidavit material and 'to have the matter proceed to hearing, so that the deponents of the affidavits filed by the Grantee Party can be cross examined, prior to determination'. Subsequently, an affidavit of Ms Katharine Estelle House was filed, supporting an application for relisting of the matter. In that affidavit Ms House deposed to the fact that she had forwarded the material that had been served on Slater and Gordon on 4 March to Mr Irving of counsel on 9 March. On 11 March she had spoken to Mr

Irving by phone seeking his advice on how to proceed. Mr Irving provided instructions to proceed on the papers unless the grantee party sought to cross examine Mr Woodley. According to Ms House's affidavit, Mr Irving at that stage had been unaware of the existence of the additional affidavits and had given his advice while unaware. Apparently Mr Irving contacted Ms House on Monday 14 March and indicated that, in light of the affidavits that had been filed by the grantee party, responsive affidavits should be filed. Subsequently, the listing hearing was relisted for 24 March. The grantee party and the Government party opposed any extension of time or alteration to the existing orders. At the listing hearing, the native title party did not seek a hearing on country or a right to cross examine any of the members of the native title party claimant group who had filed affidavits on behalf of the grantee party, but they did initially seek the right to file responsive affidavits. After some argument between the parties, the native title party withdrew that request and reasserted its position of 11 March that it agreed to the matter being dealt with on the papers with the existing material. Consequently, I again agreed to determine that matter on the papers.

[13] As is noted in *Cheedy 2011*, the native title party withdrew its assertion of a failure to negotiate in good faith against the Government and grantee parties on 18 November 2010. This was after all parties had filed contentions, but before the native title party had filed contentions in response. In early January 2011, the native title party sought to again raise the issue of the failure of the grantee party to negotiate in good faith, on the basis that it had become aware of information it did not previously possess, which materially changed its view of the alleged behaviour of the grantee party. As has been determined in the past, the question of whether a party to a s 35 proceeding before the Tribunal has failed to negotiate in good faith, other than the native title party, is critical to the power of the Tribunal to proceed to make a determination (see *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141; (2009) 255 ALR 229; [2009] FCAFC 49 ('*Cox*') at [143]). Notwithstanding the fact that the matter has been raised for a second time after being abandoned, and the consequent inconvenience and expense to the parties, it is incumbent upon the Tribunal to resolve the issue before proceeding to make any determination under s 35 (see *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* [2003] NNTTA 82 per Hon CJ Sumner at [15]). When the native title party's second statement of contentions in relation to good faith was filed on 28 January 2011, they included the statement to the effect that the native title party did not seek to rely on its previous contentions regarding good faith nor,

except in respect of parts expressly identified, did it seek to rely on the affidavit of Michael Woodley, sworn on 16 October 2010 (native title party contentions at para 1.5). Significantly, the native title party stated (at para 1.1 of its contentions) that its contentions were filed on behalf of four of the seven people who jointly comprise the applicant in the Yindjibarndi #1 claim, the native title party in this matter. The grantee party did continue to rely on the documents that it had filed in relation to the first assertion of the failure to negotiate in good faith, as well as the documents it filed subsequently in relation to the second such assertion.

THE GOOD FAITH ISSUE

[14] For the sake of clarity I set out below the documents that I had before me when making the determination in relation to the question of good faith:

- Native title party's statement of contentions in relation to good faith negotiations, undated, filed on 28 January 2011, including attachments;
- Affidavit of Michael Woodley sworn on 17 January 2011;
- Affidavit of Michael Woodley sworn on 4 February 2011;
- Affidavit of Michael Woodley sworn on 16 October 2010, to the extent that it is referred to in the native title party's contentions of 28 January 2011;
- Grantee party's statement of contentions for good faith hearing dated 2 November 2010;
- Grantee party's list of documents dated 2 November 2010;
- Grantee party's statement of facts dated 2 November 2010;
- A DVD containing a large image of each document contained in the grantee party's list;
- Grantee party's second statement of contentions for good faith hearing dated 4 February 2011;
- Government party's statement of contentions regarding the negotiation in good faith of the grantee party dated 28 October 2010; and
- Affidavit of Paola O'Neill sworn 28 October 2010.

I have also had reference to the affidavits of Aileen Sandy, Sylvia Allan, and Mavis Pat, all affirmed on 28 February 2011, in relation to the question of the native title party's authorisation to raise the issue of the grantee party's failure to negotiate in good faith.

[15] I adopt the relevant legal principles from *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corp* (2005) 196 FLR 52; [2005] NNTTA 88 (at [55]-[60]) ('*Gulliver Productions*'), for the purposes of this enquiry, unless in conflict with the full Federal Court decision in *Cox* (see also *Mt Gingee Munjie Resources Pty Ltd v State of Victoria* (2003) 182 FLR 375; [2003] NNTTA 125 ('*Mt Gingee Munjie*'), and *Western Australia v Taylor and Another* (1996) 134 FLR 211; [1996] NNTTA 34 ('*Taylor*')).

[16] Having examined the documents filed by the parties in relation to the question of good faith, I have identified the four core issues which need to be addressed:

a) The capacity of the native title party to assert that the grantee party has failed to negotiate in good faith;

b) The question of whether the grantee party brought the s 35 application in relation to M47/1431 before the expiry of the requisite six month period;

c) Whether the grantee party commenced negotiations with persons other than the registered native title claimants for the native title claimant group, and that such actions amounted to a failure to negotiate in good faith; and

d) Whether the grantee party encouraged dissent within the claimant group in a manner which constituted a failure to negotiate in good faith.

[17] The negotiation parties, under the right to negotiate provisions, are the Government party, the grantee party and the native title party (see s 30A of the NTA). If any negotiation party satisfies the Tribunal that any other negotiation party (other than the native title party) did not negotiate in good faith, as mentioned in s 31(1)(b) of the NTA, the Tribunal must not make a determination (s 36(2) of the NTA). The practical effect of s 36(2) is to place an evidentiary burden on the party alleging lack of good faith negotiations which would normally require it to produce evidence to support its allegations. The Tribunal is not required to adopt strict rules on the burden of proof but any party alleging a lack of good faith negotiations must provide contentions and documents which specify in detail the matters it relies on (*Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 at [21]-[28]).

AUTHORISATION

[18] As noted above at [9], contentions were filed on behalf of four of the seven people who jointly comprise the applicant in the Yindjibarndi #1 claim. It is those seven people who comprise the native title party in this matter. Therefore, there is an issue which goes to the question of how I should determine this challenge to the question of good faith, and that relates to the capacity of the native title party in these circumstances to mount such a challenge. Section 30A states that the parties to a future act negotiation or determination pursuant to Part 2 Division 3, Subdivision P, are the Government party, the native title party and the grantee party. Pursuant to the definition of native title party in s 253 of the NTA, the words native title party has the meaning given by ss 29(2)(a) and (b), and 30. Relevantly in this claim, where a determination of native title has not been made, and where a registered native title claim exists, the native title party, pursuant to s 29(2)(b)(i) is any registered native title claimant. The note to that section states:

> 'Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of **registered native title claimants** in section 253.'

Section 253 defines a registered native title claimant as:

> '...a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the lands or waters.'

Again, s 253 states that the applicant has the meaning given to it by s 61(2). Subsection 61(2) states that:

> '(2) In the case of:
>
> (a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or
>
> (b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;
>
> the following apply:
>
> (c) the person is, or the persons are jointly, the ***applicant***; and
>
> (d) none of the other members of the native title claim group or compensation claim group is the ***applicant***.'

In *Roe v Kimberley Land Council Aboriginal Corp* [2010] FCA 809 ('*Roe*'), Gilmour J stated (at [42]) that:

> '… it is only the applicant in the GJJ native title claim, Mr Roe and Mr Shaw acting jointly, who was standing to sue the KLC on behalf of the GJJ native title claim group.'

In that case, Gilmour J referred to the decision of Drummond J in *Ankamuthi People v State of Queensland* (2002) 121 FCR 68; [2002] FCA 897, and quotes [7] and [8] thereof to the following effect:

> '[7] The provisions of that Act are clear. Section 61 makes provision for, among other things, a person authorised by all members of the native title claim group to bring an application for determination of native title on behalf of the claim group. Such a proceeding is obviously a representative proceeding. By s 61(2), it is provided that where a person authorised by a claim group to bring an application of native title on behalf of the group makes such an application, that person is the applicant and none of the other members of the claim group is the applicant.
>
> [8] It is clear enough from that provision that it is only the named applicant who has control of the litigation instituted by the filing the application for a determination of native title on behalf of the claim group. The other members of the group, so far as the Court is concerned and so long as the applicant remains the applicant in these proceedings, have no authority to take any step in the proceedings. That follows, by implication from s 61(2), from identifying the person who makes the application as the applicant and declaring that no other member of the claim group is the applicant. But if more were needed, it is to be found in s 62A, which explicitly states that to be the position.'

Gilmour J also quoted with approval from the judgment by Stone J in *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation* (NSW) [2003] FCA 981 (at [8]), where she said:

> 'The history of the Pooncarie Barkandji (Paakantyi) People #8 shows that there have been persistent problems in the relations between Dorothy and Philip Lawson and other applicants. In the proceedings presently under consideration there have been attempts to have the applicants separately represented; that is to have Mr Dengate represent the Lawsons with the other applicants represented by someone else. These attempts reveal a fundamental misunderstanding of the role, of applicants in native title determination applications. Such applicants are representatives of the claimant group; they have no personal interest other than as members of the claimant group and for this reason their interests do not differ from each other or from the claimant group and separate representation is inappropriate and unacceptable.'

Gilmour J quoted Kiefel J in *Butchulla People v State of Queensland* (2006) 154 FCR 233; [2006] FCA 1063 (at [38]) to the effect that:

> 'The evident purposes of s 61 are to provide for representation of the claim group, to limit the number of persons who act as 'the applicant' in the proceedings and when, more than one person is authorised, to require them to act in concert with each other. It may be assumed that since the persons authorised have a common interest in the subject matter of the claim acting jointly should not present a difficulty. Regrettably this is not always the case. In any event the section seeks a workable and efficient method of prosecuting claims for native title determination, one which limits the potential for dispute which might stifle the progress of claims.'

[19] In *Tigan v State of Western Australia* (2010) 188 FCR 533; [2010] FCA 993 ('*Tigan*'), Gilmour J (at [11]) specifically rejected a submission from the second respondent to the effect that:

> '... while the applicant is, relevantly, pursuant to s 61(1) the persons, jointly, who are authorised by all the persons (the native title claim group) who, according to their traditional

> laws and customs, hold the common or group rights and interests comprising the particular native title claimed, there is no requirement that the persons who jointly are the Applicant must be unanimous in order for them to make a valid decision.'

Gilmour J, in rejecting that proposition, repeated what he said in *Roe* to the effect that by virtue of s 62A of the Act, it is the applicant who may deal exclusively with all matters arising under the Act in relation to the claimant application. I take that to mean, in these circumstances, that there is a serious question as to the status of the participation of the native title party in these proceedings in circumstances where it is clear that there is a dispute between the persons who jointly comprise the applicant group as to the course of action to be adopted. The affidavits of Aileen Sandy, Sylvia Allan, and Mavis Pat state categorically that they were not consulted by Mr Woodley about his participation in these proceedings, they did not authorise Mr Woodley to participate in these proceedings, and if they had been approached by Mr Woodley in relation to these proceedings, they would not, in their capacity jointly as members of the applicant group, have agreed to such involvement. Mr Woodley now, in his affidavit sworn on 17 January 2011 (at para 1.4) acknowledges that it is sworn on behalf of four of the members of the applicant group, on behalf of senior Yindjibarndi Lawmen and the majority of members of the native title party. His situation is also acknowledged at para 1.1 of the statement of contentions of the native title party in good faith negotiations of 28 January 2011. In those circumstances, it may well have been open to me to make a determination that there was no validly raised assertion of a failure to negotiate in good faith in these proceedings. I have not adopted that course because the affidavits that were sworn by Aileen Sandy, Sylvia Allan, and Mavis Pat were not in the possession of the native title party until they were filed in this Court after the affidavit of Mr Woodley of 17 January and subsequent contentions had been filed, albeit that such a situation was anticipated in both the affidavit and the contentions. In light of the decisions in *Roe* and *Tigan*, it is clear that the question of the views of the majority of the claimant group in these circumstances is not relevant. The course of action in circumstances where the views of the majority of the claimant group conflict with some or all of the persons who make up jointly the applicant is to bring a s 66B application to remove those dissenting members of the applicant.

[20] The Tribunal has dealt with a similar situation as this in the matter of *Mt Gingee Munjie*. In that matter, similar to this, factions had emerged amongst the persons who jointly comprised the applicant. Negotiations had been pursued separately and one of the groups, but not the other, in the context of a s 35 application, sought to assert that the grantee party

had failed to negotiate in good faith. In that matter, Deputy President Sumner made the following findings (at [36]):

> '…individual persons named as part of the applicant or factions within it are not a native title party and do not have standing to make a contention that the Government or grantee parties have not negotiated in good faith unless authorised to do so by the claim group…'

In light of the most recent decisions of Gilmour J in *Roe* and *Tigan*, it would appear to me that while the first part of that finding remains unaltered, the qualification is no longer available. In other words, even if the claimant group as a whole had authorised one or more of the persons that jointly comprised the applicant to assert the contention of a failure to negotiate in good faith against the grantee party, they would still not have the capacity to make such a contention. Of course, if, in light of that decision of the broader claim group, the persons who comprised the applicant, who were opposed to the making of such a contention, decided to change their minds and follow the views of the claimant group, that would be a different matter. In this case, there was neither such a meeting, nor a change of mind. Notwithstanding that, for the reason set out above I have chosen to address the substance of the complaint that the grantee party has failed to negotiate in good faith on the basis that substance of the complaints came to the Tribunal before the question of authorisation was clear. I note also that neither the Government Party nor the grantee party made submissions to the effect that I should not entertain the matter.

THE SIX MONTH PERIOD

[21] Under the scheme of the right to negotiate provisions of the Act, any of the parties to the right to negotiate provisions, being the Government party, the grantee party, or the native title party, can bring a s 35 application seeking a s 38 determination only if two criteria have been met. Firstly, s 35(1)(a) requires that a period of six months has passed since the notification day, specified pursuant to s 29(4). Pursuant to s 29(6) of the Act, the notification day must be the day that, in the Government party's opinion, it is reasonable to assume all notices under s 29(2) and (3) in relation to the doing of the act will have been received or otherwise have come to the attention of the persons who must be notified. Secondly, pursuant to s 35(1)(b), there must be no agreement made of the kind mentioned in s 31(1)(b). If those two conditions have been met, a party may bring the s 35 application by lodging the requisite form with the Tribunal. Once the application has been lodged with the Tribunal, the Act gives the parties an opportunity to challenge the power of the Tribunal to make the determination of the application under s 38 by alleging that one or more of the parties has

failed to negotiate in good faith as required by s 31(2) (see s 36(2)). If any party can satisfy the Tribunal that any other party, other than the native title party, has failed to negotiate in good faith, the Tribunal does not have the power to make a determination of the application under s 38. The proposition that there is a requirement under the Act that in order to satisfy the requirements of negotiating in good faith, there must be some form of engagement, lasting for a period of six months, is misconceived. As I explained in *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 38 (at [67]) ('*Cheedy 2009*'), there is no obligation:

> '…to negotiate in any physical sense for a period of six months. What is required is that the parties negotiate in good faith with a view to obtaining an agreement with the native title party to the doing of the Act upon conditions and those negotiations are confined to matters related to the effect of the Act on the registered native title rights and interests of the native title party. The actual period of the negotiations which would need to take place in order to establish that the parties had negotiated in good faith, is not necessarily related to the length of time spent negotiating. Rather it is the quality of the process that will be determinative of the question of whether the parties have engaged in the process in good faith.'

[22] The parties are not required to negotiate for six months. They are required to genuinely engage in a process of attempting to reach an agreement about the doing of the act with or without conditions in a manner which has been variously described by Members of the Tribunal and the Federal Court (see *Taylor* and *Gulliver Productions*). There is no required duration for the unfolding of this process. The critical issue is the quality of the behaviour of the parties as the process unfolds. That process must occur prior to the lodgement of any s 35 application, which can only occur by virtue of s 35(1)(a), six months after the notification date. Subject to a challenge to the power of the Tribunal to make a decision in relation to a s 35 application, the s 35 application can be brought six months after the notification date, and in circumstances where no agreement pursuant to s 31(1)(b) has been agreed to. The simple fact that negotiations do not commence a minimum of six months before the bringing of any s 35 application is immaterial. It may be that the more truncated the process of negotiation between the parties becomes, the greater the possibility that there may have been a failure by one party or another to negotiate in good faith, and again that would depend on the nature of the conduct of the parties. The first condition for the bringing of a s 35 application is tied to the six month period after the notification date and is not affected in any way by the conduct of the negotiations or their date of commencement.

[23] In respect of the matters currently before the Tribunal, the notification date for application E47/1398 was 12 January 2005 and consequently the six month period expired on 13 July 2005. For application E47/1399, the notification date was 18 January 2006 and

consequently the six month period expired on 19 July 2006, and for M47/1341, the notification date was 26 August 2009 and consequently the six month period expired on 27 February 2010.

[24] The native title party submits that the negotiations in relation to E47/1398 and E47/1399 did not commence until the native title party received a draft agreement from the grantee party on 23 July 2009, and consequently that that was the start of the six month negotiation period (see para 2.4 of the native title party's contentions in relation to good faith negotiations of 28 January 2011). As explained above, this is a misunderstanding of the operation of the *Native Title Act*. More importantly, the native title party, in its submissions, asserts that there was a failure to negotiate in good faith in relation to M47/1431, because the grantee party did not commence negotiations until it forwarded a draft agreement on 21 April 2010 (see paras 1.3 and 1.4 on page 4 of the native title party's contentions in relation to good faith negotiations of 28 January 2011). The inference apparently drawn is that the period of required negotiations in relation to that tenement did not expire until 22 October 2010, some two months after the s 35 application was brought, and therefore that application was brought in contravention of s 35(1)(a). This contention must be rejected.

[25] It may well be that the actual negotiations did not commence until 21 April 2010 in relation to M47/1431, but there is no obligation on any party, pursuant to the NTA, to negotiate in good faith for a period of six months. In relation to M47/1431, the notification date was 26 August 2009, and the six month period expired on 27 February 2010. Negotiations did not commence until 21 April 2010, and the application for the determination, in relation to M47/1431 and the others, was brought on 25 August 2010. The question that I will need to address in this matter relates to whether there were good faith negotiations between the native title party and the grantee party in relation to M47/1431 between the notification date and 25 August 2010. The position in relation to this point was reiterated by the Full Federal Court in *Cox* (at [21]), where Their Honours said:

> '[21] The scheme of the relevant provisions of the Act recognises Parliament's intention that there must be a good faith period of negotiation in relation to the future act before there is any arbitral determination in relation to the future act. The period of six months provided for in s 35 of the Act ensures that there is reasonable time to enable those negotiations to be conducted. At the same time it permits the matter to be taken forward at the end of the six-month period by way of an arbitral determination if the negotiations do not result in agreement. The ongoing protection provided for "negotiation parties" as defined by s 30A of the Act is that if any such party satisfies the arbitral body, in this case the Tribunal, that another negotiation party (other than the native title party) did not negotiate in good faith, the arbitral body must not make the determination on the application: s 36(2).

> [22] There are two obligations, therefore, spelt out in the statutory scheme. The first is that the negotiations which are directed to reaching an agreement are to be carried out in good faith and the second is that a period of not less than six months has passed since the date on which the s 29 notice is given.'

[26] As the Full Court said in *Cox* (at [20]):

> 'It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations.'

Consequently, if it be the case in this matter that there had been no approach by the grantee party to the native title party to negotiate on these matters until 21 April 2010, which was some two months after the six month period required by the act had expired, there is no necessary implication that there has been a failure to negotiate in good faith. That question will be addressed at the time the s 35 application was made, in assessing the conduct of all the negotiation parties in the period prior to the bringing of the s 35 application. The fact that negotiations, after they were initiated, were conducted for only four months prior to the bringing of the application under s 35 is not a matter of itself which is indicative of any party's failure to negotiate in good faith. What the Tribunal must focus on is the quality of the conduct displayed by all the negotiation parties up until the time of the bringing of the s 35 application, which must be more than six months after the notification date but may, as in this case, be significantly longer.

[27] The decision of the Full Court in *Cox* is also authority for the proposition that the negotiations need not have reached any particular stage in order to be characterized as having been conducted in good faith. Therefore the fact that negotiations have only reached an embryonic stage does not mean that there has been a failure to negotiate in good faith. As the Full Court said (at [23]) 'it puts a gloss on the statutory revisions and places a fetter on the negotiation party's entitlement to make an application under s 36 in order to obtain an arbitral determination'. In these circumstances, by its own contentions, the native title party accepts that a proposal was put forward by the grantee party in relation to M47/1431, and was rejected by the native title party (see paras 1.3 and 1.6 of the native title party's contentions in relation to good faith negotiations). In any event, the factual matters relating to notification dates and commencement of negotiations were matters known to the native title party prior to the withdrawal to its original contentions in relation to the failure to negotiate in good faith, and they cannot have been said to have arisen subsequent to the bringing of the s 35

application, or to events which occurred in December 2010 onwards. Notwithstanding that, the conduct of the grantee party, which the native title party alleges it is now aware occurred prior to the lodgement of the s 35 application, is still relevant to the question of whether the negotiation of good faith in relation to this tenement took place.

THE NEGOTIATIONS

[28] Apart from the matter relating to the notification date concerning M47/1431, the native title party's assertion of a failure to negotiate in good faith is based on 'information that came to light after the previous allegation was withdrawn' (see para 1.4 of the native title party's contentions of 28 January 2011). The central allegation contained at para 2.1 of the native title party's contentions is that the grantee party, in the absence of the native title party, negotiated an agreement which concerned the grant of the tenements with certain individuals who are members of the Yindjibarndi native title claimant group. They contend that while they do not know when those negotiations commenced, they infer, on the basis of a letter from Blair McGlew to Michael Woodley, dated 30 November 2010 (attachment 1 to NTP contentions) that 'it appears they had been occurring for some time'. The native title party contends (at para 2.5) that Mr Woodley responded to Mr McGlew's letter on 8 December 2010 (attachment 2 to NTP contentions) 'refuting among other things the proposition that a clear majority of Yindjibarndi people were in favour of concluding an agreement with FMG'. At para 2.6, there is a suggestion that other evidence provided by Mr Woodley 'suggests that negotiations, in the absence of the NTP ... may have commenced prior to the meeting between FMG, the NTP and the Yindjibarndi community, which was convened by the President of the Tribunal, in Roebourne on 10 August 2010.' The native title party contends at para 2.7 that on the basis of the evidence provided by Mr Woodley, at paras 52 and 55 of his affidavit of 16 October 2010, that the offer put at the meeting in August 2010 was the same as that put by FMG in 2008, save for a proposal in relation to a payment of $500,000 to 'Yindjibarndi Elders'. The contentions quote Mr Woodley at para 54 of the affidavit, where he says the following:

> '*Throughout the course of our negotiations with FMG, neither the Native Title Party, nor any other members of our negotiating team has ever asked for compensation payments to be directed towards particular Yindjibarndi individuals or groups. Instead the focus has been on securing outcomes for the benefit of the Yindjibarndi community as a whole – outcomes directed towards self-determination and autonomy as a means of gaining control over the social problems that have afflicted our community since colonisation.*'

This statement of the outcomes sought in negotiations between the native title party and the grantee party is apparently corroborated in a letter written by Mr Irving, counsel for the Yindjibarndi people to President Graeme Neate on 14 July 2010 (grantee party document 110). The final two contentions of the native title party in relation to good faith sum up the substance of what they allege founds the failure to negotiate in good faith by the grantee party in these negotiations. At para 2.9, it is suggested that Mr Woodley's affidavit of 17 January and the material set out in the contentions are sufficient to allow the Tribunal to conclude that the grantee party commenced negotiations, with persons other than the native title party, regarding the grant of the tenements prior to the end of the required negotiation period. This is an argument based on the assertion by the native title party that the six month negotiation period in relation to M47/1431 expired on 21 October 2010. As noted above, I have already rejected this contention.

[29] The second significant contention of substance, as expressed in paragraph 2.10, is that the grantee party failed to negotiate in good faith because it encouraged dissent within the claim group (presumably by commencing negotiations with individual members of the Yindjibarndi claim group), which led to a breakdown in relations between those persons who jointly formed the applicant group. This had the further consequence of the native title party not being able to make joint decisions, and consequently needing to resort to a s 66B application to the Federal Court, in order to reconstruct a functioning applicant group. *Tigan* at [28] per Gilmour J is cited as a reference.

[30] At this point it is useful to set out the affidavit of Mr Woodley, sworn on 17 January 2010, in full below:

> I, Michael Woodley, Chief Executive Officer of Yindjibarndi Aboriginal Corporation; and, Chief Executive Officer of Juluwarlu Aboriginal Corporation, of 664 Lockyer Way, Roebourne, in the State of Western Australia, make oath and say as follows:
>
> **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. The native title rights and interests that were recognised in the Yindjibarndi Native Title Determination are held in trust, for the benefit of the Yindjibarndi People, by the Yindjibarndi Aboriginal Corporation ("YAC"), a Prescribed body[sic] Corporate ("PBC") under the *Native Title Act* 1993 (Cth).

1.3. I am also a member of the Applicant for the Yindjibarndi #1 Native Title Determination Application, which was lodged in the Federal Court on 9 July 2003 (Federal Court ref: WAD6005/03), and entered on the Register of Native Title Claims, in the National Native Title Tribunal ("Tribunal"), on 8 August 2003 (Tribunal ref: WC03/3).

1.4. I am authorised to make this affidavit on behalf of the senior Yindjibarndi Lawmen, and, for reasons that will be explained below, the majority of the members of the Native Title Party, for the Inquiry by the Tribunal into whether or not two Exploration Licences, E47/1398 and E47/1399, and one Mining Lease, M47/1431([sic]the "Tenements") should be granted by the State of Western Australia ("Government Party") to FMG Pilbara Pty Ltd ("Grantee Party"); and if so upon what, if any, conditions they should be granted.

1.5. 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.

1.6. I know the Tribunal in this inquiry has to consider how the grant of these Tenements will affect the enjoyment of our registered native title rights, as well as some other issues; and I will address those issues in a separate affidavit. However, the Native Title Party and the senior Yindjibarndi Lawmen, along with the majority of people in the Yindjibarndi #1 claim group, are very upset about what FMG has been doing since we withdrew earlier allegation[sic] about the absence of good faith negotiations and I wish to address that first.

1.7. In the second week of December 2010 it became clear that FMG had been negotiating about the Tenements with certain members of the Yindjibarndi community, behind the back of both the Native Title Party and YAC; and had reached an agreement with those people which would affect both the Yindjibarndi #1 Claim area and the Yindjibarndi Native Title Determination Area. Some of those people set up a new Aboriginal Corporation to receive the benefits of that agreement and then tried to stop the Native Title Party from going on with this inquiry.

2. Background

2.1. FMG's negotiating position with the Native Title Party in respect of the grant of the Tenements has been the same as it was in 2008 in respect of the grant of three mining leases (M47/1409, M47/1411 and M47/1413), which were the subject of the Tribunal's Determinations in 2009 (the "three mining leases").

2.2. FMG wants what it calls a Whole of Country Land Access Agreement ("WOCLAA") under which:

a. FMG can "manage" our cultural heritage through a cultural management regime that is based on mitigating damage to our sacred sites and areas of significance but ultimately allows FMG, without our consent and against our opposition, to obtain the Minster's consent under s 18 of the *Aboriginal Heritage Act* 1972 ("AHA") to damage or destroy any of our sites or areas that stand in the way of FMG's development plans in Yindjibarndi country;

b. Yindjibarndi must not object to the grant of:

- any of the tenements and other interests FMG wants for its Solomon Project;
- all the Exploration Licences FMG has already applied for, in both the Yindjibarndi #1 claim area and the Yindjibarndi Determination Area;
- any other tenements or interests that may, in the future, be desired by either FMG, or any other person with whom FMG has or may have an agreement, which affects the land and waters of the Yindjibarndi #1 Claim Area, the

Yindjibarndi Determination Area or any other area that might be claimed by Yindjibarndi.

2.3. FMG has insisted, for the sake of "consistency", that it will not go beyond a compensation package that is equal to what it has previously offered to other indigenous groups in the Pilbara; namely, a fixed annual payment, (worth far less than what is offered by other iron ore mining companies to indigenous groups in the Pilbara); and, an annual VTEC allowance to train indigenous people to work in the mining industry, which potentially provides FMG with the benefit of a "local" work force.

2.4. FMG's alternative to a whole of country land access agreement is for separate agreements for clusters of tenements as required. However, the agreements proposed by FMG in those circumstances adopt the same approach to heritage management as for a WOCLAA and the same approach to compensation.

2.5. FMG's WOCLAA offer was rejected in 2008 by both the Native Title Applicant and the YAC Board, with the unanimous endorsement of the Yindjibarndi Community – and we have continued to reject this offer for three reasons:

a. FMG's agreement would make FMG the master of both our country and our cultural heritage, because the agreement makes sure FMG will always win if there is any conflict between our interests and what FMG wants to do;

b. FMG's compensation package is based on our agreement to give up our "procedural" rights, under the Native Title Act; but FMG's agreement would stop us from ever seeking any further compensation for the loss or impairment of our substantive native title rights and interests once they have been determined to exist by the Court; and,

c. the compensation package offered by FMG does not take into account the effect that FMG's operations will have on the religious observances and practices we carry out on our country and the effect this will have on our community.

2.6. Because we refused to sign up to what FMG wants, FMG adopted a strategy to create dissent in our community.

2.7. In February 2010, FMG"s[sic] Blair McGlew asked me to organise an[sic] Yindjibarndi community meeting, so that FMG could satisfy itself that all members of our community knew we[sic] were doing by rejecting FMG's WOCLAA offer. Mr McGlew threatened to organise his own community meeting if I didn't comply with that request. I reminded Mr McGlew that FMG's offer had been rejected unanimously at the community meeting he attended in 2008; and, since the terms of that offer remained unchanged, there was no point in arranging another meeting. Mr McGlew told me that he would go ahead and arrange his own community meeting. Mr McGlew confirmed this in writing by way of a letter to Slater & Gordon, by letter dated 26 February 2010 (attached as "**MW1**").

2.8. Mr McGlew held his meeting in Roebourne on 8 March 2010 against the opposition of the Native Title Party and YAC. This was during the time when the Tenements were in mediation, as part of a WOCLAA, before Member Catlin in the Tribunal.

2.9. At this meeting FMG handed out a flyer, with the title "*Yindjibarndi – Fortescue Information Paper*" (attached as "**MW2**"). It is apparent from that flyer that the purpose of the meeting was to create dissent in the Yindjibarndi community by convincing our members that their elected representatives on YAC, and the Native Title Party, were wrong when they rejected FMG's WOCLAA offer and were wrong when they refused to take part in heritage surveys, because in the end FMG will get what it wants anyway and "under the law, no financial compensation is payable to Yindjibarndi" if FMG goes through the Tribunal's process as it did for the three mining leases.

2.10. The meeting caused serious disputes in our previously unified community, so the Native Title Party held another community meeting, on 30 April 2010, to try to reach consensus. The meeting was difficult but eventually it was unanimously agreed that the Native Title Party and YAC should continue to:

a. reject FMG's offer; and,

b. refuse to participate in heritage surveys, because doing so will give FMG the information it needs to make section 18 applications.

2.11. Three weeks after this meeting, FMG stationed its in-house anthropologist, Michael Gallagher, in Roebourne four days a week. I asked Mr Gallagher what he was doing and he told me his brief was to "continue to explain FMG's project and proposal agreement to any interested members of the Yindjibarndi community".

2.12. On Tuesday 6 July 2010, Michael Gallagher and Alexa Morecombe held a second meeting in Roebourne with members of the Yindjibarndi community. The Native Title Party and the YAC Board were not informed of, nor invited to attend, this meeting.

2.13. This second meeting was conducted during the period when the Native Title Party and FMG were in mediation about the Tenements (as part of a WOCLAA) before the President of the Tribunal.

2.14. Bigali Hanlon attended this meeting and told me after it finished that she had believed she was going to a VTEC employment and training workshop run by FMG but that when she arrived she was told that FMG would pay her $500 if she stayed and listened to what Alexa Morcombe and Michael Gallagher had to say.

2.15. Bigali told me that Alexa Morecombe introduced herself as a lawyer and that she and Michael Gallagher then told the meeting that:

a. Yindjibarndi would not succeed in their appeals against the grant of the three mining leases because a single judge of the Federal Court had already dismissed those appeals;

b. Yindjibarndi would not succeed in their native title claim for exclusive possession rights, in the unallocated Crown land FMG needs for its "Solomon Project", because the Yindjibarndi are not physically occupying that part of their country; and,

c. if Yindjibarndi did not participate immediately in heritage surveys for the Solomon Project, FMG would do the surveys anyway and Yindjibarndi would lose the opportunity to protect any sites on areas of significance in the project area.

2.16. Bigali said that her son, who works for FMG at the Christmas Cheek[sic] mine, also attended the meeting and was helping FMG to persuade our people; and, that FMG had promised him a new home in Roebourne and a promotion to the position of "heritage officer" at the Solomon mine, if the project went ahead.

2.17. Bigali said that by the end of the end of[sic] this meeting, a group of about 10 Yindjibarndi members had decided to form a breakaway group and four men were going to start doing Heritage Surveys for FMG in the Solomon Project area.

2.18. The first of these Heritage Surveys was planned for the weekend of 10 and 11 July; so I quickly organised for another community meeting to be held on Thursday 8 July 2010. I attended that meeting and, for a short time, so did Michael Gallagher. Prior to his arrival Bigali informed the 40 members present of what had happened at the FMG meeting on Tuesday.

2.19. After he arrived at the meeting, I asked Mr Gallagher, why FMG was meeting with Yindjibarndi members instead of the Native Title Party and the YAC Board. Mr

Gallagher told the meeting that FMG took the view that it was entitled to arrange and conduct the Tuesday meeting, without informing the Native Title Party or YAC, because the meeting "concerned heritage issues, rather than native title issues".

2.20. The legal representative of the Native Title Party was also present at this meeting and he advised Mr Gallagher that:

a. the Yindjibarndi #1Native[sic] Title Applicant has a registered native title right to protect sacred sites and areas of significance in the area of the proposed Solomon Project;

b. the seven members of the Applicant, acting together as the Native Title Party, are the only people who are authorised to make agreements about things that affect the registered native title rights of the Yindjibarndi People; and,

c. FMG was, at its request, engaged in mediation with the Native Title Party in the Native Title Tribunal to resolve all native title and heritage issues as part of its proposed WOCLAA.

Mr Gallagher said FMG obviously took a different view.

2.21. I asked Mr Gallagher if he could confirm where the heritage survey was to be conducted over the weekend and confirm the names of the four men who had agreed to participate in the survey. Mr Gallagher did so; and I informed him that:

a. the senior Yindjibarndi Lawmen who have both the right, and the authority, under Yindjibarndi Law to speak for the survey area were present;

b. that the four men who had agreed to take part in the survey had no such right or authority and would not know the location of sites of particular significance in the survey area because they had not gone far enough through Yindjibarndi Law to learn about them; and,

c. if the survey went ahead as planned, it would be likely to cause serious problems in the Yindjibarndi community because if the four men took part in the survey, without the senior Lawmen and against their wishes, they would be breaking Yindjibarndi Law and be liable to punishment.

I then pleaded with Mr Gallagher to ring the bosses of FMG and to pass on an urgent request to call off the heritage survey. Mr Gallagher left the meeting to do so, but returned later to say that the survey would go ahead as planned.

2.22. FMG has, since that meeting, apparently conducted a number of Heritage Surveys in the Yindjibarndi #1 Claim area; and, in mid December 2010, I received a copy of a section 18 application, which had been made by FMG on 10 December. The section 18 application concerns an area of land in the Yindjibarndi #1 Claim area that will be affected by FMG's proposed "Solomon railway". I know that area well; and I know that there are sites and areas that are of particular significance to the Yindjibarndi People in accordance with our laws and customs. Those sites have not been identified in the ethnographic reports that form part of FMG's section 18 application.

2.23. The section 18 application does identify a large number of archaeological sites, many of which also have ethnographic significance because they contain the remains of our ancestors. However, the Yindjibarndi people who participated in those surveys failed to identify the ethnographic significance of those places.

3. FMG's WOCLAA with the Breakaway Group

3.1. At some point before December 2010, FMG finished negotiating a WOCLAA (the "WMYAC Agreement") with the breakaway group that was created at FMG's meeting

on 8 July 2010. About 16 members of that breakaway group attended a mediation session, chaired by the President of the Native Title Tribunal in Roebourne on 10 August 2010, and announced that they were resigning from YAC and the Yindjibarndi #1 claim group to form a new group that would be called "FMG Yindjibarndi". However, the Native Title Party and the YAC Board were not advised of, or invited to attend, any negotiations for the WMYAC Agreement did[sic] not know about it until 6 December 2010, when I was given a copy by my local member of parliament. A copy of the WMYAC Agreement is attached and marked "**MW3**".

3.2. I have since discovered that, on 23 November 2010, 34 members of the Yindjibarndi #1 Claim group, including one member of the Applicant, established a new Aboriginal Corporation, the *Wirlu-Murra Yindjibarndi Aboriginal Corporation* ("WMYAC"). A copy of the Corporation extract from the Office of the Registrar of Indigenous Corporations is attached and marked "**MW4**".

3.3. It seems WMYAC was established in order to receive the benefits of the WMYAC Agreement, because in the agreement FMG promises to pay WMYAC $500,000 within 14 days of signing the WMYAC Agreement and give WMYAC the annual compensation package of $3 million, which was originally offered in the WOCLAA negotiations with the Native Title Party.

3.4. In addition, the YMYAC[sic] Agreement:

a. gives FMG a discretion to pay any amount of the $1.5 million, previously offered to the Native Title Party as a "VTEC Royalty", to any member of WMYAC who is an FMG employee or who undergoes or have[sic] previously undergone training for employment with FMG;

b. requires FMG to spend up to $3m each year providing housing in Roebourne or Karratha, and direct flights from Roebourne to the Solomon Project, for any member of WMYAC who accepts training or employment with FMG; and,

c. requires FMG to contribute $1 million dollars[sic] each year to a foundation, to be established for the sole purpose of benefitting members of the Yindjibarndi People who have attained the age of 50 years.

3.5. The benefits offered by FMG in the WMYAC Agreement, which go beyond what was originally offered by FMG in its WOCLAA negotiations with the Native Title Party, gave a clear incentive for some of the poorest members of the Yindjibarndi community to join the breakaway group. I personally known each of the 34 members of WMYAC and I know that at least 25 of them are already over 50 years of age and one is already employed by FMG. The strategy, apparently, was to get enough of our members to join WMYAC and then undermine the authority previously given to the Native Title Party by the Yindjibarndi #1 Native Title Claim Group. I say this because the WMYAC Agreement requires execution by the Native Title Applicant; and, on 8 December 2010, a Notice was placed in the Public Notices section of the Pilbara News, under the names of three of the seven members of the Yindjibarndi Applicant, requesting all members of the Yindjibarndi #1 Native Title Claim Group to attend a meeting in Roebourne on 21 December to consider and vote on, among other things, motions to the following effect:

a. that the appeals currently before the Full Court of the Federal Court, which challenge the validity of the grant of the three mining leases to FMG, be discontinued;

b. that all objections made under the Mining Act on behalf of the Yindjibarndi #1 Native Title Claim Group, against FMG's Solomon Hub Expansion Project land tenure, be withdrawn;

c. that all objections made under the NTA on behalf of the Yindjibarndi #1 Native Title Claim Group, against FMG's Solomon Hub expansion project land tenure, be withdrawn;

d. that the Yindjibarndi #1 Native Title Claim Applicant give consent to the grant of the Tenements the subject of this current inquiry by the Tribunal; and

e. that the Yindjibarndi #1 Native Title Claim Applicant immediately proceed to finalise a land access agreement with FMG in terms approved by the majority of the claim group members.

3.6. A copy of the Public Notice referred to above is attached and marked "**MW5**".

3.7. The WMYAC Agreement also requires execution by YAC; and, on 15 December 2010, the WMYAC members who had previously announced that they were resigning from YAC, at the Tribunal's mediation session in August, turned up for the YAC Annual General Meeting, presumably in the hope of getting enough numbers to change the Board membership. They were refused entry to the AGM.

3.8. I attended the meeting on 21 December 2010, as an observer. The meeting was to be chaired by Mr Ron Bower, from Corser and Corser Lawyers; however, before the meeting commenced a member of YMYAC[sic] asked the whitefellas to leave the hall so that Yindjibarndi could have a private discussion. The topic of that discussion was FMG's section 18 application. One senior Yindjibarndi Lawman, who had not been at the July meetings and had later joined the breakaway group, was shocked when he found out that the Yindjibarndi members on the survey team had given the "go-ahead" for the railway. He addressed the meeting and said that "they shouldn't have been out there in the first place" that "people had started thinking only about the money" and that "looking after country should come first". Just about everyone at the meeting agreed; and the meeting came to an end shortly afterwards without any consideration of the advertised motions.

3.9. The Native Title Party alleges, on the basis of what has come to light since the Native Title Party withdrew the earlier allegation regarding good faith negotiations, that FMG has failed to negotiate in good faith with the Native Title Party about the Tenements. Instead, FMG has negotiated a Whole of Country Land Access Agreement with the breakaway group that was formed after FMG's second meeting with Yindjibarndi members, in July 2010.

3.10. Those negotiations and the WMYAC Agreement caused a serious split within both the Yindjibarndi community and the Yindjibarndi #1 Native Title Applicant; and, during the first three weeks of December the Native Title Party was kept very busy dealing with the fallout of this split. This, in addition to the Full Court Appeal on 6 and 7 December made it impossible for the Native Title Party to comply with the directions of the Tribunal for this inquiry.

[31] It can be seen from Mr Woodley's affidavit, that paras 2.1-2.21 deal with events which occurred prior to the bringing of the s 35 application. Paras 2.22-3.10 deal with matters subsequent to the withdrawal of the native title party's original good faith objection, and refer to matters which occurred in December 2010 onwards. Paras 2.22 and 2.23 deal with Mr Woodley's assertion that applications from the grantee party, pursuant to s 18 of the *Aboriginal Heritage Act 1972* (WA) ('AHA'), which he received in December 2010, did not mention a range of important sites within the areas that were relevant to the applications. Mr Woodley asserts that the failure to identify these sites in the application is an indication that

the Yindjibarndi people who participated in the early grantee party heritage surveys either did not identify them, or did not know they were there. At para 3.1 of Mr Woodley's affidavit, he makes reference to the Whole of Claim Land Access Agreement that the grantee party had apparently been negotiating with a breakaway group of members of the native title party subsequent to the Tribunal meeting in Roebourne in August 2010. Mr Woodley goes on to depose, in the balance of his affidavit, to the fact that he became aware that a number of the members of the Yindjibarndi claim group (34) had formed a breakaway corporation known as the Wirlu-Murra Yindjibarndi Aboriginal Corporation (WMYAC) for the purposes of entering into an agreement with the grantee party and receiving benefits from them. At paras 3.4 and 3.5, Mr Woodley suggests that the way the agreement is structured meant it provided incentives for the older and poorer members of Yindjibarndi to enter into an agreement, and consequently undermine the authority previously vested in the native title party by the Yindjibarndi native title group. This, it is said, was reflected in the fact that a meeting was advertised for 21 December in Roebourne in which it was proposed that a range of motions be put, the effect of which would have put an end to appeals in the Full Court of the Federal Court by the native title party against the grantee party, withdrawn objections by the native title party against the grantee party and directed the applicant group of the native title party to finalise access agreements with the grantee party. The meeting of 21 December was attended by Mr Woodley, and did take place, albeit that the motions proposed were not passed, and a number of senior Yindjibarndi Lawmen were upset by the proposition that the breakaway group had given the 'go-ahead' for a railway. At para 3.9, Mr Woodley reaches the conclusion, on the basis of what has been said before, that FMG had attempted to negotiate a Whole of Claim Land Access Agreement with the breakaway group, behind the backs of Yindjibarndi members. Consequently, they had caused a serious rift within the Yindjibarndi community and the native title claimant applicant group, which made it difficult for the native title claimant group to deal with all the contested matters it currently had with the grantee party at that time, including the Full Court appeal which took place in early December of 2010.

[32] In the grantee party's contentions of 4 February 2011 (at para 8.3), the grantee party concurred in the view that the <u>two</u> questions which are fundamental to the allegation of its lack of negotiation in good faith are:

1. That the grantee party commenced negotiations, 'with persons other than [some of the registered native title claimants for the FNT Group]', about the grant of the

tenements prior to 25 August 2010 (see para 2.9 of the native title party's contentions in relation to good faith); and

2. That that behaviour had 'encourage[d] dissent within the claim group' (see para 2.9 of the native title party's contentions in relation to good faith).

Accordingly, the native title party contends that the conduct referred to in one and two above constituted a failure to negotiate in good faith.

[33] The grantee party, at para 9 of its contentions, addresses the issue, set out in 1 above, concerning the commencement of negotiations with persons other than registered native title claimants. In that submission, it places great significance on the use of the word 'commencing', and suggests that the mere 'commencing' of such negotiations could not constitute the lack of good faith in any event. I do not take the native title party to be suggesting that the mere initiation of contact with members of the claimant group constituted the lack of good faith that is alleged. The grantee party, in its submissions at paras 9.5-9.8, asserts that all agreements discussed with persons, other than the native title party as a whole, took the form of an agreement which required execution by all persons who were members of the applicant of the native title party. There is a significant question as to whether the conduct of the grantee party when it negotiates with some members of the applicant group of the native title party, or indeed other members of the claimant group, particularly in circumstances where the applicant's legal representatives are not advised, constitutes a failure to negotiate in good faith. One critical factor may be the identity of the party that initiated the contact that led to the negotiation. In this case, there is an assumption by the native title party that that contact was initiated by the grantee party (see paras 3.1, 3.5 and 3.9 of the native title party's contentions of 28 January 2011).

[34] In his affidavit of 17 January 2011, Mr Woodley makes reference to the meeting which took place in February 2010, which had been organised by FMG in circumstances where Mr Woodley and the native title party had refused to convene a meeting as requested by FMG (see attachment MW1 and MW2 to Michael Woodley's affidavit of 17 January 2011). Those meetings clearly took place well before 25 August 2010, and were within the knowledge of Mr Woodley and his solicitors at the time they withdrew their previous good faith objection. In any event, it would appear that the meeting involved the conveyance of information rather than any attempt to negotiate as such with the native title party. That being said, what may have arisen from that meeting is not elucidated by any evidence currently before me.

[35] Again, according to Mr Woodley's affidavit of 17 January 2011, subsequent to the meeting held by FMG with the Yindjibarndi group in March 2010, a further meeting was convened by the native title party as a community meeting to discuss the matter and try to reach a consensus. At the meeting, which was held on 30 April 2010, according to Mr Woodley, the native title party and Yindjibarndi Aboriginal Corporation rejected FMG's offer and refused to participate in heritage surveys (see para 2.10 of Michael Woodley's affidavit of 17 January 2011). Apparently there was a second meeting, which took place on 8 July 2010, of which the native title party and the YAC were not informed and to which they were not invited. Mr Woodley nonetheless attended at least some of this meeting, and it appears to have been related to a proposed heritage survey intended to take place on the subsequent weekend. Mr Woodley deposes to the fact that he made it clear to Mr Gallagher of FMG that none of the persons he had arranged to participate in the survey had any authority within the group or knowledge of the area over which the survey was to be conducted. At para 3.1 of his affidavit, Mr Woodley asserts that the breakaway group 'was created at FMG's meeting on 8 July 2010'. This statement appears to relate back to a description of events which took place at the meeting before Mr Woodley arrived, and which were reported to him by a Bigali Hanlon, who was present (see paras 2.3-2.17). All that evidence is clearly hearsay, but in any event, what paragraph 2.7 says is that:

> 'Bigali said that by the end of the end of[sic] this meeting a group of about 10 Yindjibarndi members had decided to form a breakaway group and four men were going to start doing Heritage Surveys for FMG in the Solomon Project area.'

There is no suggestion in any of that evidence that the grantee party at any point suggested that a breakaway group should be created, or that the grantee party would enter into negotiations with such a breakaway group, had it been created.

[36] Mr Woodley deposes, at para 3.2, that on 23 November 2010 he became aware of the fact that 34 members of the Yindjibarndi claim group, including one applicant, had established a new Aboriginal Corporation known as Wirlu-Murra Yindjibarndi Aboriginal Corporation (WMYAC), as has been mentioned above. In para 3.5, Mr Woodley comes to the conclusion that this entity was created for the purpose of undermining the native title party's negotiations with the grantee: 'the strategy, apparently, was to get enough of our members to join WMYAC and then undermine the authority previously given to the Native Title Party by the Yindjibarndi #1 Native Title Claim Group.' He then proceeds to make reference to the fact that WMYAC had posted, in the public notices section of the Pilbara

News, notification of a meeting which proposed to put a number of motions, which would lead to the discontinuance of Federal Court actions against the grantee party by the native title party, and a signing by the native title party of the agreements currently proposed by the grantee party. There does not appear to be any evidence proffered by the native title party which suggests that the grantee party initiated contact with any member of the native title party applicant group or other member of the Yindjibarndi native title claim group, other than in circumstances where the native title party had refused to convene meetings to explain the state of negotiations. Clearly, there had been discussions taking place between some members of the applicant, some members of the claimant group and FMG by the time that the draft WOCLAA agreement had been presented to Mr Woodley by Mr Catania in December 2010. That agreement, which is exhibited to Mr Woodley's affidavit of 17 January 2011 as annexure MW3, is an agreement which required execution by the native title party, ie all seven surviving individuals who comprised the applicant, as well as the Yindjibarndi Aboriginal Corporation Registered Native Title Body Corporate (see pages 71-73 of MW3).

[37] At paras 2.6, 3.5 and 3.10, Mr Woodley asserts that there had been a deliberate strategy adopted by the grantee party designed to undermine the authority of the native title party and sow the seeds of dissent within it, in order to achieve its purpose of an unsatisfactory agreement. The documentation that has been filed by both parties, and the chain of events that had commenced at least by July 2010, suggests that there was, and is, serious dissention within the native title party, ie the group of individuals who jointly comprise the applicant of the Yindjibarndi #1 claim, and the members of the Yindjibarndi claimant group as a whole, as to how they should deal with the proposals that have been put to them by the grantee party. There is no evidence as to whether any contact or discussions which took place between the grantee party and those members of the native title party who disagreed with Mr Woodley's strategy was initiated by the grantee party or those members. Para 14.2 of the grantee party's contentions in relation to good faith, dated 4 February 2011, refers to its first contentions in relation to good faith at para 46 where there is a reference to grantee party document 80 which is the minutes of the mediation meeting of the Tribunal in relation to E47/1398 and E47/1399, dated 26 March 2010, where it was noted that following the meeting, Mr Singh of the grantee party had advised the Tribunal that members of the grantee party had met with members of the native title party in Roebourne on 8 March 2010 at the request of 'some members of the Yindjibarndi community who wanted to know of developments between the grantee party and the native title party.' Further, the grantee party cites grantee party

document 78, which is an email from Blair McGlew of the grantee party to Michael Woodley of the native title party, dated 10 March 2010, where he sets out that the meeting on 8 March 2010 took place at the request of members of the native title, 'it was simply a request to Fortescue to explain the situation from our point of view.' This evidence is not particularly compelling, but in any event, it cannot be said that a grantee party who enters into discussion with one or other, or indeed both, factions of a native title party applicant group which has fractured because of disagreement has automatically failed to negotiate in good faith. There certainly may be circumstances in which such behaviour might be indicative of a failure to negotiate in good faith. On the other hand, it may well be a rational response to the difficult situation that a grantee party finds itself in when it is required to negotiate with an entity which does not have a unanimity of purpose. The grantee party is confronted with a situation where, at least as it is currently constituted, it requires the consent of all the persons who constitute the applicant group of the native title party to execute any agreement, before an agreement as contemplated under s 31(1)(b) can be perfected. Such a situation is most unfortunate, but as the grantee party contends, relying on *Western Australia v Daniel* (2002) 172 FLR 168; [2002] NNTTA 230 per Hon CJ Sumner at [157]:

> The Tribunal has acknowledged that it must take a reasonably robust common sense approach to what is required when examining whether a negotiation party has negotiated in good faith and not impose some unattainable, ideal standard.

In my opinion, in circumstances where a native title party has broken into factions the grantee party is entitled to enter into discussions with both groups with the view to reaching agreement with them jointly about the proposed act, so long as it does not, in that process, engage in sharp practice or unconscionable conduct. If there had been evidence that the grantee party had actively incited dissention within the native title party, I might well have taken the view that such behaviour amounted to a lack of good faith. In this matter there is no such evidence. As the evidence of the affidavits which were filed by both members of the native title applicant group and the claimant group of Yindjibarndi #1 relating to the substantive determination in this matter reveal, it is open on the facts to assume that the reason for the dissention within the native title party related not to the machinations of the grantee party, but to genuine disagreement within the group as to whether or not to accept the agreement proposed by the grantee party. In all, some three of the seven named applicants, and 13 members of the claimant group deposed to the fact that they had not been consulted about the native title party's decision to challenge the good faith of the grantee party in the negotiation process, and they had been ignored in their assertion that the agreement proposed

by the grantee was acceptable, they agreed that the current action before the Tribunal should be discontinued and the current agreement proposed by the grantee party should be entered into. It is only Mr Woodley's evidence which is uncorroborated, including by his three fellow members of the applicant whom he deposes continue to support him. In these circumstances, I find that the native title party has failed to establish that the grantee party sought to create dissension within the group which could be regarded as a failure to negotiate in good faith.

[38] In the circumstances the native title party has not satisfied me, on the basis of evidence produced, that the grantee party has failed to negotiate in good faith, and consequently I am empowered to make the determination of the s 35 application pursuant to s 38.

REASONS FOR FUTURE ACT DETERMINATION

[39] On 25 August 2010, 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 s 35 Application'/'the Application'). The Application was made on the basis that the negotiation parties had not been able to reach agreement.

Directions for the Inquiry

[40] The procedural history of this matter is set out in detail in my decision of 1 March 2011, referred to above, at [7]-[9].

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

- Government party's statement of contentions and supporting documents GVP1 to GVP18, lodged 15 November 2010;
- Grantee party's statement of contentions and supporting documents GP1 to GP129, lodged 18 November 2010;
- Grantee party's statement of facts, lodged 2 November 2010;
- Yindjibarndi native title party's statement of contentions and supporting documents, lodged progressively over the period 4 February 2011 to 14 February 2011;
- The affidavit of Michael Woodley, sworn 4 February 2011;

- Government party's reply and supporting documents to the native title party's contentions, lodged on 28 February 2011;
- Grantee party's statement of contentions in reply to the native title party's contentions and documents GP130-158, lodged on 4 March 2011;
- Grantee party's supplementary list of documents GP159-173, lodged 23 March 2011; and
- 16 affidavits by members of the native title applicant and the Yindjibarndi #1 Claim Group on behalf of the grantee party, filed on 4 March 2011.

[42] 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 directions hearing on 24 March 2011, all parties agreed the inquiry could be conducted on the papers and I believe it appropriate to do so in the circumstances.

Government party's evidence

[43] Government party documentation submitted on 15 November 2010 establishes the underlying tenure to be:

- E47/1398 – vacant Crown land and pastoral lease Mt Florance. Overlapping this proposed tenement are also four file notation areas vested in the Department of State Development, Department for Planning and Infrastructure and the Department of Regional Development and Lands.
- E47/1399 – vacant Crown land, two pastoral leases; Mulga Downs and Mt Florance. Overlapping this proposed tenement is also a Crown Reserve vested in the Department of Planning and Infrastructure for use as a watering place for travellers and stock.
- M47/1431 – vacant Crown land and pastoral lease Mt Florance. Overlapping this proposed tenement are also two file notation areas vested in the Department for Planning and Infrastructure and the Department of Regional Development and Lands.

[44] There are no Aboriginal communities identified within or in the near vicinity of the proposed leases. The closest Aboriginal community is Youngaleena situated approximately 35 kilometres from the eastern boundary of E47/1399. There is evidence of an extensive

history of mining and exploration activity over the proposed tenement areas. This includes two live exploration licences and one live miscellaneous licence overlapping M47/1431.

[45] Department of Indigenous Affairs ('DIA') documentation provided by the Government party reveals the following registered sites under the *Aboriginal Heritage Act* within or near the vicinity of the proposed leases:

E47/1398

- ID 6613; Rio Tinto Gorge; Artefacts / Scatter, Archaeological Deposit, Rockshelter; Open Access;
- ID 7065; Hamersley Gorge Engraving; Man-Made Structure, Painting, Engraving, Artefacts / Scatter; Open Access; and
- ID 11267; Hamersley Gorge; Ceremonial, Artefacts / Scatter, Water Source; Open Access.

E47/1399

- ID 11267; Hamersley Gorge; Ceremonial, Artefacts / Scatter, Water Source; Open Access.

M47/1431

- ID 11267; Hamersley Gorge; Ceremonial, Artefacts / Scatter, Water Source; Open Access.

[46] The *Mining Act* entitles the grantee party to exercise the rights set out in s 85 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.

[47] On 15 November 2010 the Government party proposed the following endorsements and conditions on the grant of the proposed leases:

E47/1398 Endorsements

1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. The Licensee'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.
3. The Licensee's attention is drawn to the existence of a licence for heritage and environmental investigations for proposed Solomon Railway Spur granted pursuant to section 91 of the Land Administration Act 1997 and which is shown designated as 8923 in TENGRAPH.

4. The Licensee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to explore for iron.

E47/1398 Conditions

1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe after completion.
2. 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 Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
3. 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.
4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
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;[sic] water carting equipment or other mechanised equipment.
6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving notification of:-

    - the grant of the Licence; or
    - registration of a transfer introducing a new Licensee;

    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 Stations SSM-MOUNT BRUCE, SSM-HRE86, SSM-HRE87 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.
8. No activities being carried out within the proposed railway corridors (designated FNA 7279, FNA 7838 and FNA 9011) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.

    In respect to the area designated as CPL 3 in TENGRAPH the following conditions apply:
9. Prior to any ground-disturbing activity, as defined by the Director, Environment, DMP the Licensee preparing a detailed program for each phase of proposed exploration for approval of the Director, Environment, DMP. The program to include:

    - maps and/or aerial photographs showing all proposed routes, construction and upgrading of tracks, cramps, drill sites and any other disturbances;
    - the purpose, specifications and life of all proposed disturbances;
    - proposals which may disturb any declared rare or geographically restricted flora and fauna; and
    - techniques, prescriptions and timetable for the rehabilitation of all proposed disturbances.

10. The Licensee, at his expense, rehabilitating all areas cleared, explored or otherwise disturbed during the term of the licence to the satisfaction of the Direction, Environment, DMP. Such rehabilitation as is appropriate may include:

    - stockpiling and return of topsoil;
    - backfilling all holes, trenches and costeans;
    - ripping;
    - contouring to the original landform;
    - revegetation with seed; and
    - capping and backfilling of all drill holes.

11. Prior to the cessation of exploration/prospecting activity the Licensee notifying the Environmental Officer, DMP and arranging an inspection as required.

E47/1399 Endorsements

1. The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. The Licensee'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.
3. The Licensee's attention is drawn to the provision of:

    - Water and Rivers Commission Act 1995 and any Regulations thereunder; and
    - Identification of environmental sensitive wetlands listed within the RAMSAR Convention 1971, ANCA's Directory of important wetlands, the National Estates Register and the Environmental Protection Policies 1999.

4. The Licensee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to explore for iron.

E47/1399 Conditions

1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe after completion.
2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
3. 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.
4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
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;[sic] water carting equipment or other mechanised equipment.
6. The Licensee or transferee, as the case may be, shall within thirty (30) days or receiving notification of:-

    - the grant of the Licence; or

- registration of a transfer introducing a new Licensee;

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 Stations SSM – MOUNT BRUCE; 166, 167, 168, 169, 170, 171, 172, 172T, 173, 192, 192T, 193 and 193T and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

8. No activities being carried out within the proposed railway corridors (designated FNA 7279 and FNA 7838) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.

9. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Watering Place for Travellers and Stock Reserve 1747.

In respect to the area designated CPL 3 in TENGRAPH the following conditions apply:

10. Prior to any ground-disturbing activity, as defined by the Director, Environment, DMP the Licensee preparing a detailed program for each phase of proposed exploration for approval of the Director, Environment, DMP. The program to include:

    - maps and/or aerial photographs showing all proposed routes, construction and upgrading of tracks, camps, drill sites and any other disturbances;
    - the purpose, specifications and life of all proposed disturbances;
    - proposals which may disturb any declared rare or geographically restricted flora and fauna; and
    - techniques, prescriptions and timetable for the rehabilitation of all proposed disturbances.

11. The Licensee, at his expense, rehabilitating all areas cleared, explored or otherwise disturbed during the term of the licence to the satisfaction of the Director, Environment, DMP. Such rehabilitation as is appropriate and may include:

    - stockpiling and return of topsoil;
    - backfilling all holes, trenches and costeans;
    - ripping;
    - contouring to the original landform;
    - revegetation with seed; and
    - capping and backfilling of all drill holes.

12. Prior to the cessation of exploration/prospecting activity the Licensee notifying the Environmental Officer, DMP and arranging an inspection is required.

In respect to the area designated "AW/66" (Fortescue Marshes) in Tengraph the following conditions apply:

13. Written notification, where practicable, of the timeframe, type and extent of proposed ground disturbing activities being forwarded to the Department of Water KARRATHA seven days prior to commencement of those activities.

14. Any significant waterway (flowing or not), wetland or its fringing vegetation that may exist on site not being disturbed or removed without prior written approval from the Department of Water.

15. The rights of ingress to and egress from the Licence being at all reasonable times preserved to officers of the Department of Water for inspection and investigation purposes.

16. The storage and disposal of hydrocarbons, chemicals and potentially hazardous substances being in accordance with the Department of Water's Guidelines and Water Quality Protection Notes.

17. All Mining Act tenement activities prohibited within 200 metres of RAMSAR or ANCA listed wetlands unless written permission of Department of Environment and Conservation, in consultation with the Department of Water, is first obtained.

18. All Mining Act tenement activities prohibited within 200 metres of "Conservation" and "Resource Enhancement" Category wetlands unless written permission of the Department of Water is first obtained.

M47/1431 Endorsements

1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. 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.
3. The Lessee's attention is drawn to the existence of a licence for heritage and environmental investigations for proposed Solomon Railway Spur granted pursuant to section 91 of the Land Administration Act 1997 and which is shown designated as 8923 in TENGRAPH.
4. The Lessee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to work and mine for iron.

M47/1431 Conditions

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 disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitating being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
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, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
6. The Lessee 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.
7. The Lessee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-

    - the grant of the Lease; or
    - registration of a transfer introducing a new Lessee.

    advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
8. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Direction, Environment, DMP for his assessment and written approval prior to commencing any development or productive mining or construction activity.
9. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Direction, Environment, DMP for his assessment and written

approval prior to commencing any development or productive mining or construction activity.

10. The rights of ingress to and egress from Miscellaneous Licence 47/302 being at all times preserved to the Licensee and no interference with the purpose or installations connected to the licence.

11. No activities being carried out within the proposed railway corridor (designated FNA 7838) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.

12. Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface.

[48] The Government party also proposes four extra conditions on the grant of E47/1398 and E47/1399:

i. 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.

ii. 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.

iii. 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.

iv. Upon assignment of the mining lease the assignee shall be bound by these conditions.

[49] The Government party also proposes four extra conditions on the grant of M47/1431:

i. 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.

ii. 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.

iii. Where, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safe guard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his assessment and written approval; the grantee party must at the same time give to the native title party a copy of the proposal or addendums, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.

iv. Upon assignment of the mining lease the assignee shall be bound by these conditions.

[50] I have addressed the circumstances of the imposition of these extra conditions in *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia* [2009] NNTTA 69 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 is appropriate, I will make the imposition a condition of the doing of the acts, rather than assume they are to be imposed as a matter of course upon grant.

[51] The Government party also filed an extensive statement of contentions in relation to s 39 criteria on 15 November 2010, and subsequently in reply to the native title party's contentions on 28 February 2010, to which I will have reference when assessing the evidence.

The grantee party's evidence

[52] The grantee party's evidence includes:

- A statement of contentions, lodged on 18 November 2010;
- A statement of contentions in reply to the contentions of the native title party, lodged on 4 March 2011;
- In various formats a number of lists of documents extending from GP1 to GP173, filed between November 2010 and February 2011; and
- A statement of facts lodged on 2 November 2010.

The grantee party also filed other documents relevant to the question of an on country hearing on 23 March 2011, which are not currently relevant to these matters.

[53] On 4 March 2011, the grantee party also filed 16 affidavits from members of the native title claimant group, including three affidavits from individually named Applicants of the Yindjibarndi #1 claim. These affidavits fall into three categories. Each of the affidavits within the category referred to is largely identical to the other. There are some differences in paragraph numbering, and some minor differences in substance. However, for the purpose of this determination, I propose to set out an example of one from each of the categories, but will make clear in the discussion of the evidence the extent to which there is any difference between them, which is pertinent to such discussion. The first category of affidavit are from male members of the claimant group and comprise of:

- Affidavit of Barry Radley Phillips, affirmed on 28 February 2011;

- Affidavit of Steven Adams, affirmed 28 February 2011;
- Affidavit of Ricky Sandy, affirmed 28 February 2011;
- Affidavit of Ken Sandy, affirmed 28 February 2011;
- Affidavit of Jon Sandy, affirmed 28 February 2011;
- Affidavit of Jimmy Horace, affirmed 28 February 2011;
- Affidavit of Francis Phillips, affirmed 28 February 2011;
- Affidavit of Clifton Mack, affirmed 28 February 2011;
- Affidavit of Bruce Woodley, affirmed 28 February 2011; and
- Affidavit of Bruce Monadee, affirmed 28 February 2011.

I set out below, in full, the affidavit of Bruce Monadee:

> 'On 28 February 2011 I[sic] Bruce Monadee of Cheeditha Community via Roebourne, Western Australia, pensioner say on affirmation as follows:
>
> 1. I am a member of the Yindjibarndi People, the society of Aboriginal people whose native title rights and interests were recognised by a determination of the Federal Court of Australia in *Daniel v State of Western Australia [2005] FCA 536* and upheld in 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 Native Title Determination').
>
> 2. The native title rights and interest[sic] that were recognised in the Yindjibarndi Native Title Determination are held in trust, for the benefit of the Yindjibarndi People, by the Yindjibarndi Aboriginal Corporation ('**YAC**'), which is a prescribed body corporate and a Registered Native Title Body Corporation under the *Native Title Act*. I am a registered member of YAC.
>
> 3. There were 10 named applicants in the Yindjibarndi Native Title Determination, of which there are now 7 surviving named applicants. One of those applicants, Mr Michael Woodley has signed eight affidavits since May 2009, in which he speaks as one of the Yindjibarndi #1 applicants.
>
> 4. I know about those affidavits because on 11 February 2011 at Roebourne, the anthropologist Michael Gallagher and the lawyer Ronald Bower told me about them.
>
> 5. At the same time Ronald Bower game me information about what an affidavit is. I understand from Mr Bower's advice that an affidavit is a formal statement of fact signed by the person making the affidavit, witnessed by someone with legal authority that is the maker's signature that is on the affidavit and that the maker has promised that it is true. An affidavit is a type of written statement in which the person who makes it has to be telling the truth and that if they are not being truthful then they could be in legal trouble.
>
> 6. Mr Gallagher and Mr Bower have told me that in all but one of his affidavits signed since May 2009 Michael Woodley says in slightly different ways that he is authorised to sign the affidavits on behalf of the Yindjibarndi Native Title Applicant, the Yindjibarndi People and other senior Yindjibarndi Lawmen.
>
> 7. I am informed by Mr Bower that in his affidavit dated 25 May 2009, at paragraph 1.2, Mr Woodley said, '*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.'*

8. I am informed by Mr Bower that in his affidavit dated 18 July 2010 used in the Federal Court, at paragraph 2, Mr Woodley said, *'I am a senior Yindjibarndi Lawman, and I am authorised to make this affidavit on behalf of the Native Title Applicant, the Yindjibarndi People and the other senior Yindjibarndi Lawmen.'*

9. I am informed by Mr Bower that in his affidavit dated 15 November 2010 at paragraph 2, Mr Woodley said *'I am a senior Yindjibarndi Lawman and I am authorised to make this affidavit on behalf of the Appellant.'* I have been told by Mr Bower that the Appellant is the Yindjibarndi #1 Native Title Determination Application.

10. I am informed by Mr Bower that in his affidavit dated 4 February 2011 at paragraph 1.7, Mr Woodley said *'I have been authorised by [the senior Yindjibarndi Lawmen] to make this affidavit on behalf of the Native Title Party and the Yindjiabrndi[sic] People.'*

11. Michael Woodley has never talked to me about any of his affidavits. He has not asked me to tell him whether or not he had my authority to sign any of his affidavits, whether as one of the Yindjibarndi #1 applicants or simply as a Yindjibarndi person; nor has he talked to me about what he is saying in any of his affidavits.

12. If Mr Woodley had wanted to speak to me about his affidavits, he could easily have done so. We both live in the same area and there is nothing to stop him speaking to me.

13. There is another reason why I say that Michael Woodley was not authorised to sign his affidavits.

14. This reason is that in his affidavits Michael Woodley has talked about men's initiation. Yindjibarndi men who know about the initiation ceremonies are not allowed to talk about them to anyone except other men who have a right to know about them.

15. When Yindjibarndi people were giving evidence to Justice Nicholson in the trial of the Ngaluma Yindjibarndi native title claim, the men gave information about their knowledge of country, their connect[sic] to country and traditional Yindjibarndi laws and customs which they and their families observed. We did not show Justice Nicholson about the secret men's business. We just talked about country, we took him to country, we did not tell him things about culture which is secret.

16. They did not talk about the initiation of Yindjibarndi boys into Yindjibarndi law because that is secret men's business which women, children and the public do not have a right to hear or to know. This knowledge is only allowed to be given to initiated men.

17. Under Yindjibarndi law, it is very seriously wrong to reveal this kind of information. Michael Woodley has broken our traditional law by talking about initiation, in his affidavits.

18. I did not and could not authorise Michael Woodley to talk about secret initiation information in his affidavits, as he has done.

19. There are things which Michael Woodley says in his affidavits about initiation ceremonies which are wrong. I am allowed to talk about what Michael says so long as I do not give information about the ceremonies.

20. In his affidavit dated 25 May 2009 Michael Woodley mentions mining lease applications M47/1409, M47/1411and[sic] M47/1413 which have been applied for by FMG.

21. Michael Woodley says at paragraph 1.8 of that affidavit that each year, Yindjibarndi people visit the area where FMG wants the tenements to collect some things that Yindjibarndi people use in our ceremonies; and that each year we sing that country in our ceremonies, to keep it alive. He then says that that is the way it has always been.

22. There are some things in this paragraph by Michael Woodley that are wrong.

23. First, he should not have talked about the collection of things used in ceremonies. What he is saying in that part of the paragraph has to do with the initiation of boys into Yindjibarndi law. He is not allowed to talk about that.

24. Secondly, he says that those things are collected from ground within the Mining Lease applications that he has identified as M47/1409, M47/1411 and M47/1413.

25. I know the country where those three tenements are located because I know Yindjibarndi country and I know where those tenements area. I have been there many times in my life.

26. I have been living as a Yindjibarndi person all of my life in Yindjibarndi country. I have no knowledge of the things mentioned by Michael Woodley in his paragraph 1.8 as being used in ceremonies ever having been collected from within those three tenements.

27. Instead, Yindjibarndi men always get the things needed for the initiation ceremonies from other places, mostly from Millstream (which is to the north of the the[sic] Yindjibarndi #1 claim area, in the original Ngaluma Yindjibarndi determination area) and they are taken to Woodbrook, where the ceremonies always take place. Woodbrook is about one hour's drive from Roebourne.

28. In an affidavit by Michael Woodley dated 18 July 2010, starting in paragraph 19, he refers to the traditional area called *Garliwindji*[sic] *Ngurra*.

29. He says in paragraph 22 that the *Garliwindji*[sic] *Ngurra* runs through the area of the proposed mining lease M47/1413.

30. I am told by the solicitor Ronald Bower that M47/1413 is in the FMG Firetail area. On that basis I believe that to be true.

31. There are three things which are wrong about this part of Michael Woodley's affidavit.

32. First, he should not be talking about this topic because it has nothing to do with our initiation ceremonies.

33. Secondly, on the basis of my knowledge of my country and of the locations of the FMG Firetail project and tenement M47/1413, I say that *Garliwinyji Ngurra* takes its name from Garliwindji Creek at the western-most part of the Yindjibarndi #1 claim area, more than 60 kilometres from the location of the Firetail project. *Garliwinyji Ngurra* does not extend into the Firetail project area.

34. I now refer to paragraph 25 of the same affidavit by Michael Woodley.

35. Here, Michael Woodley is saying that if FMG is allowed to mine in tenement M47/1413, then important things needed for initiation ceremonies will be destroyed. He says "It will no longer be possible to put the *Garliwinyji* boys through their initiation ceremonies. This is what is causing the *Nyambali-Tharngungali* so much worry, because it is the boys who did not go through their initiation ceremonies that we see all the time getting into trouble, through the grog and the drugs. They are incomplete, without connection, and lost."

36. Michael Woodley is wrong about this. I know this country and I have been there recently as a member of a heritage survey team for FMG's firetail project. Initiated Yindjibarndi men not[sic] take Yindjibarndi boys into that country as part of their initiation ceremonies and we do not get things from that country for use in the ceremonies. FMG's wish to do mining in this area will not affect the initiation of Yindjibarndi boys into the law.

37. I refer to Michael Woodley's affidavit dated 4 February 2011 which is about the new mining lease application M47/1431.

38. In this affidavit Michael Woodley describes in even greater detail some details of secret men's business concerning initiations. He should not have done so. There have not been any men's meetings to consider what he has put in this affidavit or his other affidavits in which he has talked about secret things.

39. He says some detailed things about the management of ceremonies which he says take place within the ground covered by M47/1431.

40. He says that if the ceremony is not done exactly as he describes in his affidavit, then the boys being initiated will be in great danger and it might also cause their deaths.

41. This is not true. Initiation ceremonies do not take place within M47/1431; nor do ceremonies that are preparations for initiations that take place somewhere else.

42. In paragraphs 6.7 and 6.8 of Michael Woodley's affidavit there is a description of how people must travel into country within M47/1431 and do certain things. I am not allowed to repeat what Michael Woodley has said about those things, but what he has said in[sic] not true.

43. Preparations for initiation ceremonies to be conducted at Woodbrook are not performed in any place within M47/1431. Initiations are only done at Woodbrook, which is in a completely different location.

44. Also, initiated Yindjibarndi men do not collect resources for initiation ceremonies from the area covered by M47/1431. They are mostly collected from Millstream and places close to Millstream.

45. Further, no ceremonial preparations of the kind described by Michael Woodley in his paragraphs 6.7 and 6.8 take place other than at Woodbrook.

46. In his paragraph 6.9, Michael Woodley says that the boy will be in great danger and might lose his life if the procedures described by Michael Woodley are not followed, precisely. This is wrong, because the procedures which Michael Woodley says take place, do not occur. Also, nothing is done which could put boys' lives are risk during initiations.

47. Michael Woodley also talks about ochre in his affidavits. He mentions ochre in his affidavit dated 25May[sic] 2009, within the ground covered by M47/1409.

48. He describes increase rituals in his affidavit dated 25 May 2009, dealing with the ground covered by M47/1409 and in his affidavit dated 4 February 2011 which is about the new mining lease application M47/1431.

49. He says that Yindjibarndi men go to the areas of those two mining lease applications and get painted with ochre from those places, for the performance of an increase ritual performed by the men who are responsible for the *Galiwinyji*[sic] *Ngurra* and that if the FMG mining activity proceeds, then the men will no longer be able to conduct that ceremony.

50. The details which he reveals are secret and should not be talked about by Michael Woodley in those affidavits.

51. Increase rituals are not conducted in those two places.

52. Any ochre needed by Yindjibarndi men for ceremonies is obtained from the Millstream area.

53. In his affidavit dated 18 July 2010 Michael Woodley says he is one of the law bosses for the *Garliwinyji Ngurra*. This is wrong. Michael Woodley has traditional responsibility for country in the Millstream area, but not in the *Garliwinyji Ngurra*.

54. I know about the legal dispute taking place between FMG Pilbara Pty Ltd and Michael Woodley, in which Mr Woodley presents his affidavits as being authorised in the ways I have talked about in this affidavit.

55. I disagree with what Mr Woodley is doing to have the legal dispute with FMG Pilbara Pty Ltd.

56. If Mr Woodley had asked me to authorise him to make his affidavits so he could use them in that legal dispute with FMG Pilbara Pty Ltd I would have told him that I did not authorise him to do that, because I am not happy about the dispute which Mr Woodley is having with FMG Pilbara Pty Ltd.

57. On the basis of my personal involvement in meetings and discussions with lots of Yindjibarndi people I know that all of the members of the Wirlu-murra Yindjibarndi Aboriginal Corporation (who presently number approximately 190 people) are opposed to the existence of the dispute and would prefer it if an agreement on terms which have already been negotiated and agreed between those Yindjibarndi people and FMG could be executed by the Yindjibarndi #1 Applicant and FMG.'

[54] The second category of affidavit are from female members of the claimant group and comprise of:

- Affidavit of Julie Stevens, affirmed 28 February 2011;
- Affidavit of Diana Smith, affirmed 3 March 2011; and
- Affidavit of Berry Malcolm, affirmed 28 February 2011.

I set out below, in full, the affidavit of Berry Malcolm:

'On 28 February 2011 I, Berry Malcolm, of 413 Harding Way, Roebourne, Western Australia, home duties, say on affirmation as follows:

1. I am a Yindjibarndi person.

2. I have lived in or close to Yindjibarndi country for my whole life. I grew up here.

3. I am a member of the Yindjibarndi #1 Native Title Determination Application.

4. I am informed by the anthropologist Mr Michael Gallagher that in an affidavit dated 25 May 2009 at paragraph 5.1, Mr Michael Woodley said that the area where FMG wants tenements is called '*Gambulanha*'. I am informed that the tenements that Mr Woodley refers to are the tenements for FMG's project area known as '*Firetail*'.

5. I know where *Gambulanha* is. The Yindjibarndi people know it as *Gambulanha Marnda*, and its English name is Mount Pyrton. Mt Pyrton is 12 kilometres north-west of the western boundary of the Yindjibarndi #1 claim area and is 65 kilometres from the Firetail mining leases. Mr Gallagher has shown me a map of the Firetail project area. *Gambulanha Marnda* is not within the Firetail project area. Mr Woodley is wrong about that. Annexed to this affidavit is a true copy of the map which Mr Gallagher showed me. It is marked "Annexure 1".

6. I am informed by Mr Gallagher that in Mr Woodley's affidavit dated 25 May 2009 at paragraph 5.4, Mr Woodley recites a dreaming song, *Gambulanha Jawi*. This song

refers to several places, which are *Jirdangga*, *Barnarrarala Hill*, *Thardiwarngu Pool*, *Jimawarrada Hill*, *Yaralarnha* country and *Bangarru*.

7. I know where all of these places are. They are not within the Firetail project area. *Jirdangga* is near Millstream. *Jirdangga* and all of the other places are within Yindjibarndi country, but none is within the Firetail project area. The song recited by Mr Woodley therefore has nothing to do with the Firetail project area.

8. I am informed by Mr Gallagher that in Mr Woodley's affidavit dated 25 May 2009 at paragraph 5.11, Mr Woodley said that *Barngkawyinha Marnda*, a registered sacred site, is within proposed mining lease M47/1411, which Mr Woodley says is within what he calls *Gambulanha*.

9. I know where *Barngkawyinha Marnda* is. It is near Hamersley Homestead, close to the intersection of the Rio Tinto railway line and the southern boundary of the Yindjibarndi #1 claim. It is more than 20 kilometres away from the Firetail project area.

10. In the same paragraph, Mr Woodley recites the dreaming song for *Barngkawyinha Marnda*, and it refers to *Jilinjilin Hill*. I do not recognise *Jilinjilin Hill* but I do know a place called *Bilinbilin Hill* which is near Millstream. This is not within the Firetail project area. Mr Woodley is wrong. He is getting lost in there.

11. In the same song in the same paragraph, Mr Woodley also refers to *Warduwarranha Hill*. This is near Millstream. It is not within the Firetail project area.

12. Mr Gallagher has drawn my attention to paragraph 19 of Mr Woodley's affidavit dated 18 July 2010, in which Mr Woodley refers to four *Ngurra* in the Yindjibarndi #1 claim area. The names which he gives for them are *Garliwinyji*, *Buthurnha*, *Winyjuwarra*, and *Ngurrbanha*.

13. I have thought about my knowledge of *Ngurra* within Yindjibarndi country and in a meeting in Roebourne on 11 February 2011 I discussed Mr Woodley's paragraph 19 with nineteen other senior Yindjibarndi people. The twenty of us all have good knowledge of Yindjibarndi country and language.

14. We all agreed that *Garliwinyji Ngurra* is in the west of the Yindjibarndi #1 claim area, outside the Firetail project area; that *Buthurnha* is the Yindjibarndi name for Hooley Creek (which is outside the Firetail project area) and that *Winyjuwarra Ngurra* is within Hooley Station, and therefore it also outside the Firetail project area.

15. No one at the meeting in Roebourne on 11 February 2011 had any knowledge of the word *Ngurrbanha*. We did not know what Mr Woodley was referring to, by using that word.

16. Mr Gallagher has told me that in the affidavit by Mr Woodley dated 18 July 2010 at paragraph 20, Mr Woodley says that "the three mining leases," by which I think Mr Woodley means mining lease applications M47/1409, M47/1411 and M47/1413, are in the *Garliwinyji Ngurra*.

17. I know where *Garliwinyji Ngurra* is. I also know where the Firetail project area is. *Garliwinyji Ngurra* is not within the Firetail project area. Mr Woodley is wrong about that.

18. I am advised by Mr Gallagher that in an affidavit by Mr Woodley dated 4 February 2011 Mr Woodley refers in paragraph 5.3 to a place called *Yawarnganha*. Mr Woodley says that this is a flat plain that lies between *Gambulanha* (which Mr Woodley wrongly says is the Yindjibarndi name for the Hamersley Ranges, when in fact it is the Yindjibarndi name for Mt Pyrton) and *Birdarrdamra* (which Mr Woodley says is the Yindjibarndi name for the Chichester Ranges.)

19. The other 19 people at the meeting on 11 February 2011 and I all agreed that *Yawarnganha* is a table-topped hill near Mt Florance Station, which I know to be to the north of and outside the Yindjibarndi #1 claim.

20. I am advised by Mr Gallagher that in paragraph 5.11 of the affidavit by Mr Woodley dated 4 February 2011 Mr Woodley refers to two healing places for which he provides the names *Garngambinha Marnda* and *Tharndiburndinha Marnda*.

21. None of the other 19 people at the meeting in Roebourne on 11 February 2011 nor I have any knowledge of healing places in those locations, which Mr Woodley says are within the land covered by exploration licence application E47/1398.'

[55] The third category of affidavit are from three members of the applicant and comprise of:

- Affidavit of Mavis Pat, affirmed 28 February 2011;
- Affidavit of Sylvia Allan, affirmed 28 February 2011; and
- Affidavit of Aileen Sandy, affirmed 28 February 2011.

I set out below, in full, the affidavit of Aileen Sandy:

'On 28 February 2011 I[sic] Aileen Sandy of 603 Sharp Court, Roebourne, Western Australia, Artist, say on affirmation as follows:

1. I live at 603 Sharp Court, Roebourne Western Australia.

2. I have lived in or close to Yindjibarndi country for my whole life. I grew up here.

3. I am one of the seven members of the applicant group of the Yindjibarndi Native Title Determination Application.

4. I know all of the other six Applicants.

5. I know that one of the other members of the applicant group, Michael Woodley, has signed seven affidavits since May 2009, in which he speaks as one of the Yindjibarndi Number 1 applicants.

6. I know about those affidavits because on 11 February 2011 at Roebourne, the anthropologist Michael Gallagher and the lawyer Ronald Bower told me about them.

7. At the same time Ronald Bower gave me information about what an affidavit is. I understand from Mr Bower's advice that an affidavit is a formal statement signed by a person, and witnessed by someone with legal authority so that it is confirmed that it is the person's signature that is on the affidavit and that the person has promised that it is true. An affidavit is a type of written statement in which the person who makes it has to be telling the truth and if they are not being truthful then they could be in legal trouble.

8. Mr Gallagher and Mr Bower also told me that in all but one of his affidavits signed since May 2009 Michael Woodley says in slightly different ways that he is authorised to sign the affidavits on behalf of the Yindjibarndi Native Title Party, the Yindjibarndi People and other senior Yindjibarndi Lawmen.

9. I was also informed by Mr Bower that in his affidavit dated 25 May 2009, at paragraph 1.2, Mr Woodley said, "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."

10. I am informed by Mr Bower that in his affidavit dated 18 July 2010 used in the Federal Court, at paragraph 2, Mr Woodley said, "I am a senior Yindjibarndi Lawman, and I am authorised to make this affidavit on behalf of the Native Title Applicant, the Yindjibarndi People and the other senior Yindjibarndi Lawmen."

11. I am informed by Mr Bower that in his affidavit dated 15 November 2010 at paragraph 2, Mr Woodley said "I am a senior Yindjibarndi Lawman and I am authorised to make this affidavit on behalf of the Appellant." I have been told by Mr Bower that the Appellant is the Yindjibarndi #1 Native Title Applicants.

12. Michael Woodley has never talked to me about any of his affidavits. He has not asked me to tell him whether or not he had my authority to sign any of his affidavits, whether as one of the Yindjibarndi Number 1 applicants or simply as a Yindjibarndi person; nor has he talked to me about what he is saying in any of his affidavits, or why he is saying those things.

13. If Mr Woodley had wanted to speak to me about his affidavits, he could easily have done so. We both live in the same area and there is nothing to stop him speaking to me.

14. I know about the legal dispute taking place between FMG Pilbara Pty Ltd and Michael Woodley, in which Mr Woodley presents his affidavits as being authorised in the ways I have talked about in this affidavit.

15. I disagree with what Mr Woodley is doing in relation to the legal dispute with FMG Pilbara Pty Ltd, because together with the other Yindjibarndi people who are members of Wirlu-murra Yindjibarndi Aboriginal Corporation, (and 20 additional Yindjibarndi people who have applied to join that Corporation) I wish our native title claimant group to sign an agreement with FMG Pilbara Pty Ltd which has already been worked out and agreed between FMG Pilbara Pty Ltd and all of those people.

16. If Mr Woodley had asked me to authorize him to make his affidavits so he could use them in that legal dispute with FMG Pilbara Pty Ltd I would have told him that I did not authorise him to do that, because I am not happy about the dispute which Mr Woodley is having with FMG Pilbara Pty Ltd.

17. On the basis of my personal involvement in meetings and discussions with lots of Yindjibarndi people I know that at least two other members of the Yindjibarndi #1 Applicant and all of the members of the Wirlu-murra Yindjibarndi Aboriginal Corporation (who presently number 190 people; and as at the time of signing this affidavit there are another 20 people whom I know to be Yindjibarndi who have applied for membership) are opposed to the existence of the dispute and would prefer it if an agreement on terms which have already been negotiated and agreed between those Yindjibarndi people and FMG could be executed by the Yindjibarndi#1[sic] Applicant and FMG Pilbara Pty Ltd.'

[56] The grantee party also filed an affidavit of Peter Fletcher Meurs, affirmed 17 November 2010, and the affidavit of Hugh Martin Reynoldson, affirmed 4 March 2011.

[57] The grantee party also filed an extensive list of documents which are frequently referred to in its various contentions. Of particular importance are grantee party documents 119-130, 136, 153-155, 157 and 158.

Native title party's evidence

[58] The native title party's primary evidence is set out in an affidavit of Michael Woodley, sworn 4 February 2011, which I have set out below. Mr Woodley also swore an affidavit dated 25 May 2009 in *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2009] NNTTA 91 ('*FMG/Cheedy*') at [38] and [39]. At para 2.18 of the native title party's contentions in relation to s 39, the native title party indicates that it does rely on the evidence set out in that determination to the extent that it is directly referred to, or included, in the above contentions. The references contained in the contentions are to:

- Paras 3.5-3.7 and 3.9 (see contention paras 2.15 and 2.17) (the native title party also specifically relies on paras 2.1-2.4 in relation to Ngurranyujunggamu).
- Paras 3.1-3.4 in relation to Birdarra;
- Paras 3.11-3.4 in relation to Birdarra initiation ceremonies;
- Paras 4.1-4.7 in relation to Yindjibarndi Galharra; and
- Paras 4.8-4.15 in relation to Binjimagayi and Binga rituals;
- Paras 5.2-5.8 in relation to occupation use and enjoyment of Gambulanha.

[59] Affidavit of Michael Woodley, sworn 4 February 2011:

> 'I, Michael Woodley, Chief Executive Officer of Yindjibarndi Aboriginal Corporation; and, Chief Executive Officer of Juluwarlu Aboriginal Corporation, of 664 Lockyer Way, Roebourne, in the State of Western Australia, make oath and say as follows:
>
> **Introduction**
>
> 1.1. I am a member of the *Yindjibarndi People*, the society of Aboriginal people whose native title rights and interests were recognised by a 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)[sic], in an area of land and waters in the Pilbara region of Western Australia ("Yindjibarndi Determination Area").
>
> 1.2. The native title rights and interests that were recognised in the Yindjibarndi Native Title Determination are held in trust, for the benefit of the Yindjibarndi People, by the Yindjibarndi Aboriginal Corporation ("YAC"), which is a Prescribed body[sic] Corporate ("PBC") and a Registered Native Title Body Corporate under the *Native Title Act*.
>
> 1.3. I am also a member of the Native Title Party, the Applicant on the Yindjibarndi #1 Native Title Determination Application, which was lodged in the Federal Court on 9 July 2003 (Federal Court ref: WAD6005/03), and entered on the Register of Native Title Claims, in the National Native Title Tribunal ("Tribunal"), on 8 August 2003 (Tribunal ref:WC03/3).

1.4. I make this affidavit for the purposes of the Inquiry by the Tribunal into whether or not two Exploration Licences, E47/1398 and E47/1399, and one Mining Lease, M47/1431 ("the Tenements") should be granted by the State of Western Australia ("Government Party") to FMG Pilbara Pty Ltd ("Grantee Party"); and, if so, upon what, if any, conditions they should be granted. 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.

1.5. I previously swore an affidavit on 17 January 2011 (that was mistakenly dated 17 January 2010) in which I explained how FMG last year negotiated a "*Whole of [Yindjibarndi] Country Land Access Agreement*", with a breakaway group of Yindjibarndi people. That agreement requires YAC and the Native Title Party to consent to the grant of all mining tenements and other interests, which FMG has already applied for; and the future grant of any other tenements or interest that may be desired by either FMG (or by any other person with whom FMG has or may have an agreement) in both the Yindjibarndi Determination Area and the Yindjibarndi #1 Native Title Claim Area. However, YAC and the Native Title Party were neither notified of, nor involved in, the negotiations which led to that agreement; and the terms of the agreement were not disclosed to YAC or the Native Title Party, until 6 December 2010, when a copy of the agreement was given to me by a Member of Parliament.

1.6. It seems FMG, through its back-door negotiations with this group, has successfully divided both the Native Title Party and our previously united Yindjibarndi community. On the one hand, the four senior Yindjibarndi Lawmen, who are members of the Native Title party and, as far as we can tell, the majority of Yindjibarndi people, remain opposed to the agreement, for the reasons set out in my previous affidavit. On the other hand, the three women members of the Native Title party, and the 34 members of the newly established Wirlu-Murra Yindjibarndi Aboriginal Corporation, which is to receive the benefits of the agreement, remain in favour of the agreement. A claim group meeting, called by the three women members of the Native Title Party (to pass resolutions requiring the Native Title Party to execute the agreement) was held on 21 December 2010; however, the meeting did not consider the proposed resolutions. In the time that has passed since that meeting, it has not been possible to achieve consensus within the Native Title Party or the Yindjibarndi community.

1.7. The senior Yindjibarndi Lawmen, including those who are members of the Native Title Party, are concerned that the Tribunal may make a determination about the grant of the Tenements anyway; and so I have been authorised by them to make this affidavit on behalf of the Native Title Party and the Yindjibarndi People.

1.8. This Inquiry concerns the grant of two exploration licences and one mining lease in areas of our traditional country that are covered by the Yindjibarndi #1 Native Title Determination Application. The two exploration licences would mostly affect areas within the Mount Florence[sic] Pastoral Lease, although they would also affect a few small areas of unallocated Crown land; and, the proposed mining lease would mostly affect an area [sic] unallocated Crown, situated between two of the mining leases that were considered in the previous Inquiry (M47/1409 and M47/1413) although it would also affect a smaller area that is within the Mount Florence[sic] Pastoral Lease.

2. Yindjibarndi Law and Culture

2.1. I have spent the past 20 years learning everything I can about Yindjibarndi Law and culture from the old Yindjibarndi Law Bosses of my grandfather's generation. They taught me what they had learned from their old Law Bosses: the ceremonies, songs and stories for *Yindjibarndi*; the site and areas in Yindjibarndi Country, which are significant to us because of our religious beliefs; the ancient language we use in our ceremonies; and the dreaming meditation (*Buyawarri*) we use to receive the ancient knowledge from our country. I have spent my time doing this because, like other senior Yindjibarndi Lawmen in the present generation, such as Angus Mack and Fabian Cheedy, I believe the survival of Yindjibarndi Law and culture is important, not just for Yindjibarndi but for everyone; because the continued practice of our *Birdarra* Law ceremonies helps keep our boys away from the grog, off the drugs, and out of the prisons.

2.2. I met Dr Kathryn Trees, in 2004, doing field work for her report to the WA Law Reform Commission. Dr Trees wrote how she witnessed a strong revival of our Law ceremonies following a slump in attendance that had been caused by the deaths of the Law Bosses of my Grandfather's generation. When Dr Trees wrote that this revival was "led by a younger generation who are in their 30's", she was referring to me, Angus Mack and Fabian Cheedy. Together, we had to take up this responsibility from the old Law Bosses because most of the men in our fathers' generation lost themselves on the grog during the 1960's and 70's mining boom. That's why my Grandfather pulled me out of school and took me to *Ngurrawana* in our traditional country at Millstream. He wanted to make sure Yindjibarndi Law and culture did not end with his generation.

2.3. Today, thanks to him and the other old Bosses, our Law and culture is still going strong; and I am seen as the "go-to" man for making sure our Law ceremonies are conducted each year in the proper way.

2.4. I previously swore two affidavits for the Tribunal Inquiry, in WF08/31 concerning the grant of mining lease M47/1413, in which I set out some of the Law, customs and religious beliefs of the Yindjibarndi People; and the evidence I gave in those affidavits was written into the Tribunal's Determinations. I will not repeat everything I said about the *Ngurranyujunggamu*, the *Birdarra*, the *Wuthurru* ritual, the *Thalu* ceremonies and the *Galharra* rules; but what I missed in those affidavits is how *Yindjibarndi Ngurra* and *Galharra* work together to give Yindjibarndi our traditional structure of authority and how that is connected to our Law ceremonies.

3. *Yindjibarndi Ngurra*

3.1. In *Yindjibarndi* language, the word "*Ngurra*" is used in three different ways. Firstly, it means "the whole of Yindjibarndi Country" because this is the home for *Yindjibarndi*; and, secondly, it means the "home areas" for the *Marrga* that live in different areas of Yindjibarndi Country.

3.2. The third way in which "*Ngurra*" is used is to refer to 13 areas, in Yindjibarndi Country, that are "home areas" for "*Ngurrarangarli*" – our name for the Yindjibarndi humans whose spiritual beings come from, and return (after their passing) to those *Ngurra*. Each of these *Ngurra* is divided into two parts by a *Wundu* (a river or watercourse) from which the *Ngurra* takes its name; and, four areas – one for each of the four *Galharra* groups. The *Banaga* and *Burungu* groups are on one side of the *Wundu*; and, *Garimarra* and *Balyirri* are on the other side. We call the *Banaga* and *Burungu* side "*Walhany*"; and the *Garimarra* and *Balyirri* side "*Ngarrli*". These divisions are very important for our ceremonial activities.

3.3. Each of these *Ngurra* holds the spiritual life-force of all the ancestors who belonged to the *Ngurra*; and each has its own *Thalu*, which must be worked by the *Ngurrarangarli* to control creatures and other things in Yindjibarndi country.

3.4. Each of these *Ngurra* also has its own sacred resources, such as *Gandi* (sacred stones used in initiation ceremonies) and *Yarna* (ochre quarries of different colours that are used when performing rituals or ceremonies). According to the *Birdarra*, these resources can be used only by the *Ngurrarangarli*.

3.5. In the area covered by the Yindjibarndi #1 Native Title Determination Application, there are four of these *Ngurra*. Looking west to the east, they are called: *Garliwinyji*, *Buthurnha*, *Winyjuwarra* and *Ngurrbanha*. Today these are among the strongest *Ngurra* in Yindjibarndi country, because we have always been able to access them to do what we need to do, under our law, to look after them, and the *Ngurrarangarli* who come from them.

3.6. The area where FMG wishes to develop the Solomon Project, including the area that would be affected by M47/1431, is in *Garliwinyji Ngurra*, Exploration licence E47/1398 is mostly in *Buthurnha Ngurra*; but it also (on the western side) affects *Garliwinyji Ngurra*. The portion of Exploration licence E47/1399, which overlaps the Yindjibarndi #1 claim, seems to be entirely within *Buthurnha Ngurra*, but may also (on the eastern part of the overlap) affect the southern tip of *Winyjuwarra Ngurra*. I have not been able to work that our precisely. Angus Mack is our mapping expert and he has been away on Law business.

3.7. Thomas Jacobs and Angus Mack are *Ngurrarangarli*, from *Buthurnha Ngurra*, old Ned Cheedy is from *Winyjuwarra Ngurra*, and I am from *Garliwinyji Ngurra*.

4. *Structure of Authority under Yindjibarndi Law*

4.1 Under the *Birdarra* Law, Yindjibarndi women exercise authority in relationships: between women; between men and women; and between children and adults; and Yindjibarndi men exercise authority in relation to Yindjibarndi Law and Yindjibarndi Country. It is not my place to talk about how women exercise their authority; so I will talk only about the structure of authority for Yindjibarndi Law and Yindjibarndi Country.

4.2 In each *Ngurra*, there are four bosses, which we call "*Mirduwarra*" – one boss for each of the four *Galharra* groups. One of these *Mirduwarra*, the most knowledgeable, in our Law, is called "*Tharngungarli*". He is the overall boss for both the *Ngurra* and the *Ngurrarangarli*. The *Tharngungarli* is assisted by one of the other *Mirduwarra*, who is called "*Minga-Margu*". He is the *Mirduwarra* who is "closest" in knowledge to the *Tharngungarli*; and is therefore likely be[sic] the next *Tharngungarli* for the *Ngurra*. All *Mirduwarra* are what we call "senior Lawmen" in English; and the *Tharngungarli* and *Minga-Margu* are what we call the "Law Bosses" in English.

4.3. The *Tharngungarli* who is acknowledged to be, and respected as, the most knowledgeable, in our Law, is called "*Nyambali*"; he is the Chief Law Boss for all that is Yindjibarndi. The *Nyambali* also has a *Minga-Margu*: the *Tharngungarli* who is "closest" in knowledge to the *Nyambali*; and is therefore, likely be[sic] the next *Nyambali*.

4.4. The *Nyambali* and the *Tharngungarli* are, in accordance with our beliefs, directly accountable to the *Marrga*, for making sure that the *Birdarra* Law continues to be followed, and that sacred places, areas and objects in Yindjibarndi country are properly protected and preserved for the future generations of *Yindjibarndi*. This is why the *Nyambali* does not make decisions alone. Instead, important decisions affecting Yindjibarndi Law and Yindjibarndi Country have to be made by what we call the "*Nyambali-Tharngungarli*", the *Nyambali* and the *Tharngungarli*, sitting together as one body.

4.5. The *Nyambali-Tharngungarli* still meets today to discuss important issues and reach consensus on what fits best with our *Birdarra* Law. But these days, important decisions affecting country are made by consensus of all members of the Yindjibarndi community, sitting together in a community meeting, in which the *Nyambali* and *Tharngungarli* provide advice and guidance. This is because the authority of the Law Bosses today really depends on whether the Yindjibarndi People, as a community, wishes to continue to practice the *Birdarra* Law ceremonies and to uphold the *Birdarra* Law.

4.6 At the Yindjibarndi #1 Claim Group meeting in Roebourne, on 21 December 2010, which was organised by the *Wirlu-Murra* group, the Yindjibarndi People as a community decided that the continuation of the *Birdarra* Law ceremonies and the upholding of *Birdarra* Law is and should always remain the most important priority for all Yindjibarndi people.

4.7 Ned Cheedy, who at 105 is, sadly, the last of the old Law Bosses of my Grandfather's generation; he is the current *Yindjibarndi Nyambali*. He also remains the *Tharngungarli* for *Winyjuwarra Ngurra*; and *Mirduwarra* for the *Balyirri Galharra* group in that *Ngurra*. Thomas Jacobs is *Tharngungarli* for *Buthurnha Ngurra* and *Mirduwarra* for the *Balyirri Galharra* group in that *Ngurra*. I am now *Tharngungarli* for *Garliwinyji Ngurra*, *Mirduwarra* for the *Garimarra Galharra*, and *Minga-Margu* for Ned Cheedy.

4.8 As was said many times, in the evidence given by Yindjibarndi people, during the Federal Court hearing for the Yindjibarndi Native Title Determination, under our law, if someone other than *Ngurrarangarli* wants to go to a particular area in Yindjibarndi country, they should let the *Tharngungarli* or *Nyambali* know; and if someone other than Yindjibarndi wants to go there they should get permission from the *Tharngungarli* or *Nyambali*.

5. Effect of the Tenements in relation to the Pastoral Lease Area

5.1. Under our Law, Yindjibarndi people have always had the exclusive right to possess, occupy, use and enjoy all the areas that would be affected by the Tenements, to the exclusion of all others. However, this exclusive right has been claimed (and registered) only in the unallocated Crown land areas where we have been able to continue to exercise and enjoy our registered native title rights and interests as and when we please.

5.2. Yindjibarndi people have also been able to continue to exercise and enjoy our registered native title rights and interests in the Mount Florence[sic] Pastoral Lease area. The only difference is that we have to make arrangements to do that so our activities don't clash with pastoral activities. But this has never been a problem because the current owners of the Pastoral Lease, like those who had pastoral interests in that area before, have always respected the traditional rights of Yindjibarndi people; so we have always been able to go there to camp, hunt and fish, collect bush tucker and bush medicines, and perform particular religious ceremonies. And we do this every year.

5.3. The area on the Mount Florence[sic] Pastoral Lease that will be affected by the two exploration licences is an area we call "*Yawarnganha*". *Yawarnganha* is a flat plain that lies between *Gambulanha* (the Yindjibarndi name for the Hamersley Ranges) and *Birdarrdamra* (the Yindjibarndi name for the Chichester Ranges).

5.4. *Yawarnganha* is a very important area for Yindjibarndi for two reasons. Firstly, because this is the only area in Yindjibarndi Country that holds the sacred trees called "*Wirndamarra*", from which we make certain objects to identify Yindjibarndi people with our Law and country so no other group can steal our lands.

5.5. *Yawarnganha* is also very important because it is the only place in Yindjibarndi country where the emu run; and, during our Law time, which occurs between October and February each year, Yindjibarndi people have to go to *Yawarnganha* and hunt emu for the *Yulbirirri Thurru* ritual. This is a ritual performed by grandfathers with their newly initiated grandsons. The young man must hunt for an emu on the *Yawarnganha* plain; and, once he has one, he must take it to one of the *Yulbirirri Thurru* areas (chosen by his grandfather) which surround the mouths of the watercourses that flow out of *Gambulanha* (the Hamersley Ranges) into *Yawarnganha*, near the base of the escarpment.

5.6. The Yindjibarndi name for the escarpment is "*Gumbayirranha*"; which, in our language, means "a face-to-face reflection of each other"; and it is here, that the young man must for the first time show his face to the face of *Gambulanha*.

5.7. When Yindjibarndi look face-to-face at *Gambulanha* we reflect each other; the Range and its knowledge is the Yindjibarndi and his knowledge – it's like looking into a mirror and seeing a true reflection of yourself and all the fine features of your face that you must care for and protect: a head that holds the key to the[sic] all Yindjibarndi knowledge; a mouth that speaks and sings to you; an eye looking over and seeing everything; an ear that hears everything that the birds, plants, animals and the *Ngurrarangarli* are saying. And a brain that controls all Yindjibarndi movements on country and responds by activating all sorts of unanswerable events that Yindjibarndi put down to natural chain of events.

5.8. The *Yulbirirri Thurru* ritual is carried out where the waters flow out of *Gambulanha* for the young man's safety, it allows him to be seen by the spirits of our country, so that the religious knowledge can find him, without the risk of being grabbed by them. To this end the grandfather teaches his grandson how to cook the emu on hot stones and then covers his body with the emu oil. The *Yulbirirri Thurru* ritual makes the young man and country one, so that he is accepted by all the elements of the country as a *Birirri* (man).

5.9. The *Yawarngganha*[sic] plain is named after the hot stones that are used to cook the emu; and these stones can be found only in the river along the *Mangudunha* – this is a hunting and gathering ground and is like a cause-way located between the Range and the Fortescue River.

5.10. I have indicated on the attached map, marked "MW1" the areas in which the *Yulbirirri Thurru* ritual must be conducted, however it is impossible to give precise locations within those areas because the location is a matter of choice for the grandfather of each young man.

5.11. There are different kinds of *Thalu* in Yindjibarndi country; some are for controlling creatures; and some are healing places called "*Mawarn*". These kind of *Thalu* do not need to be worked by the *Ngurrarangarli*; instead, they must be worked by senior Lawmen who have been given special powers to use the *Thalu* for healing. We call them "*Mawarnkarra*". To become a *Mawarnkarra* the Yindjibarndi Lawman must paint his whole body with white ochre from a nearby ochre quarry ("*Yarna*") and then walk into the *Marnda* (hills) and stay there for at least a week, during which time, the *Marnda* assess him to see if he is worthy of such power, to hold and protect for the good of the Yindjibarndi people. There are two *Mawarn Thalu* in the E47/1398 area. One is situated in the north-eastern section of the tenement and is called "*Garngambinha Marnda*" the other overlaps the eastern boundary of the tenement, directly west of M47/1413; and is called "*Tharndibirndinha Marnda*". These two *Marwarn*[sic] *Thalu* are hills (*Marnda*); and they are also shown on the map, as are the nearby white ochre (*Yarna*) quarries. These *Thalu* are still used by Yindjibarndi people today.

5.12. Each of the proposed exploration licences also affects an area of unallocated Crown land in the southern part of the Yindjibarndi #1 Claim. This area is in the southern part of *Yawarnganha*, which I talked about above and is one of the areas we use for the *Yulbirirri Thurru*.

5.13. The proposed Exploration Licence E47/1498[sic] also affects a few small areas of unallocated Crown land on the eastern side of the escarpment (*Gumbayirranha*) within the Hamersley Ranges (*Gambulanha*), which I include in what is set out below.

6. Effect of the Tenements in relation to the Unallocated Crown Land

6.1. In *Garliwinyji Ngurra* there is a large area of unallocated Crown land which, prior to FMG, held no interest for non-indigenous people. In that area Yindjibarndi people have been able to freely exercise and enjoy all our registered native title and interests, as and when we pleased. My Grandfather used to take me camping and hunting in these areas, when I was a boy; and, after I became a man, he took me there to teach me the songs and stories for the different places there, some of which are set out in the WF08/31 Determination. My Grandfather and the other old Law Bosses also taught me how to do particular religious rituals there, which I describe below.

6.2. I have continued to use and enjoy this unallocated Crown land areas ever since then. I go there with my kin for ceremonial purposes and we also camp and hunt there; we fish in the watercourses and collect mussels from the springs; we visit and take care of important sites; check and clean the pools, waterholes and soaks; and light fire for country rejuvenation. I go there every year is because I am *Ngurrarangarli* for *Garliwinyji* – it is my spiritual home and I belong there. I do not see or feel myself as something separate from *Garliwinyji* – I am a reflection of it; so I look after *Garliwinyji*; and *Garliwinyji* looks after me.

6.3. The Yindjibarndi name for the general area, in which FMG wants to develop its Solomon project, is "*Gambulanha*" which is what we call the Hamersley Ranges)[sic]. Closer up, the name for the particular area, which would be affected by FMG's project, including the M47/1431 mining lease, is called *Ganyjingarringunha Ngurra*. This is because *Ganyjingarringunha* is the Yindjibarndi name for the *Wundu* (watercourse) that runs roughly north-south through the western edge of M47/1431; and, that watercourse is the home of *Barrimirndi*, the *Marrga* water serpent who, in accordance with our beliefs, created all the "*Wundu*" (water places) in Yindjibarndi Country during the *Ngurranyujunggamu* (the time of creation, when the world was still soft).

6.4. "*Ganyjingarringunha Wundu Yaayu*" is what we call the watercourse that runs through the middle of M47/1413, which was considered by the Tribunal in WF08/31. "*Yaayu*" is the Yindjibarndi word for "east". An arm of *Ganyjingarringunha Wundu Yaayu* also runs into the unallocated Crown land area that would be affected by M47/1431.

6.5. The area surrounding this arm of the *Wundu* is part of the same *Gandi* area I spoke about in my affidavit for the WF08/31 Inquiry; when I said:

> "*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. One of the places where we go each year to collect Gandi is in the area that will be affected by M47/1413 ... and if FMG is allowed to mine that Tenement in the way it says it will destroy the Gandi that are located there*."

6.6. As I explained earlier each *Ngurra* (of the third kind I mentioned) is divided into two parts by a watercourse and has four *Galharra* areas. The *Banaga* and *Burungu* groups are on the *Walhany* side of the watercourse; and, *Garimarra* and *Balyirri* are on the *Ngarrli* side. The *Gandi* area for each *Ngurra* is in the same way divided into two sides by a watercourse, and those sides are also called "*Walhany*" and "*Ngarrli*".

6.7. FMG's proposed "Solomon Project", including M47/1431, is in *Garliwinyji Ngurra*; and there are many boys of different ages from that *Ngurra*. As each of these boys reaches the right age for initiation, the *Mirduwarra* for his *Galharra* must travel to the *Gandi* area on the *Walhany* side or the *Ngarrli* side of the *Ganyjingarringunha Wundu*, depending on the *Galharra*, and perform the ritual that allows us to find and take the *Gandi* for the boy's ceremony. In *Garliwinyji Ngurra*, the *Ngarrli* side of the *Gandi* area is the eastern side of the *Ganyjingarringunha Wundu* (the area we call "*Ganyjingarringunha Wundu Yaayu*"); and it is here (and nowhere else) that the *Gandi* for the *Garimarra* and *Balyirri* boys, from *Garliwinyji Ngurra*, must be found.

6.8. The *Gandi* must be chosen and handled very carefully by the right *Mirduwarra* who must then hand it to the father of the boy. The father then hands it back to the *Mirduwarra* to show his trust in the *Mirduwarra*, and the *Mirduwarra* must then shape and sharpen the *Gandi*, with the utmost care, so that it is properly prepared and can be used on the boy, for his initiation, without causing any harm.

6.9. If any of these things are not done exactly as required under our Law it puts the boy in great danger; both his body and his spirit could be harmed by the *Gandi* and, in the worst case, it may cause his death. In the past, when such tragedies have happened, it was always because the *Gandi* was wrong – it was not properly prepared, it was handled by the wrong person, or it got mixed up and used on the wrong boy[sic]

6.10. The ritual to find the *Gandi* involves the dreaming meditation we call "*Buyawarri*"; and what needs to be understood is that this is not just a fly in and fly out thing. You have to camp there; and you have to sing the songs until you put yourself in the country, become one with it, so that you are "*Buyawarri*" – dreaming with the country. The knowledge is not something you can learn; it is something that is given to you. Some people can do Law for a long time and never get the knowledge; but then, for some, the mind opens and the knowledge comes through.

6.11. My first experience of this ritual was in 1994, when my grandfather and I went with Ned Cheedy and some of the other old Law Bosses to the *Gandi* area for the *Winjuwarra Ngurrarangarli*, on the *Ngarrli* side. We camped there for a couple of days, with the Bosses singing the country. Then on the third day we followed old Cheedy as he walked along a creek bed, going this way and that, for about three kilometres, all the time singing these four songs, over and over, until he finally knelt down and started digging. I was impatient and wondered why he couldn't just have gone in a straight line to the place. But then, while he was still digging, I saw a *wili-wili* get up a few kilometres away and start travelling towards us. It too went this way and that, until finally it came to the place where old Ned was, and right over the hole he had dug, it just vanished.

6.12. The point is, I can't say precisely where the *Gandi* are located, because I don't know. I can show the spots where they have been found previously; and I have done this, for the

area of the proposed mining lease M47/1431, on the attached map, marked "MW1". As for the future, all I can say is that the present day *Mirduwarra* agree they would not look beyond 250 metres on either side of the centre of the *Wundu*, because *Gandi* are unique cold stones, which are kept cold by the *Wundu* – so the further you go away the deeper you would have to dig. The map shows the kind of area involved for the mining lease (M47/1413) the[sic] was considered in WF08/31.

6.13. The only other thing I want to say about *Gandi* is that they are not a topic senior Lawmen usually talk about with others. We decided we had to talk about them in this Inquiry because of the consequences we face for not having talked about them in the WF08/31 Inquiry. We didn't know, then, that FMG wanted the mining lease that is the subject of this inquiry. If both these areas are mined, in the way FMG says they will be, it will no longer be possible to put our *Garimarra* and *Balyirri* boys from *Garliwinyji Ngurra* through their initiation ceremonies.

6.14. The *Birdarra* initiation ceremony is the first stage, of a long process, for those boys who choose to earn respect in our community by becoming Yindjibarndi Lawmen. It introduces the boys to our rich culture and our religion, shows him how he is related spiritually to Yindjibarndi country, and gives him a sense of what he can look forward to and enjoy, if he continues to go through our ceremonies. In this way, we make young men strong, it helps keep them away from alcohol, drugs and gaol, and gives them an important reason to continue to live and to struggle against the problems that have been hurting our country for a long time.

6.15. When our boys go through their initiation ceremonies they learn about our law and culture from, and listen to and accept the authority and guidance of, the senior Yindjibarndi Lawmen and the Law Bosses. When they do not go through these ceremonies the Lawmen lose their connection with them, and their authority over them; and it is these boys we see all the time getting into trouble, with the grog and the drugs, ending up dead or in prison. They are incomplete, stumbling around, lost like so many of our parents' generation. This is why the continuation of our *Birdarra* Law ceremonies was so important to my Grandfather and the other old Law Bosses. If they stop, it will be the end for Yindjibarndi.

6.16. This is what is most worrying the senior Lawmen and Law Bosses, and the majority in our community, today; and it's the reason we have not been prepared to accept the terms of FMG's offer for a whole of country agreement. The compensation offered by FMG is only for the loss of our procedural rights under the Native Title Act, yet FMG insists we must not only agree to the grant of all tenements it has already applied for (by our count: about 30 in the Yindjibarndi #1 claim area; and 25 or so in the Determination area) or wishes to apply for in the future; but also agree to never seek any further compensation for the loss of anything more substantial than those procedural rights.

6.17. This is simply not enough to replace to replace what we stand to lose as a community if FMG's project goes ahead. For example:

a. FMG's applications in the Yindjibarndi #1 claim area now completely cover[sic] all the unallocated Crown land in *Garliwinyji Ngurra* where we are confident we can establish exclusive possession native title rights. Had this already been determined, FMG would need to get our consent to access that area. As it is, nearly eight years after lodging our native title application we [sic] still awaiting the recognition of our rights; and, by the time we get it FMG will most likely have established all the access it needs through its proposed roads, airport and railway.

b. The mining of the two tenements (M47/1413 and 1431) using the methods proposed by FMG, will destroy the Gandi in that area and will forever prevent our boys (from of[sic] the *Garimarra* and *Balyirri Galharra* groups in *Garliwinyji Ngurrarangarli*) from participating in the religious practices of their community. And future grants may well carry the same consequence for the other two *Galharra* groups from the *Garliwinyji Ngurrarangarli* and for neighbouring *Ngurrarangarli*.

c. By our count FMG has to date made in excess of 50 applications for tenements in Yindjibarndi Country: about 30 in Yindjibarndi #1 claim area; and 25 or so in the

Determination area. The grant of these tenements will remove the management of our cultural heritage from our hands and put it in the hands of FMG and the Minister; and thus prevent us from carrying out our religious obligations in respect of the management of sites and areas of significance.

d. The loss of our ability to practice our religious ceremonies will mean that there will be no foundation for the traditional structure of authority in our community – it will perish and so will the foundation of our native title.

6.18. For us, this is just totally unacceptable. FMG currently reckons that the iron ore in *Garliwinyji Ngurra* alone is worth about $240 thousand million. What we have been seeking from FMG, in our negotiations, is an opportunity to earn a share in that mineral wealth in our traditional country. We asked FMG to give us a leg-up, so that we could make a real difference for our people, by creating cultural appropriate governance and commercial structures institutions[sic] to deliver health care, education, training and employment opportunities for our people, which Yindjibarndi own and control. This would enable us to secure the means for the future survival of our distinct society, culture and religion.

6.19. Our last offer to FMG was a compensation package of $10m per year ($4m of which would go to a future fund for future generations; with the remaining $6m being use3d[sic] for community and commercial development) and the transfer to Yindjibarndi of five of FMG's exploration licence applications. FMG refused to even consider this.

6.20. What we asked for was not handouts but real financial assistance to develop for Yindjibarndi – so that we, the Yindjibarndi community, can train and employ our own people to work in our country rather than have them work for FMG.

7. Effect on Areas or Sites of particular significance

7.1. In addition to the sites and areas of significance identified above, there are, within the area that would be affected by M47/1431 four ochre quarries, about which the Tribunal made orders, in the original determination for WF08/31, dated 31 July 2009. The four ochre sites were identified as:

a. YIN_09_05

b. YIN_09_06

c. YIN_09_11; and,

d. YIN_09_15

The Tribunal ordered that these ochre sites were not to be disturbed without our consent; however, it turned out, they were each located in the unallocated Crown land to the south of M47/1413 – in the area that is now the subject of FMG's application for M47/1431. Each of these ochre quarries remains just as important to us now as it was then.

7.2. There are also numerous *Yamararra* (caves) in the area of M47/1431, that overlook the *Wundu* (riverbed); and which we sing each year in the *Burndud*. The old Yindjibarndi used the *Yamararra* as burial chambers when senior Lawmen passed away. The Law Bosses would prepare the *Malgarri* (deceased) for burial; first, by covering the body in *Maliya* (honey); and then they would wrap the body in paper bark before placing it in the *Yamararra*. So some of those *Yamararra* also contain the physical remains of our old people; others contain their sacred gear, which they used in ceremonies (in nearby law grounds at *Garliwinyji* and *Wilumarra*, and others contain relics, demonstrating their use, as shelters for our old people over thousands of years[sic]

7.3. The areas that would be affected by the two Exploration Licences are very large and I have not had the opportunity to examine those areas, in order to precisely locate sites of significance, beyond those mentioned above. Each of these areas remains important to us; however, without knowing what activities are proposed by FMG for its exploration program in these areas and the precise locations where it is proposed to conduct those

activities, it is not possible to precisely say what effect the grant of the Exploration Licences will have on our registered native title rights and interests.

7.4. The Yindjibarndi People do not have a heritage agreement with FMG. We tried to negotiate one, in 2007 and thought we had done so when Yindjibarndi Lawmen participated in a heritage survey with FMG before signing off on that agreement. However, after we left the survey area, FMG bulldozed a site of significance, which we had pointed out during the survey. We later agreed to negotiate a new heritage agreement as part of what FMG call a *Whole of Claim Land Access Agreement*, but negotiations over that agreement broke down in 2008.

7.5. Although the previous heritage agreement we negotiated with FMG provided that FMG would not, in exploration licence areas, make a section 18 application without our consent; FMG's offer in respect of the grant of the two Exploration Licences in this Inquiry requires FMG to "consult" with us but not to obtain our consent before making a section 18 Application. The same terms appear in both the offer made by FMG in respect of the Mining Lease and the whole of country agreement. The senior Yindjibarndi Lawmen who are members of the Applicant, Native Title Party, cannot agree to give up the responsibility we carry under our Law to care for, protect and manage sites and areas of significance in Yindjibarndi Country, because to do so would be to breach our own Law.

7.6. In any event, we do not accept that the Aboriginal Heritage Act will properly protect our sacred sites and areas of significance. In a court case we had in the Supreme Court in 2008 the current Minister gave sworn evidence to the effect that he would never allow any Aboriginal group to have the last say on the protection of a site or area of significance to them because to do so would be to give the[sic] a veto over development.

7.7 On the basis of our own experience with the Aboriginal Heritage Act it is clear that the Act seeks to mitigate but will not eliminate damage to a site that is in the way of a development such as FMG's proposed Solomon Project. This is achieved, as the Minister said in his evidence by way of consultation with the relevant Aboriginal group, but never in any way that requires their agreement.'

[60] The evidence contained in the above affidavit sworn by Mr Woodley on 4 February 2011 is consistent with, but more detailed in certain respects than the affidavit he swore on 25 May 2009, which is set out in full in *Cheedy* referred to above. Central to this affidavit is its explanation of the nature of the traditional law and customs which bind the Yindjibarndi to their country. The whole of Mr Woodley's evidence is usefully summarised at para 3.3 of the native title party's contentions. I think it helpful to set that explanation out in full as it gives a systematic account of the nature of laws and customs applicable to Yindjibarndi country. The summary set out in the contentions is as follows:

a) Yindjibarndi country is divided into 13 different areas called "*Ngurra*" [see affidavit of Michael Woodley, dated 4 February 2011, at 3.2].

b) Yindjibarndi people believe that the spiritual essence of each Yindjibarndi human being emanates from and belongs to one of these 13 *Ngurra*; thus: "*Ngurrara-ngarrli*" [see affidavit of Michael Woodley, dated 4 February 2011, at 3.2].

c) There are four of these *Ngurra* in the Yindjibarndi #1 Claim Area, which, running west to east, are called: *Garliwinyji Ngurra*, *Buthurnha Ngurra*, *Winyjuwarra Ngurra* and *Ngurrbanha Ngurra* [see affidavit of Michael Woodley, dated 4 February 2011, at 3.5].

d) Yindjibarndi society is divided into four ("*Galharra*") sections: "*Banaga*" and "*Burungu*"; "*Garimarra*" and "*Balyirri*"; and two moieties: "*Walhany*" (which is comprised of the *Banaga* and *Burungu* sections); and, "*Ngarrli*" (comprised of

Garimarra and *Balyirri*). Relationships, as between sections and moieties, are governed by a system of rules, called "*Galharra*" [see affidavit of Michael Woodley, dated 4 February 2011, at 3.2 and 6.7, and, see: WF08/31 Determination, p 18, at 4.1-4.7].

e) The *Galharra* system is reflected, geographically, in each *Ngurra* by its division (via the river for which it is named) into two sides – the "*Walhany* side", for the *Banaga* and *Burungu Galharra*; and the "*Ngarrli* side" for *Garimarra* and *Balyirri* [see affidavit of Michael Woodley, dated 4 February 2011, at 3.2].

f) In each Ngurra there are four bosses, one for each of the *Galharra* sections. These bosses are called "*Mirduwarra*". One of the *Mirduwarra* (the one who is respected as the most knowledgeable in Yindjibarndi law) is also called "*Tharngungarli*" – the overall boss for both the *Ngurra* and the *Ngurrarangarli*; and the second-most knowledgeable of the Mirduwarra is called *Minga-Margu* and assists the *Tharngungarli* [see affidavit of Michael Woodley, dated 4 February 2011, at 4.2].

g) Each of the 13 *Ngurra* has its own sacred resources, such as *Gandi* [sacred stones used in initiation ceremonies], and *Yarna* [ochre quarries of different colours that are used when performing rituals or ceremonies], which, in accordance with the traditional laws and customs of the Yindjibarndi People, may be used only by the human beings whose spirits emanate from that *Ngurra*; i.e. its *Ngurrarangarli* [see affidavit of Michael Woodley, dated 4 February 2011, at 3.4, and see ethnographic evidence in Anthropological Report at 91].

h) The "*Gandi* area", for the *Garliwinyji Ngurrarangarli*, is situated in a different kind of *Ngurra* to those that are the home of the *Ngurrarangarli*; one that is called *Ganyjingarringunha Ngurra* [in this case the *Ngurra* is believed to be "home" to one of the *Marrga* – the water serpent called "*Barrimirndi*" who is held to be the creator of all rivers, creeks, and springs, which are collectively referred to as "*Wundu*" or "water places"]. This *Ngurra* is also divided into two sides, by the river for which it is named – *Ganyjingarringunha Wundu*. The *Walhany* side of this *Ngurra* is on the western side of the river; and the *Ngarrli* side is on the eastern side [see affidavit of Michael Woodley, dated 4 February 2011, at 3 and 6.3].

i) As this river passes by the western edge of M47/1413 it is fed by a creek which runs in through the middle of M47/1413. That creek shares the same name as the river, "*Ganyjingarringunha Wundu*" but with the addition of one word "*Yaau*[sic]", which is the Yindjibarndi term for "east". An arm of that creek also runs through the centre of the adjoining M47/1431 [see affidavit of Michael Woodley, dated 4 February 2011, at 6.4].

j) The "*Gandi* area", for *Garliwinyji Ngurrarangarli* in the *Ngarrli* moiety, is the bed and banks of that creek, which in[sic] the *Ngarrli* side of *Ganyjingarringunha Ngurra* [see affidavit of Michael Woodley, dated 4 February 2011, at 6.7].

The submissions then go on to discuss in some detail Mr Woodley's standing in the community and the consequent obligations that fall upon him in relation to the collection of Gandi and the conduct of ceremonies at certain periods of time. Mr Woodley also swore an affidavit in relation to appellant proceedings before the Federal Court concerning the native title party's appeal against the decision of the Tribunal, amongst others, of *FMG/Cheedy*, and the decision of the Federal Court at first instance by McKerracher J, *Cheedy obh Yindjibarndi People v State of Western Australia* [2010] FCA 690 ('*Cheedy v Western Australia*'). That affidavit was sworn 18 July 2010, and is referred to in the materials of the grantee party. To the extent

that it is relevant to the questions before the Tribunal, that affidavit will also be referred to.

Interpretation of s 38 and 39 of the Act

Legal principles

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

- *Western Australia v Thomas* (1996) 133 FLR 124; [1996] NNTTA 30 (*'Waljen'*);
- *WMC Resources v Evans* (1999) 163 FLR 333; [1999] NNTTA 372 ('*WMC/Evans*');
- *Western Desert Lands Aboriginal Corporation v Western Australia and Another* (2009) 232 FLR 169; (2009) 2 ARLR 214; [2009] NNTTA 49 ('*Holocene*'); and
- I also rely on the principles set out in *Cheedy v Western Australia*.

[62] 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.'

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.'

[63] 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 enabled 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.'

[64] 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.

[65] 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 and Others v State of Western Australia and Another* (1996) 69 FCR 208; (1996) 136 ALR 557; [196] FCA 1452 at 215-218). This approach has been endorsed by the Land and Resources Tribunal, Queensland (*Doxford, Re* [2003] QLRT 58 at [7]-[12]).

Findings on the Section 39 criteria

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

[66] The extract from the Register of Native Title Claims in relation to the Yindjibarndi #1 Claim, WAD6005/03 (WC03/3), sets out three areas where native title rights and interests have been registered: area A (where a claim for exclusive possession can be sustained), area B (where a claim for exclusive possession cannot be sustained), and area C (where a claim to exclusive possession cannot be sustained over land and waters which are 'nature reserves' or 'wildlife sanctuaries', as those terms defined in the *Wildlife Conservation Act* 1950 (WA) created before 31 October 1975). The difference between these two sets of rights (areas B and C being identical) appears to be that area A includes 60 listed rights, areas B and C, 59. Area A includes a different 'right number one', which is expressed as 'the right to possess, occupy, use and enjoy the area as against the world'. The rights set out in areas B and C do not contain this right, but otherwise the rights in all three are identical. The areas that particularly concern the Tribunal in making this determination are area A, which is relevant to the UCL area, and area B, which is relevant to the pastoral lease area. As indicated, there are 60, in one case, and 59, in the other, native title rights and interests which are registered

and consequently are relevant to the consideration under this subsection of s 39 of the NTA. The native title party, in their submissions, have usefully summarised the nature of the rights which they say are registered over the area of UCL, which is affected by M47/1431, and the area of the pastoral lease, which has an impact on M47/1431, E47/1398 and E47/1399 (at paras 4.1 and 6.2 respectively of their contentions). In relation to the registered native title rights and interests over UCL, the native title party summarise them as follows:

> Such occupation involves the exercise and enjoyment of the native title party's registered right to possess, occupy, use and enjoy that area as against the world; and, the exercise and enjoyment of other registered rights, which, in summary form include:
>
> a) the right to enter, remain, camp, live, hunt, forage and fish in the area;
>
> b) the right to, use and enjoy the land and waters of the area, for all personal, social, community, cultural or religious purposes;
>
> c) the right to find, take, use and enjoy all the resources of the area, other than minerals and petroleum; for all personal, social, community, cultural or religious purposes;
>
> d) the right to conduct and teach cultural and religious activities, ceremonies and rituals in the area;
>
> e) the right to make decisions about the use of the area;
>
> f) the right to care for and protect the area;
>
> g) the right to care for and protect all sites and areas of religious or cultural significance.

In relation to the subject of the pastoral lease, specifically Mount Florance, the registered native title rights and interests, as summarised in para 6.2 of the native title party's contentions, are:

> a) the right to occupy, use and enjoy the land and waters of the area, for all personal, social, community, cultural or religious purposes;
>
> b) the right to enter, remain, camp, live, hunt, forage and fish in the area;
>
> c) the right to find, take, use and enjoy all the resources of the area, other than minerals and petroleum; for all personal, social, community, cultural or religious purposes;
>
> d) the right to conduct and teach cultural and religious activities, ceremonies and rituals in the area;
>
> e) the right to speak for, care and preserve and protect the cultural heritage [sic] the area;
>
> f) the right to speak for, care and protect all sites and areas of religious and cultural significance;

[67] As has been noted by the grantee party, at para 5.3 of its contentions, and the Government party, at para 4.2 of its contentions, this criteria of s 39 directs attention to the 'physical enjoyment of rights and interests that are of a kind that can be exercised on the land and … not … purely religious or spiritual relationships with the land' (see *Western Australia v Ward* (2000) 99 FCR 316; (2000) 170 ALR 159; [2000] FCA 191 at [104]; also see *Australian Manganese Pty Ltd v State of Western Australia* (2008) 218 FLR 387; [2008] NNTTA 38 ('*Australian Manganese*') at ([36]-[39])). I accept what is said by the grantee

and Government parties in relation to the matters that I must consider, albeit it seems clear to me that what Mr Woodley is talking about squarely involves a significant physical dimension, notwithstanding it is of a religious character. The central contention of the native title party, as expressed in the affidavit of Mr Woodley, dated 4 February 2011, is that he is obliged, pursuant to his traditional obligations, under the law and culture of the Yindjibarndi People, to annually conduct ceremonies and obtain materials, both Gandi and ochre, from the area subject to the tenements, particularly M47/1431. Mr Woodley's affidavit contains a great deal of evidence to support his contention that the grant of M47/1431 would significantly interfere with and, indeed, make impossible, the conduct of his cultural and legal obligations under the law and culture of Yindjibarndi.

[68] Mr Woodley's evidence is that his Ngurra is the Garliwinyji Ngurra, which is largely within the unallocated Crown land area covered by M47/1431. Mr Woodley deposes that prior to FMG obtaining its underlying exploration licences in that area, Yindjibarndi people had been able to freely exercise and enjoy all their registered native title rights and interests as and when they pleased. Mr Woodley deposes that his grandfather used to take him camping in 'these areas' when he was a boy, and when he was a man he took him there to teach him songs and stories for different places within the area (see para 6.1 of Michael Woodley's affidavit of 4 February 2011). Mr Woodley deposes that he continues to visit the unallocated Crown land areas, in order to camp, hunt, fish, take care of important sites and to light fires for country rejuvenation. He also goes there because he is a Ngurrarangarli for Garliwinyji, and that it is his spiritual home to which he belongs, and which belongs to him (see para 6.2 of Michael Woodley's affidavit of 4 February 2011). Mr Woodley deposes that the name of the general area which FMG wishes to develop its Solomon Project is Gambulanha, which is the Yindjibarndi word for the Hamersley Ranges. The word for FMG's project area, including M47/1431, is Ganyjingarringunha, because this is the Yindjibarndi name for the Wundu or watercourse that runs roughly north-south through the western edge of M47/1431, and that water course is the home of the water serpent, Barrimirndi, which was responsible for creating all the places in Yindjibarndi country in Ngurranyujunggamu, or time of creation, when the world was soft (see para 6.3 of Michael Woodley's affidavit of 4 February 2011). Ganyjingarringunha Wundu Yaayu is a watercourse that runs through the middle of M47/1413, which was considered in the earlier Tribunal determination in relation to this area (WF08/31). Yaayu means east in Yindjibarndi,

and an arm of the Ganyjingarringunha Wundu Yaayu runs through the unallocated Crown area into what might become M47/1431.

[69] Mr Woodley then deposes that the area around the arm of the Wundu, which affects M47/1431, is the same area as he had spoken about in his earlier affidavit, in WF08/31 (at para 3.12 of Michael Woodley's affidavit of 25 May 2009). In para 6.6, Mr Woodley again sets out neatly the manner in which Yindjibarndi law divides country into areas specifically relevant to people from different sections of each Ngurra. He says each Ngurra is divided into two parts by a watercourse, and has four Galharra areas. The Banaga and Burungu groups are on the Walhany side of the watercourse, or Wundu, and the Garimarra and Balyirri are on the Ngarrli side. The Gandi area for each Ngurra is in the same way divided into two sides by a watercourse, and those sides are also called Walhany and Ngarrli. In para 6.7 of his affidavit, Mr Woodley puts the fundamental point that the area of M47/1431 is in the Garliwinyji Ngurra, and consequently, the boys that come from the Ngurra are dependent for their initiation on the capacity of the Mirduwarra for their Galharra travelling to the area of the Garliwinyji Ngurra, either on the Walhany side, or the Ngarrli side of the Ganyjingarringunha Wundu, depending on the Galharra to which they belong, in order to perform the ritual which involves the collection of Gandi or stones for the conduct of the boys ceremony. The stones for those ceremonies for particular boys must come from either the Ngarrli or the Walhany side of the Wundu, if the law is to be complied with (see para 6.7 of Michael Woodley's affidavit of 4 February 2011). Mr Woodley deposes that the stones must be chosen and dealt with very carefully. If the stones are not dealt with in accordance with the law, it could lead to tragedy (see paras 6.8 and 6.9 of Michael Woodley's affidavit of 4 February 2011). At para 6.10 of his affidavit, Mr Woodley indicates the ritual of finding Gandi involves not a mere physical search, but a process of meditation known as Buyawarri, where the searcher is required to imbue himself with the spirit of the country, by sitting and meditating into the country. If that meditation is conducted correctly 'the mind opens and the knowledge comes through'. At para 6.11, Mr Woodley describes how in 1994 he went with his grandfather and Ned Cheedy to an area to search for Gandi in the Winjuwarra Ngurrarangarli on the Ngarrli site (which is an area different from the area currently under consideration, and probably to the north east, on Hooley Station). Mr Woodley describes how 'old Cheedy' had wandered for up to three kilometres along the creek bed, singing all the time, before he finally came to a place where he was able to dig for Gandi. Mr Woodley then states, at para 6.12 of his affidavit, that:

> 'The point is, I can't say precisely where the *Gandi* are located, because I don't know. I can show the spots where they have been found previously; and I have done this, for the area of proposed mining lease M47/1431 on the attached map, marked "MW1". As for the future, all I can say is that the present day *Mirduwarra* agree that they would not look beyond 250 metres on either side of the centre of the Wundu, because *Gandi* are unique cold stones, which are kept cold by the Wundu – so the further you go away the deeper you would have to dig. The map shows the kind of area involved for the mining lease (M47/1413) which was considered in WF08/31.'

[70] Mr Woodley then concedes that it is not usual for a senior Lawmen to talk about Gandi, but he has decided to take the difficult step of explaining the circumstances, in order to ensure that the area is not mined, or that FMG will not put the Yindjibarndi People in a position which will make it impossible for boys from the Garliwinyji Ngurra to go through their initiation ceremonies (see para 6.3 of Michael Woodley's affidavit of 4 February 2011). Mr Woodley describes the drastic social consequences that are likely to occur in his view should initiation become impossible, including circumstances in which it is likely that the law will break down and the young men concerned will end up 'getting into trouble, with the grog and the drugs, ending up dead or in prison. They are incomplete, stumbling around, lost like so many of our parents' generation.' Mr Woodley explains, in paras 6.16-6.20, why it is that in consequence of these considerations, the native title party has refused to agree to the terms of an agreement proposed by FMG in relation to the area. Mr Woodley characterises the FMG proposal as a handout, and that what the Yindjibarndi require is 'real financial assistance to develop for Yindjibarndi – so that we, the Yindjibarndi community, can train and employ our own people to work in our country rather than have them work for FMG'. Much of this evidence is restated in the native title party's contentions, from paras 3.4-3.8. At para 3.7 of the contentions, the native title party contends that Mr Woodley's description of the ritual is suggestive of the religious sacrament of revelation and is equivalent to the sacrament of the Eucharist. At para 7.8 of the contentions, the native title party then goes on to suggest that on the basis of the evidence it is highly unlikely that the existence of Gandi in an area would be revealed during any archaeological survey. At para 4.2-4.3 of its contentions, the native title party suggests that according to FMG's mining statement:

> '...in support of its application for the grant of M47/1431, iron ore deposit in this area is 50 metres thick and 4 kilometres long; and FMH[sic] intends to mine it using open pit mining methods…It is submitted that the mining of M47/1431 will destroy the Gandi located therein and will prevent members of the Native Title Party from continuing to enjoy their registered native title rights and interests, as they have done to date.'

[71] In relation to the areas of the pastoral lease, which are largely the exploration licences E47/1398 and E47/1399, Mr Woodley indicates that in accordance with the traditional laws and customs of Yindjibarndi they had always exclusively possessed, occupied, used and enjoyed the area affected by these tenements, and the subject of the pastoral lease. They have been able to continue to use and exercise their native title rights in the area of the Mount Florance pastoral lease, because of understandings they have with the pastoral lessee, who allows them to continue to camp, hunt, fish, collect bush tucker and bush medicines and perform particular religious ceremonies every year (see paras 5.1-5.2 of Michael Woodley's affidavit of 4 February 2011).

[72] Mr Woodley says that the area of the Mount Florance pastoral lease, which is affected by the two exploration licence areas is important because of the existence of an area known as Yawarnganha. Mr Woodley deposes that Yawarnganha is a flat plain the lies between Gambulanha (Yindjibarndi name for the Hamersley Ranges) and Birdarrdamra (the Yindjibarndi name for the Chichester Ranges). Mr Woodley says that this area is very important to the Yindjibarndi for two reasons, firstly, it is the only area in Yindjibarndi country which holds the sacred tree Wirndamarra, from which certain objects are used to identify Yindjibarndi People with their law and country so no other group can steal their lands (see para 5.4 of Michael Woodley's affidavit of 4 February 2011). The second reason for the importance of this area is because it is the only place in Yindjibarndi country where 'the emu run'. Mr Woodley deposes that during the law time, between October and February, Yindjibarndi people have to go to Yawarnganha to hunt emu for the Yulbirirri Thurru ritual, which is conducted around the mouths of watercourses that flow out of Gambulanha into Yawarnganha near the base of the escarpment, which is known in Yindjibarndi as Gumbayirranha, which means a 'face to face reflection of each other'. Through the process of coming face to face with Gambulanha, the Yindjibarndi come to have knowledge of themselves as being a true reflection of country. Similarly, the Yulbirirri Thurru ritual 'makes the young man and country one, so that he is accepted by all elements of the country as a *Birirri* (man)' (see paras 5.6-5.8 of Michael Woodley's affidavit of 4 February 2011). Again Mr Woodley says that Yawarnganha is named after hot stones which are used to cook the emu, and these stones can only be found in the river along the Mangudunha, which is 'hunting and gathering ground and is like a cause-way located between the Range and the Fortescue river'. Mr Woodley deposes that he has marked the areas in which the Yulbirirri Thurru ritual must be conducted on the map, however the

precise location cannot be provided as it is a matter of the choice of the grandfather of each man (see paras 5.9-5.10 of Michael Woodley's affidavit of 4 February 2011).

[73] At para 5.11 of his affidavit, Mr Woodley deposes to the fact that there are different kinds of Thalu in Yindjibarndi country, and some are healing places called Mawarn. These kind of Thalu are worked by senior Lawmen who have special powers, called Mawarnkarra, who must paint their whole body with white ochre from a nearby ochre quarry (Yarna), and then walk into the Marnda (hills) and stay there for a week, during which time the Marnda will assess whether the person is worthy to hold the power to protect the Yindjibarndi People. Mr Woodley deposes that there are two Mawarn Thalu in the area of E47/1398. One is situated in the north-east section of the tenement and is called Garngambinha Marnda, the other overlaps the eastern boundary of the tenement, directly west of M47/1413 and is called Tharndibirndinha Marnda. Apparently these two Mawarn Thalu are hills, and they are also shown on the map as they are nearby the white ochre quarries. Mr Woodley deposes that these Thalu continue to be used today by Yindjibarndi People (see para 5.11 of Michael Woodley's affidavit of 4 February 2011).

[74] The map marked MW1 attached to the affidavit of Michael Woodley, sworn on 4 February 2011, is of limited assistance. It sets out, without identifying the areas of the three proposed tenements under consideration, the general area in which particular sites are located. It identifies Yawarnganha as sitting between the Hamersley and Chichester Ranges, largely to the east of Gumbayirranha, across which, from the north-east to the south-west, runs the Burnthurrunha which appears to be the Fortescue River, or a tributary of it. There is also depicted, slightly further to the south-east, the Gatharranunha, which may also be part of the Fortescue River. What appears to be another large watercourse on the eastern side of the map, running through the Hamersley Ranges, appears to be identified as the Ganyjingarringunha Jinkard (Jinkard means south in Yindjibarndi). It also identifies the Garngambinha Thalu on the far northern central side of the map, and the Tharndibirndinha Thalu which appears to be on the west of the Yawarnganha. It is also identifies three Yulbirirri Thalu sites coming down the centre of the map from north to south, with one of those sites apparently in the area of current consideration. The map also identifies large areas of brown colour which are said to describe areas of Yarnararra, or caves, scattered around the central part of the map, which is largely covered by the tenements in question, and around that large areas of a grey colour said to indicate Yarna, or ochre, in that area which extend

further to the north. The maps also identify in the area immediately around the Ganyjingarringunha Yaayu area a series of red dots following that water course at the base of the Hamersley Range. There is one further red dot in the middle of an area of cave, further to the west and nearer to the Tharndibirndinha Thalu. These red dots indicate where Gandi has been found in the past. The grantee party in grantee party document 154, has helpfully plotted various tenements, including tenements currently in consideration, over MW1. That map shows that of the 21 red dots, which are said to be illustrative of where Gandi had previously been collected, 13 of them lie within M47/1413, and are not the subject of this determination. The other eight lie along a watercourse proceeding north-west to south-east into M47/1431. M47/1431 is also shown to be the subject of a large number of grey areas indicating ochre on the eastern side, and a range of brown areas indicating caves, particularly on the eastern side and along the south-western boundary, as well as on the southern side of the watercourse that runs north-west to south-east across the proposed tenement. There are no Thalu or Thurru sites within M47/1431. The area of exploration licence E47/1398, although it's not entirely clear from either map, does include the Tharndibirndinha Thalu, most of Yawarnganha, Gumbayirranha, at least two and possibly three of the Yulbirirri Thurru sites, and possibly the Garngambinha Thalu, as well as significant areas of Yarna, or ochre. There are difficulties in understanding the map which comprises MW1 to Mr Woodley's affidavit. Within M47/1431, which has a total area of 2,964.66 hectares, I would estimate that the four clumps of cave area, Yarnararra, would take up approximately a quarter of the entirety of the area of the tenement. Similarly, the areas of Yarna, or ochre, in the eastern side of the tenement would probably comprise some 25 per cent of the tenement area. As there is some overlap, perhaps 40 per cent of the area is covered by either the caves, the ochre, or both. It may be that the areas in brown, depicting caves, are areas in which the caves are located rather than areas entirely of caves. Similarly, the areas marked with ochre are the areas in which the sources of ochre may be located, not that the entirety of the area is a source of ochre. In any event, the lack of precision in relation to that description of those locations is not particularly probative.

[75] The Government party (at paras 43-46 of its submissions), in relation to s 39(a)(i), takes issue with the native title party's capacity to have maintained exclusive possession over all of the area. Notwithstanding Yindjibarndi law and culture, it is clear and conceded by the native title party that they do not continue to retain exclusive possession over the areas of pastoral lease (para 5.2 of Michael Woodley's affidavit of 4 February 2011). They have,

however, asserted that they have rights of exclusive possession over areas of unallocated Crown land, and those rights have been registered. To the extent that the State's contention is that I should not take account of any interference with the native title party's right to exclusively possess part of the area covered by the tenements, I will do so in relation to those areas covered by the pastoral lease. I do, however, take into consideration that right when considering those parts of the relevant tenements which sit on unallocated Crown land, and I do that notwithstanding the effect of granted exploration licences which exist underlying the mining lease application. At paragraph 47 of its contentions the State maintains that in any event, the interference with the native title rights and interests will be mitigated by the imposition of the proposed extra conditions one and two. I accept that they will provide some mitigation of any impact on the exercise of registered native title rights and interests, and discuss this question further below.

[76] The grantee party has filed both contentions and contentions in reply in relation to this limb of s 39(1). Also, on its behalf, have been filed the 16 affidavits of members of the native title party. Those affidavits are of critical significance, and I will come to them later. I will deal with the grantee party's contentions first.

[77] The grantee party, like the native title party, deals with the first limb of s 39(1) in two parts, the first dealing with the mining lease and the second with the two exploration licences.

[78] In relation to the mining lease, the grantee party makes the following point:

> 'The evidence of the native title party relates to the area of unallocated crown land which exists in a significant area in the central part of the Yindjibarndi #1 Claim. It includes and surrounds tenement M47/1431, but involves an area significantly larger than the area covered by M47/1431.'

The point the grantee party makes is that there is no specific distinction contained in the evidence of the native title party which sets apart the activities that it conducts in the UCL area in general against the specific activities it conducts within the area of the mining lease M47/1431. The grantee party cites *WMC/Evans* as authority for the proposition that the task that the Tribunal is undertaking concerns an assessment of the impact of the grant of the tenement on the exercise of registered native title rights and interests within the area of the proposed tenement, and consequently I should give little weight to the evidence Mr Woodley has provided in relation to those activities (see para 5.2 of the grantee party's statement of contentions in reply, as they are insufficiently specific to the area of M47/1431). Similarly, at para 5.3 of the contentions, the grantee party suggests that 'almost all of the evidence

provided by Mr Woodley goes to what he is obliged to do under Yindjibarndi law, rather than what he does do, or indeed what others do, the only exception to that is contained in Mr Woodley's description of activities in his affidavit at 6.2'.

[79] I agree that in general terms the evidence of Mr Woodley in relation to his activities on the unallocated Crown land is general, and is open to a suggestion that those activities may be conducted on areas other than that the subject of M47/1431. However, Mr Woodley is quite specific that the activities on the Garliwinyji Ngurra in the collection of Gandi and ochre along the Ganyjingarringunha Wundu are, according to his map MW1, conducted within the area of M47/1431. This appears to be confirmed by the map at grantee party document 154. Similarly, notwithstanding the deficiencies of the location of the Gandi sites, which we discuss above, the red dots on the map MW1 do, at least in eight out of the 21 cases, put those dots inside M47/1431. Again, I accept that the evidence of Mr Woodley focuses largely on the system of religious obligation, which is enshrined under Yindjibarndi law, however, as is illustrated by the comments above, and by other statements of Mr Woodley (at paras 6.7-6.15), there is specific reference to activities which are carried on in the area of M47/1431.

[80] At paragraph 5.9 of its submissions in reply, the grantee party suggests that the proposition put forward in the native title party's contentions, at para 4.3, cannot be sustained. Para 4.3 states in part:

> 'the mining of M47/1431 will destroy the *Gandi* located therein and will prevent the members of the native title party from continuing to enjoy their registered native title rights and interests as they have done to date.

The submission of the grantee party, looking at doc 124, indicates the area of resource within M47/1431, which does not include all the areas within that tenement, and suggest that the grantee party would only proceed to mine, either by open cut method or any other means, those areas which contained resource, and would not mine, under any circumstances those areas which did not contain enough resource to be economically recoverable. Grantee party document 121 shows the infrastructure layout which would cover the areas in and surrounding M47/1431, and the grantee party contends that it leaves plenty of room for the continued conduct of activities sanctioned under the registered native title rights and interests of the native title party. At para 5.9 of their contentions, the grantee party go on to make the point that the furthest Gandi spot, as indicated in the map MW1, and the overlap in grantee party document 154, falls in an area on the north-eastern boundary of M47/1431 which is unlikely

to be affected by mining in that tenement. Further, grantee party document 158, which shows the proposed FMG infrastructure in the vicinity of the *Ganyjingarringunha Yaayu*, which covers both areas M47/1431 and M47/1413, and indicates proposed pits in the area, illustrates both that there would be a significant part of M47/1431 which would not be impacted in any way by the proposed development, and secondly that, within the area of M47/1413, where they have mapped both the *Ganyjingarringunha Yaayu* and a 250 metre buffer zone, that there will still be significant areas which fall outside either the proposed pit outline or the proposed infrastructure development.

[81] Further, the grantee party challenges the evidence of the native title party, and that contained in Mr Woodley's affidavit in relation to the areas where Gandi can be collected. At paras 5.12 and 5.13, the grantee party indicates discrepancies between paras 3.11 and 3.12 of Mr Woodley's affidavit of 25 May 2009, and paras 5.6 and 5.8 of the same affidavit. They subsequently point out that in Mr Woodley's affidavit sworn on 18 July 2010, in proceedings before the Federal Court seeking to stay the application of McKerracher J in *Cheedy v Western Australia*, that he swore an affidavit to the effect that Gandi were only located within mining area M47/1413, which logically, would preclude the existence of Gandi in M47/1431. The relevant paragraph (para 22) states: 'Like all the other Ngurra, in Yindjibarndi country, there is only one Thalu in Garliwinyji Ngurra, and only one area where Gandi can be found. That area surrounds the part of the Ganyjingarringunha Yaayu Wundu, which runs through the area of proposed mining lease M47/1413'. I believe it might reasonably be argued that that statement is not inconsistent with the assertion that Gandi stones may also be found in the area which surrounds the creek existing within M47/1413, as that creek follows a course into M47/1431, but I accept that it is probably a generous interpretation. In any event, at paras 5.17 and 5.18, the grantee party then goes on to take issue with the point made by Mr Woodley in para 6.12 of his affidavit of 4 February 2011, where he says he cannot precisely place where Gandi are located because he doesn't know. He says he only knows where Gandi were previously found, which he has marked on the map MW1. He then says 'as for the future, all I can say is that the present day Mirduwarra agree they would not look beyond 250 metres on either side of the centre of the Wundu, because Gandi are unique cold stones'. At para 5.18, the grantee party contends that if there are Gandi remaining in the area of M47/1413 (or M47/1431), Mr Woodley does not know where they are. At para 5.19 the grantee party challenges the evidence in relation to Gandi as mapped on MW1, as there is no explanation as to how each of those dots was mapped, when the Gandi was collected, who

collected it, how it was retrieved or who accompanied him while the Gandi was collected. I accept that the large dots, which probably representative a significant area in terms of hectares, are not particularly useful other than to indicate the general area in which the Gandi was collected, as I previously indicated in the determination WF08/31.

[82] At [80] of WF08/31 I said '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.' That would stand true for a circumstance in which I sought to impose a condition to protect specially identified areas, however, it would not be an obstacle to making a determination that an area was of such significance that the application for a mining lease should not be granted in any event.

[83] Further, in para 5.19, the grantee party argues that it is quite likely that there may well be other Gandi areas within the Garliwinyji Ngurra, and that in any event the most eastern Gandi site, which is the most eastern red dot on MW1, is not likely to be impacted by the project on the basis of current plans of FMG.

[84] Mr Woodley puts a powerful case to the Tribunal to make a determination of the impact on the exercise of their native title rights in M47/1431, in particular for the interference with the collection of Gandi and the conduct of initiation ceremonies in the area specific to M47/1431, including the Garliwinyji Ngurra (which appears to overlap with that tenement, M47/1413 and possibly beyond). Such a level of interference would be a critically significant consideration in coming to a conclusion that the tenement should not be granted. Mr Woodley's evidence, however, is uncorroborated, contested, and potentially unauthorised. Before I consider the evidence against the native title party, I will set out the evidence as I see it in relation to the pastoral lease areas, put forward by the Government party and the grantee party.

[85] Approximately 91 per cent E47/1398 is covered by the Mount Florance pastoral lease, and approximately 22.6 per cent is UCL. In relation to E47/1399, approximately 58.6 per cent is covered by Mount Florance pastoral lease and 36.3 per cent is UCL, however, only 28.8 per cent of E47/1399 is within the Yindjibarndi #1 Claim, most of which is covered by Mount Florance. So in other words, in relation to E47/1399, the great bulk of that exploration licence which falls within the Yindjibarndi claim is covered by a pastoral lease. The Government party indicates that the evidence in relation to activities conducted on

Mount Florance station is general and limited (in reference to para 5.2 of Mr Woodley's affidavit of 4 February 2011 and para 6.1 of the native title party's contentions). The Government party contends that the extent to which the activities are asserted to have been carried out every year may mean annually, ie once a year. The Government party asserts that there is only one Yulbirirri Thurru site within E47/1398, and two others outside. They contend the only possible interference with any ceremonies at the Yulbirirri Thurru site would be if they conflicted with exploration activities being conducted, but as they are usually carried out in law time, between October and February, when exploration activities are limited, such interference is unlikely, and in any event would be protected by the extra conditions proposed (see para 9 of the Government party's contentions). At para 11 the Government party cites the significant areas of ochre that are suggested to exist within E47/1398 and E47/1399 as being potentially illustrative of the fact there may be numerous sources of ochre in the area of the exploration licence applications. Similarly the sacred tree, Wirndamarra, is also not precisely located, and there is no indication as to how the nature of exploration activities, given the protection of the AHA and the Government's regulatory regime will in any way endanger them.

[86] The grantee party contend, at para 5.22, that the references to the sacred tree give no particulars in relation to their location or significance. Notwithstanding that contention, it does appear to me that the significance of the tree is identified in para 5.4 of Michael Woodley's affidavit of 4 February 2011, in that it provides materials which distinguish the Yindjibarndi from other Aboriginal persons, and consequently as owners of Yindjibarndi land. Despite that, there is no explanation provided as to how it is likely that the conduct of exploration in these areas will interfere with these trees. Secondly, the grantee party contends that the hunting of emu and the Yulbirirri Thurru ritual, discussed in paras 5.5-5.10 of Michael Woodley's affidavit of 4 February 2011, is, from the annexure MW1, conducted in at least four areas within the area of the exploration. I note that one of those areas is located within the existing E47/1447, which is also held by the grantee party, and there has been no indication that there has been interference with that site or that ritual as a result of the grant of that tenement. It would appear that the precise location of these areas cannot be given as it is a matter of choice, and may well be that it varies from year to year. Similarly, in the description of the Mawarn Thalu, the Mawarn is described as being near the wide ochre Yarna quarries, however, as is seen from annexure MW1 to the Woodley affidavit of 4 February 2011, the area shown for ochre quarries covers significant areas probably involving

several square kilometres within the area of the proposed exploration licences. At paras 5.23 and 5.24, the grantee party makes the point that while the Yindjibarndi People have been able to coexist with the holders of the Mount Florance pastoral lease, their situation will not change with the grant of these tenements, as under the *Mining Act* the grantee of such tenements does not have the same level of control over the Mount Florance pastoral lease as the current lessee does. The grantee party invites the native title party to seek arrangements with it, in order to ensure that the grantee party's activities do not clash with the cultural exercise of the native title party's registered native title rights and interests.

[87] The grantee party makes a good deal of the fact that the native title party fails to precisely identify areas where Gandi can be located within either the exploration applications or M47/1431, and appears to take the view that a failure to precisely locate means that the Tribunal should discount the significance of the collection of Gandi, or its importance to cultural matters concerning Yindjibarndi law and culture. Notwithstanding that it is true that Mr Woodley has indicated that he 'does not know' precisely where Gandi can be located within any particular Ngurra, he does indicate, in my view, that it is critical to the continuation of Yindjibarndi law and culture that for each Ngurra the Ngurrarangarli obtain Gandi from the appropriate side of the Wundu in order to properly conduct the initiation rituals which are a fundamental part of Yindjibarndi culture. Mr Woodley does establish, at para 6.10 of his affidavit of 4 February 2011, that there is a process, albeit a mystical one, by which Gandi can be located, known as the dreaming meditation they call Buyawarri.

[88] If it was established that the activities that are likely to be conducted on a tenement would make it impossible, in any meaningful sense, to continue to carry on this process, that would be a significant factor in determining whether or not the proposed activity could be carried out at all, or at the very least, whether it would be necessary to impose a condition requiring close cooperation between the grantee party and the native title party in the conduct of any mining activities on the area, so as to ensure that access could continue to be achieved by Yindjibarndi to these stones and permit the conduct of those ceremonies.

[89] Mr Woodley's affidavit evidence is challenged by the evidence provided by 16 persons who are members of the Yindjibarndi native title claimant group, including three of the seven surviving members of the Yindjibarndi #1 applicant group. In general, the affidavits take issue with:

a) His authority and capacity to speak in an authorised fashion on the Yindjibarndi #1 native title claim;

b) His authority and capacity to speak with the authority of the Yindjibarndi People;

c) His authority and capacity to reveal the secret matters relating to the conduct of Yindjibarndi law and ceremony;

d) The accuracy of his location of geographical features within the area of the three proposed tenements;

e) The accuracy of his description of ceremonial events, which take place on the area of the three proposed tenements; and

f) The cultural significance of the area, the subject of the three tenements.

[90] There may be a question as to the seniority of some of the deponents of these 16 affidavits, including the question of whether women are able to speak of these matters. In the native title party submissions, reference is made to evidence which was given before Nicholson J in the judgment of his in *Daniel v State of Western Australia* [2003] FCA 666 ('*Daniel*'). In those submissions, the native title party refers to sections of his Honour's judgment to support the position of the native title party in relation to the extent of Yindjibarndi country, the structure of authority in Yindjibarndi society in respect of Yindjibarndi law, the passing down of responsibilities under Yindjibarndi law, and the nature of the Galharra system (see paras 2.8, 2.11, 2.14 and 2.16 of the native title party's contentions).

[91] At para 2.8 of the native title party contentions, [1193] and [1226] of the decision in *Daniel* is referred to as supportive of the Yindjibarndi claim to the Yindjibarndi area going beyond the area dealt with in that determination, to the country the subject of the Yindjibarndi #1 claim. In the second of those two passages, his Honour discusses the evidence of Woodley King, the grandfather of Michael Woodley, but there is also reference to Bruce Monadee, Sylvia Allen, Berry Malcolm, and Allery Sandy. Similarly, in relation to the question of the structure of authority in Yindjibarndi society, the native title party's contentions at para 2.11 make reference to his Honour's observations in [1318], [1319] and [1321] of the judgment. In [1321], the following statement is made:

> '*Kenny Jerold … identified Woodley King as a very important person who puts people through the Yindjibarndi law, as do Bruce Monadee and himself. Because they carry the law for Yindjibarndi country they are the traditional owners of it (T 6703).*'

At para 2.4, in relation to the passing down of responsibilities by Mr Woodley's grandfather, the native title party makes reference to the observations made by his Honour in [1331] and [1349]. In [1331] of the judgment, his Honour makes reference to the fact that Woodley King indicated that he felt it was the responsibility of younger men, especially his grandson Michael Woodley, to look after the area of the Thalu at Jirda Hill. Earlier in that paragraph, reference is made to the fact that the people who testified about the significance of the Thalu at Jirda Hill included Bruce Woodley. In para 2.14 of the native title party's contentions, reference is made to the observations made by his Honour at [1334] of his judgment, in relation to the question of correct Galharra, where various people, including Woodley King, are referred to as well as Berry Malcolm, who had explained reasons various Aboriginal witnesses performed the ritual involving blowing out water when they approached this Thalu (at Jinduwurrina).

[92] It is also notable that the applicants in the Ngaluma Yindjibarndi Claim (WAD6017/96) included, on behalf of the Yindjibarndi people, Bruce Monadee, Bruce Woodley and Jimmy Horace amongst the eight members of the Yindjibarndi side of the applicant group.

[93] Without being systematic in my examination of the evidence contained in the judgment of his Honour in this matter, from reference to Appendix D to the judgment, 'Evidence referable to part six observable behaviour in relation to rights and interests claims by the first applicant; Lay evidence', it is apparent that Bruce Monadee, Sylvia Allen, Berry Malcolm, Allery Sandy, Jimmy Horace, Bruce Woodley, Mavis Pat and Clifton Black, all gave evidence at that trial, as did Michael Woodley. I make reference to these facts simply to demonstrate that, in my view, the fact that they were witnesses in the trial, and in four instances applicants on the claim, they do have a level of seniority in the Yindjibarndi Claim group and knowledge of its law and custom. Similarly, native title party document 3, entitled 'Anthropological Report Yindjibarndi #1 Native Title Claim April 2008' by Michael Robinson and Mark Chambers with Juluwarlu Aboriginal Corporation, is the anthropological report produced by the Yindjibarndi #1 Applicants to support its application for a consent determination of native title to be negotiated between it and the Government parties. The document is a comprehensive one which quotes from the statements of members of the claimant group in an extensive manner in order to support the propositions it makes. Mr

Michael Woodley is prominently represented in those quotations, but so are Sylvia Allen, Berry Malcolm and Mavis Pat.

[94] As has been mentioned above in [15], at para 1.4 of Mr Woodley's affidavit of 17 January 2011, Mr Woodley says he was authorised to swear that affidavit on behalf of the senior Yindjibarndi Lawmen, and the majority of members of the native title party. At para 1.7 of his affidavit of 4 February 2011, Mr Woodley said that he had been authorised by the senior Yindjibarndi Lawmen to make this affidavit on behalf of the native title party and the Yindjibarndi People.

[95] There are seven surviving members of the persons who comprised the Yindjibarndi applicant group. They are Michael Woodley, Allum Cheedy, Mavis Pat, Ned Cheedy, Aileen Sandy, Sylvia Allen and Thomas Jacob. Three of those persons who comprise the applicant, Mavis Pat, Aileen Sandy and Sylvia Allen, have sworn affidavits in these proceedings which have been filed on behalf of the grantee party. The affidavit of Aileen Sandy, affirmed on 28 February 2011, is set out at [51] above. The affidavits of Mavis Pat and Sylvia Allen, both affirmed on 28 February 2011, are in near identical terms, save that Ms Pat and Ms Allen say in para 5 of their affidavits that they are unable to refer by name to the other member of the applicant group that had filed affidavits in these and similar proceedings, who is identified in para 5 of Ms Sandy's affidavit as Michael Woodley. Similarly, throughout the affidavits, Mr Woodley is referred to as 'the person to whom I must not refer by name'. They refer to the affidavits sworn by Mr Woodley on 25 May 2009, 18 July 2010, 15 November 2010, which Mr Woodley alleged he was authorised to swear on behalf of the Yindjibarndi applicant group. At para 12 of their respective affidavits, Ms Sandy, Ms Allen and Ms Pat set out that Mr Woodley had never talked to them about his affidavits, he had not requested their authority to sign the affidavits, either as a member of the applicant group or as an individual Yindjibarndi person, nor had he consulted them about the contents of the affidavits. At para 13, they deposed that they live near to Mr Woodley, and it would be easy for him to contact them. At para 15 of their affidavits, they say they disagree with the stance taken by Mr Woodley in relation to his negotiations with the grantee party in this matter and in other proceedings, and indicate that they wish to reach agreement with the grantee party on the terms currently proposed. At para 16 of their affidavits, they say that if Mr Woodley had sought their authorisation to swear these affidavits, they would not have given it to him, because they do not agree with the direction of the negotiations. At para 17 they say that the

three of them are also members of Wirlu-Murra Yindjibarndi Aboriginal Corporation, who currently number 190 people. It is clear from the authorities, particularly in recent decisions of *Roe* and *Tigan* which are discussed at [14] and [16] above, that Mr Woodley was not authorised to swear these affidavits in circumstances where he did not have the full authority of the applicant group. The affidavits that he swore on 17 January 2011 in relation to good faith, and 4 February 2011 in relation to the substantive determination in this matter were expressed explicitly as being filed or authorised on behalf of some (ie four) of the members of the applicant and other senior Lawmen. These circumstances have an impact not only on Mr Woodley's capacity to file affidavits in these proceedings, but also on the credibility of their content, at least in the sense that they are purportedly an expression of the opinions of the native title party.

[96] The affidavit of Berry Malcolm, affirmed on 28 February 2011, is set out in full at [50] above. As far as I can determine, the affidavits of Diana Smith, affirmed 3 March 2011, and the affidavit of Julie Stevens, affirmed 28 February 2011, are in identical terms. At para 4 of the affidavits, the three deponents take issue with the location by Mr Woodley of Gambulanha which, according to Mr Woodley, is the Yindjibarndi name for the Hamersley ranges, within the Firetail Project area (para 5.1 of Michael Woodley's affidavit of 25 May 2009). At para 5, the three deponents state that they know where Gambulanha is and it is Gambulanha Marnda, a hill whose English name is Mount Pyrton, which is 12 kilometres north-west of the western boundary of the Yindjibarndi #1 claim, and 65 kilometres from the Firetail mining leases. At para 6 of their affidavits, they make reference to para 5.4 of Mr Woodley's affidavit of 25 May 2009 relating to the recital of a dreaming song titled Gambulanha Jawi, which refers to several places including Jirdangga, Barnarrarala Hill, Thardiwarngu Pool, Jimawarrada Hill, Yaralarnha Country, and Bangarru. At para 7 they say they know where all of those places are, and that none of them are within the Firetail Project area. They say Jirdangga is near Millstream, and that that place, and all the other places, are within Yindjibarndi country but outside the Firetail Project area, and that, consequently, the song that Mr Woodley sang, the Gambulanha Jawi, has nothing to do with the Firetail Project area. At paras 8 and 9, they refer to Mr Woodley's reference to the Barngkawyinha Marnda within mining lease M47/1411, which Mr Woodley says is within the Gambulanha area. At para 9, the deponents say that Barngkawyinha Marnda is actually near Hamersley Homestead, close to the intersection of the Rio Tinto railway line and the southern boundary of the Yindjibarndi #1 claim, which is 20 kilometres away from the Firetail Project area.

[97] They also say, at para 10 of their affidavits, where Mr Woodley refers to Jilinjilin Hill in the dreaming song, at para 5.11 of his affidavit of 25 May 2009, that, although they do not know a place of that name, they know Bilinbilin Hill, which is near Millstream, and nowhere near the Firetail Project. They also say at para 11 of their affidavits that the reference in para 5.11 of Mr Woodley's affidavit to Warduwarranha Hill is not within the Firetail Project but is near Millstream. At para 12 of their affidavits, they refer to para 19 of Mr Woodley's affidavit of 18 July 2010, where he refers to four Ngurra within the Yindjibarndi #1 claim as being Garliwinyji, Buthurnha, Winyjuwarra and Ngurrbanha. Mr Woodley repeats that statement in his affidavit of 4 February 2011, at para 3.5, where he adds that the four Ngurras, in the same order as he referred to in the earlier affidavit, proceed from west to east. At para 13 of their affidavits, they depose to the fact that on 11 February 2011 they discussed Mr Woodley's affidavit with 19 other senior Yindjibarndi people (20 in total). At para 14 they all agree that Garliwinyji Ngurra is in the west of Yindjibarndi #1 claim, outside the Firetail Project area, that Buthurnha is the Yindjibarndi name for Hooley Creek, which is outside the Firetail Project area, and that Winyjuwarra Ngurra is within Hooley Station, and therefore also outside the Firetail Project area. At para 15 they suggest that none of the group at the meeting of 11 February 2011 had any knowledge of the word Ngurrbanha, and they did not know what Mr Woodley was referring to by the use of the word. I should intersperse at this point that the evidence of Mr Woodley, as I understand it, in his affidavit of 18 July 2010 and 4 February 2011 was that there were four Yindjibarndi Ngurra within the claim area, ie an area far more extensive than the Firetail Project area or the area of the proposed tenements that we are dealing with, and that the area of most significance within the area of the current tenements that we are considering was the Garliwinyji Ngurra. So while it is the evidence of these three deponents that Garliwinyji Ngurra is to the west of the Firetail Project area, and therefore outside the area covered by the proposed tenements, the fact that reference was made to the other areas is not relevant to my considerations. At para 18 of their affidavits, they suggest that the reference at para 5.3 of Mr Woodley's affidavit of 4 February 2011 to a place he calls Yawarnganha, which Mr Woodley says is a flat plain lying between Gambulanha, which Mr Woodley wrongly refers to as the Hamersley Ranges, when in fact it is Mount Pyrton, and Birdarrdamra, which Mr Woodley says is the Yindjibarndi name for the Chichester Ranges, is not a correct description of Yawarnganha. At para 19, the three deponents say that all the people at the meeting of 11 February 2011 agreed that Yawarnganha is a table topped hill near Mount Florance, which is to the north and outside of the Yindjibarndi #1 Claim. At paras 20 and 21, they refer to para 5.11 of Mr Woodley's

affidavit of 4 February 2011, in which he said that there were two healing places, which he described as Garngambinha Marnda and Tharndiburndinha Marnda, which Mr Woodley indicated were within exploration licence application E47/1398. The deponents say that none of the people at the meeting on 11 February 2011 had any knowledge of healing places of those names in these locations.

[98] The affidavit of Bruce Monadee, affirmed on 28 February 2011, is set out in full at [49] above. It is in identical terms to the affidavits of Bruce Woodley, Clifton Mack, Jimmy Horace, and Barry Radley Phillips, all affirmed on 28 February 2011. Save for the fact that paras 13 and 14 in Mr Monadee's affidavit are merged into one, being para 13, it is also identical to the affidavits of Ricky Sandy, Steven Adams, Ken Sandy, Jon Sandy, and Francis Phillips, all affirmed on 28 February 2011. Mr Monadee, Mr Bruce Woodley and Mr Horace were members of the Yindjibarndi part of the Ngaluma Yindjibarndi applicant group (WAD6017/96). Also, Mr Monadee, Mr Bruce Woodley, Mr Horace and Mr Mack gave evidence in the matter (WAD 6017/96). All the deponents depose to the fact that they are members of Yindjibarndi society and that they are registered members of the Yindjibarndi Aboriginal Corporation, which is the registered native title body corporation under the Act for the Yindjibarndi determined area. In their affidavits they describe how Mr Gallagher and Mr Bower, a solicitor and an anthropologist who were working with the Wirlu-Murra Aboriginal Corporation, told them that Mr Woodley had sworn affidavits, on 25 May 2009, 18 July 2010, 15 November 2010 and 4 February 2011, in which he had variously said he had been authorised to do by the Yindjibarndi #1 applicant, senior Yindjibarndi Lawmen, members of YAC and the Yindjibarndi people. They were informed that in the first three affidavits, he deposed that he was authorised on behalf of the native title applicant and senior Yindjibarndi Lawmen, and in the fourth affidavit, that he was authorised by senior Yindjibarndi Lawmen on behalf of the native title party and the Yindjibarndi People. There is no statement in any of the affidavits that any of the deponents are, in fact, senior Lawmen of the Yindjibarndi People, although it is clear from the evidence given in WAD6017/96 that his Honour accepted that at least Mr Monadee, Mr Mack, Mr Bruce Woodley and Mr Horace were senior Lawmen. They say, at para 11 of their affidavits, that Mr Woodley did not discuss the question of his affidavits with them, nor ask them for their authority to sign the document either as Yindjibarndi applicants or Yindjibarndi People, nor did he discuss the content of his affidavit. I should point out that none of these people are in fact members of the Yindjibarndi #1 applicant, and consequently Mr Woodley had no need to consult them.

At para 12, they mention that they all live in an area nearby to Mr Woodley, and he could have spoken to them if he had chosen to do so. At paras 13-14, they say that Mr Woodley was not authorised to sign these affidavits because he was talking about men's initiation, and Yindjibarndi men who know about initiation are not allowed to talk about it, except to other men who have the right to know about it. They say, at para 15, that when they were giving evidence to Nicholson J in Ngaluma Yindjibarndi (WAD6017/96), they did not talk about secret men's business, they just talked about country and took him to country, but didn't tell him about secret cultural matters, and that in particular they did not talk about the initiation of Yindjibarndi boys. At para 17 they say that under Yindjibarndi law it is very seriously wrong to release this information and Mr Woodley has broken the traditional law by talking about it in his affidavits. At para 19, they say that, in any event, some of the things that Mr Woodley says about initiation are wrong, and they state that they will only discuss the matter so long as they do not give information about the ceremonies. At para 21 they say that when Mr Woodley says, in para 1.8 of his affidavit of 25 May 2009, that Yindjibarndi people visit the proposed tenement area to collect 'some things that Yindjibarndi People use in our ceremonies' and that they sing the country, they say that some of the things that Mr Woodley describes are incorrect. At para 23, they say that firstly Mr Woodley shouldn't be talking about the things that they collect and secondly, in paras 21-25 they explain that they know that those 'things' which are collected for initiation ceremonies are not collected in the area the subject of M47/1409, M47/1411 and M47/1413 (the latter being immediately to the north of the mining lease currently under consideration, M47/1431). They say they know that country well, and they have never collected those 'things' on that area. At para 27, they say that the Yindjibarndi get all that they need for initiation ceremonies from other places, mostly from around Millstream, and are taken to Woodbrook, where the ceremonies take place. At paras 28-33 they refer to Mr Woodley's affidavit of 18 July 2010 where they say that the identification of the location of the Garliwinyji Ngurra is incorrect because firstly, he should not be talking about initiation ceremonies and secondly, the Garliwinyji Ngurra takes its name from Garliwindji Creek, at the western most part of the Yindjibarndi native title claim, some 60 kilometres from the Firetail Project, and that Garliwinyji Ngurra does not extend into the Firetail area. At paras 34-36, they address para 25 of Mr Woodley's affidavit of 18 July 2010, where Mr Woodley says that if they were allowed to mine M47/1431 it would no longer be possible to put Garliwinyji boys through their initiation ceremony, and that was causing the Nyambali-Tharngungali so much worry, because if they didn't go through ceremonies they would be incomplete and lost. The deponents say at para 36 that Mr

Woodley is wrong in this assertion, they say they have recently attended a heritage survey conducted by the grantee on the Firetail Project, and that initiated men do 'not take Yindjibarndi boys into that country as part of their initiation ceremonies and we do not take things from that country for use in those ceremonies. FMG's wish to do mining in this area will not affect the initiation of Yindjibarndi boys into the law'. At paras 37-41, they make reference to Mr Woodley's affidavit of 4 February 2011, about mining lease application M47/1431, where they say he goes into even greater detail about secret men's business concerning initiation, which he should not have done. They say that Mr Woodley's assertion that if the ceremony is not done exactly as he describes in his affidavits on the ground covered by M47/1431 then the boys being initiated will be in great danger and it may cause death, is incorrect. At para 41 they say:

> 'This is not true. Initiation ceremonies do not take place within M47/1431; nor do ceremonies that are preparations for initiations that take place somewhere else.'

At paras 42-45, they refer to the assertions in paras 6.7 and 6.8 of Michael Woodley's affidavit of 4 February 2011, where they say preparation for ceremonies to be conducted at Woodbrook are not performed within M47/1431, initiations are only done at Woodbrook, which is in a completely different location, and further, that Yindjibarndi men do not collect resources from areas covered by M47/1431, they are mostly collected from Millstream, and no ceremonial preparations of the kind described by Michael Woodley take place, other than at Woodbrook. In paras 46-47, they deal with the assertion in para 6.9 of Mr Woodley's affidavit of 4 February 2011, where Mr Woodley asserts that if the procedures that he described are not followed precisely the boys will be in danger. They say in these affidavits that that is wrong because what Mr Woodley says takes place does not take place and boys are never put at risk during initiations. They also make reference, at para 48, to his affidavit of 4 February 2011, which talks about the mining lease M47/1431 where increase rituals are conducted, and where he says that men go into those areas of the mining lease to get painted up for the increase ceremony to be performed by people who are responsible for the Garliwinyji Ngurra and that if the grantee party's activities proceed they will not be able to do that anymore. They say at para 50 that the details Mr Woodley reveals are secret and should not be talked about, and at para 51 that the rituals are not conducted at those places. They say at para 52, 'any ochre needed by Yindjibarndi men for ceremonies is obtained from the Millstream area'. At para 53, they refer to the affidavit of Michael Woodley on 18 July 2010, where he says he is one of the law bosses for the Garliwinyji Ngurra. They dispute this, and say that Mr Woodley has traditional responsibility for country in the Millstream

area, but not for the Garliwinyji Ngurra. Finally in paras 54-57 they say that they know about the negotiations between the grantee party and the native title party in this matter, that they disagree with Mr Woodley's approach, and that they would prefer to see an agreement on the terms which have already been negotiated by the grantee party agreed to by the Yindjibarndi People.

[99] Mr Woodley's evidence is uncorroborated. There is no corroborative evidence from the other three members who comprise the native title applicant group, who Mr Woodley says support him. As mentioned earlier, the evidence filed on behalf of the grantee party that consists of the 16 affidavits, taken as a whole, take comprehensive issue with Mr Woodley's evidence. There are, as mentioned above, three basic affidavits which, apart from the most minor differences, have been sworn by, in one case, three people, in the second case three people, and in the third case 10 people. In one sense the affidavits are formulaic, however, in a detailed way they take issue with the evidence given by Mr Woodley. The three affidavits of Ms Pat, Ms Allen and Ms Sandy, three of the persons who comprise the applicant group, dispute Mr Woodley's authorisation by the applicant group to bring the application and file the affidavits that he has. The affidavits of the three other women significantly challenge Mr Woodley's geographical knowledge of the area the subject of the proposed tenements, suggesting that many of the places he specifically refers to are, in fact, not where he says they are. The ten affidavits of the men, most significantly, challenge the evidence which Mr Woodley has given, to its core. In my view, as has been suggested above, if it were the case that the area the subject of these tenements, and particularly M47/1431, was of the magnitude of significance which Mr Woodley describes to the conduct of vital initiation ceremonies, the interruption of those activities in the manner the grant of M47/1431 would entail would be a critically significant factor in considering whether the tenements should be granted. However, the evidence of the ten men is that no such activities, as described by Mr Woodley, in fact occur on the area, and that initiation ceremonies occur at Woodbrook and the materials needed for initiation ceremonies are obtained from Millstream and its surrounds, neither of which are in the vicinity of the current proposed tenements. Similarly, they suggest that the Garliwinyji Ngurra is not within the area the subject of the tenements, and that Mr Woodley is in fact not responsible for it, and does not hold the positions he alleges he does in his affidavits.

[100] None of the 16 affidavits filed by members of the Yindjibarndi group on behalf of the grantee party challenge Mr Woodley's description of the operation of Yindjibarndi law and custom in relation to land in the general sense, for instance the description of the structure of Yindjibarndi land tenure set out in paras 3 and 4 of Mr Woodley's affidavit of 4 February 2011. What is essentially challenged is how that law is said to operate within the areas of the proposed tenements, and the factual basis upon which Mr Woodley asserts that the grant of those tenements will result in very great disturbance in the Yindjibarndi's capacity to continue to comply with the fundamental precepts of its laws and culture. There is, however, a general criticism from those 16 deponents, in particular the 10 men, as to the level of detail which Mr Woodley has provided. Their view is that it is inappropriate to reveal these matters to persons other than initiated Yindjibarndi men and it was consciously something which they did not do in giving their evidence to Nicholson J in the Ngaluma Yindjibarndi trial. Mr Woodley has explained his reasons for giving the evidence he has done on the basis that he had no alternative if he wished to protect the country from being despoiled by FMG. I am sympathetic to Mr Woodley's predicament while noting that it was open to him to seek confidentiality orders.

[101] In relation to the question of Mr Woodley's connection to the Garliwinyji Ngurra, and its location, I have some reservations about the evidence given by the 10 men and the three women who expressed opinions about its location. As has been said, Mr Woodley gave evidence at para 3.5 of his affidavit of 4 February 2011 as to the four Ngurra, including Garliwinyji, which he says are located within the area covered by the Yindjibarndi #1 native title claim. He indicated that they proceed west to east with Garliwinyji being the most western. Given that it is clear that Mr Woodley is one of the senior men of the Yindjibarndi group, it would be fundamental to his understanding of Yindjibarndi law and culture to know to which Ngurra he belongs, and axiomatically the location of that Ngurra. It may well be that the Garliwinyji Ngurra, being the most western, and given the extent of land to the west of the proposed tenements within the Yindjibarndi #1 claim, extends to the western boundary of the Yindjibarndi #1 claim, and consequently includes significant areas of land outside the areas the subject of the proposed tenements. On the other hand, the evidence of the 10 men, in the last sentence of para 33, is explicitly that Garliwinyji Ngurra does not extend into the Firetail Project area. Similarly Berry Malcolm, Julie Stevens and Diana Smith also say that at the meeting on 11 February all the persons agreed that the Garliwinyji Ngurra is in the west of the Yindjibarndi claim and outside the Firetail Project area. Also, in the affidavit of

the 10 men, at para 33, they say that Garliwinyji Ngurra takes its name from Garliwindji Creek, which is in the western most part of the Yindjibarndi claim area, some 60 kilometres from the Firetail Project area. In the Robinson-Chambers anthropological report, at para 136 onwards, there is discussion of the site referred to there as Garliwinyji (Caliwinge Spring) where the evidence of Michael Woodley is cited to support the proposition that it is on the western edge of the Yindjibarndi claim area, where Mr Woodley says, according to an interview apparently taken on 9 November 2007:

> 'It [Garliwinyji] belongs to Yindjibarndi. Garliwinyji is a Yindjibarndi word. It is a name that represents the creek and Caliwinge Spring and the river that runs through. Garliwinyji is a permanent waterhole and it is a camp for Yindjibarndi people and it also used to be a half way point for other groups to come and practise not law and culture but corroborees. And this was told to me by old Peter Stevens.'

The Appendix 1 to the report is a document entitled 'Claimants Comments About Sites', and there is a reference to Garliwinyji (Caliwinge Spring). The comments are made by, amongst others, Sylvia Allen, to the effect that it was a place that she went to with her parents, and Michael Woodley, who says that:

> 'the Garliwinyji area for me is part of my family tree and where my great grandfathers father came from, and his brothers and sisters. And that is on my great grandmothers side Yali.'

At para 37 of the report, Gladys Walker, a non Yindjibarndi person, is quoted as saying that it was an area where non Yindjibarndi might participate in ceremonies, albeit that only Yindjibarndi law could be performed because it was on Yindjibarndi land. Mrs Walker said it was an area where the Kurrama, a non Yindjibarndi group, would come to meet with the Yindjibarndi people. Further, at para 138, Nelson Hughes, another Kurrama man, says that Garliwinyji is the boundary between Kurrama and Yindjibarndi. From this evidence I can conclude that it would appear to me that the Garliwinyji Ngurra does extend well beyond and to the west of the area the subject of the proposed tenements. None of this, however, alters the weight that I must attribute respectively to the evidence of Mr Woodley on the one hand, against the other Yindjibarndi deponents, and the 10 men in particular, on behalf of the grantee party.

[102] I acknowledge that, in light of the affidavits of the three applicants, Mr Woodley was put in a difficult position because it did not appear that he, or the native title party, had the authorisation to file any further affidavits in response to the affidavits of the members of the Yindjibarndi group who swore affidavits on behalf of the grantee party. Be that as it may, the situation is that I am confronted with the detailed evidence of one member of the applicant,

which is substantially contradicted on fundamental issues by three members of the applicant group, and 13 other members of the Yindjibarndi claim group.

[103] In these circumstances, I am unable to find, on the balance of probabilities, that Gandi or ochre are collected in the area the subject of the three tenements, or that initiation ceremonies are conducted in those areas. I am also unclear as to what Ngurra, in terms of the 13 Ngurras that comprise Yindjibarndi country and the four Ngurras that were said to exist within the Yindjibarndi #1 Claim, actually are the subject of the three proposed tenements. It would seem to me, as discussed below, that there will be some interference with the Yindjibarndi's capacity to exercise its registered native title rights of access to the area, and their rights to hunt, fish and camp, particularly in M47/1431, although those effects will be mitigated by the four extra conditions that the Government party has agreed to impose. As I have been unable to find that there is any significant ceremonial activity conducted on the area, the submissions made by the native title party in relation to the very great interference to the exercise of their registered native title rights and interests cannot be accepted.

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

[104] In relation to this limb of s 39 the native title party contends that the Tribunal ought properly, in considering the weight to be attached to evidence relevant to s 39(1)(a)(ii), adopt a construction of the provision that is consistent with the terms of article 27 of the International Covenant on Civil and Political Rights, and the obligations each imposes on Australia. As I stated in *Cheedy 2009*, I did not accept this approach. My approach was approved by the Federal Court in *Cheedy v Western Australia*, and I continue to adopt that point of view. At para 7.4 of the contentions, the native title party suggests the grant of the mining lease and the exercise of rights under that lease will directly affect the life, culture and tradition of those members of the native title party who are members of the Garimarra and Balyirri Galharra sections of the Garliwinyji Ngurra, by preventing them having a capacity to practice their own religion and, in particular, prevent the collection of Gandi and the conduct of religious ceremonies and initiation rites within the area subject to the proposed tenements. As indicated above, in light of the 16 affidavits filed by members of the native title party on behalf of the grantee party I have come to the conclusion that I do not accept Mr Woodley's evidence to the effect that cultural activities, including initiation processes and preparation for initiation, in fact take place on the areas the subject of the proposed tenements.

[105] The Government party, in its submissions, supports the view that the native title party has not demonstrated that there will be interference with the life, culture and traditions that has been demonstrated on the basis of Mr Woodley's affidavit. The grantee party, in its statement of contentions in reply also cites the findings of the Federal Court in *Cheedy v Western Australia* at [107] in particular, rejecting the proposed approach in relation to the International Covenant on Civil and Political Rights proposed by the native title party. Again, on the basis of my findings in relation to the evidence in this matter, I cannot conclude that there will be a significant impact on the exercise of the native title party's way of life, culture and traditions by virtue of the grant of the proposed tenements, particularly if the four extra conditions proposed by the Government are imposed.

Section 39(1)(a)(iii) – effect of the tenements on the development of social, cultural and economic structures of the native title party, Section 39(1)(a)(iv) – freedom to access the land and freedom to carry on rites and ceremonies and other activities of cultural significance, Section 39(1)(a)(v) – effect on areas or sites of particular significance, Section 39(1)(b) – effect on interests, proposals, opinions and wishes

[106] With one exception in relation to s 39(1)(a)(v), in light of my findings in relation to the evidence concerning the activities conducted by the native title party on the area of the proposed tenements, I find that there is likely to be little impact on the native title party in respect of each of these considerations, particularly if it is the case that the four extra conditions proposed by the State are imposed as conditions on the grant of the proposed tenements.

[107] The one exception which I refer to is the conditions which I had initially intended to propose in relation to sites in WF08/31, which were purportedly within the area of M47/1413 (those sites being three open mines and other related sites) but upon further investigation were found to be outside M47/1413 and to the south. Those sites are YIN_09_05, YIN_09_06, YIN_09_11, and YIN_09_15. I discussed these sites in some detail in WF08/31 where I said at [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 and Others* (1996) 142 ALR 21; [1996] FCA 1147 at 34-35, and repeated in *Holocene* at 99). The Tribunal must make a value judgment 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.

[108] The four relevant sites were identified in a field survey report (document NTP9 in WF08/31), an archaeological survey over the Firetail area. That survey identified these areas, including rock shelters and quarries which were the sources of ochre, which were acknowledged by the consultants as being of particular significance to the native title party in the conduct of ceremonies, and in those circumstances, on the assumption that they were within mining lease M47/1413, I was prepared to make conditions which would require that they not be interfered with without the express consent of the native title party. Acknowledgments that are made in the report to the effect that these mines are of particular significance to the native title party are, to a certain extent, at odds with the evidence of the ten male deponents who are members of the native title party who filed affidavits on behalf of the grantee party.

[109] Their evidence in relation to the obtaining of ochre for ceremonies is clear. They say that no ochre is obtained from within the area the subject of the proposed tenements, and all ochre used in ceremonies is obtained from areas in and around Millstream. At para 9 of the grantee party's contentions in reply, they raise a range of issues in opposition to the imposition of any specific conditions relating to these four sites though, in my view, the fundamental issue is the question of the evidence of ochre usage from this area. Given that the evidence of the ten male members of the native title party who filed affidavits on behalf of the grantee party contradicts the evidence which Mr Woodley gives in relation to ochre usage in the area, and bearing in mind my inclination to impose the extra conditions proposed by the Government, I do not believe that there is likely to be any significant impact on areas of particular significance to the native title party in the areas the subject of the proposed tenements and I decline to impose conditions specific to the four sites.

Section 39(1)(c) - economics and other significance

[110] At para 11 of the grantee party's contentions they state that the grant of the tenements is of significant importance to the local economy, by:

- Allowing improved management use or development of the local resources and minerals; and
- Engaging local or approximate communities to provide services to the grantee party's project.

To the state by:

- Indirectly by way of such improved management or use of the development of the land;
- Direct payment of royalties in accordance with the *Mining Act*.

And to the nation:

- By the earning of foreign capital from the sale of iron ore and by the contribution to the national tax base.

They say that the whole of the Solomon Project is of significance to the nation.

[111] In its contentions, at para 60, the State submits that the tenements are of great economic significance to the Nation and State in terms of the production of royalties for the State and export income for the Nation. They also submit that it is likely to benefit the local economy in and around the Pilbara in general and they cite *Australian Manganese* at 409 [58] as authority for that proposition. The native title party does not make any submissions in relation to this matter, and I conclude that it is a project of economic significance, which will benefit the State and the Nation, and that some positive economic effect may be experienced by the local economy including by local Aboriginal people and in particular the Yindjibarndi.

Section 39(1)(e) – public interest

[112] The grantee party contends there is strong public interest in determining that the proposed tenements be granted and go ahead in allowing the management, use and development of the local resource, and they cite *WMC/Evans* at [215], as an authority. The State, in its submissions at para 61 essentially reiterate that position. The native title party does not make any submissions in relation to that matter. I adopt the findings of the Tribunal in *Waljen* at [215]-[216] on matters relating to public interest. The Tribunal accepts that the mining industry is of considerable economic significance to Western Australia and Australia and I conclude that the public interest is served by the grant of the proposed lease.

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

[113] The grantee party makes submissions in relation to this limb of s 39 at para 13 of its contentions that set out the location of the proposed tenements in relation to pastoral leases and underlying exploration licences, the import about which I am not entirely clear. The

State, in its contentions at paras 62 and 63, submits that the effect on the environment of the grant of the proposed tenements is a relevant factor, and cite *WMC/Evans* at 357 [81]. They submit that any impact on the environment will be mitigated, minimised and regulated by the effect of the *Mining Act* and mining regulations, in particular ss 63 and 82 of the *Mining Act*, by the conditions and endorsements proposed to be imposed on the tenements by the State and Federal regulatory regime with respect to environmental protection and the protection of Aboriginal heritage. In relation to this matter I adopt the findings of *Waljen* at [212]-[214] relating to the effect of the proposed acts on the natural environment, and to *WA Minister for Mines (WA) v Evans on behalf of the Koara People & Sons of Gwalia Ltd* (1998) 163 FLR 274 at [53]-[62] regarding the provisions of the *Environmental Protection Act 1986* (WA)).

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

[114] As noted previously, the area of the proposed leases is unallocated Crown land and parts of the Mount Florance pastoral lease (3114/465), which overlaps in some respect all of the three proposed tenements. Other than the grantee party's underlying exploration licences and miscellaneous licence which, pursuant to s 238, are subject to the non extinguishment principal, there are no other non native title rights and interests in the areas subject to the proposed lease.

Conclusion

[115] 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 tenements, 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. The Tribunal, in carrying out its functions, is not bound by technicalities, legal forms, or the rules of evidence (s 109(3) of the *Native Title Act*). It must also be fair, just, economical, informal and prompt (s 109(1) of the *Native Title Act*), and it may take into account the cultural and customary concerns of Aboriginal Torres Strait Islanders, but not so as to prejudice unduly any party to the proceedings (s 109(2) of the *Native Title Act*). It is always a difficult situation for the Tribunal to deal with matters such as these in circumstances where there is significant inconsistency, if not contradiction, between evidence given by members of the native title

party, and even more acutely in circumstances where persons who comprise the applicant give conflicting evidence.

[116] In the circumstances of this matter it was probably open to me to find that Mr Woodley was not authorised by the native title party (ie the applicant as a whole) to file the evidence he filed on behalf of the native title party. In that circumstance I would have been confronted with the prospect of considering the criteria contained in s 39 of the Act without any evidence from the native title party, on the face that that may have been an appropriate course. However, in the circumstances of this case I believed it more appropriate to consider all the evidence that came before me in order to thoroughly consider the evidence before coming to a decision about the grant of the proposed tenements. I have considered that evidence, and I believe its weight falls clearly on the side of allowing the grant subject to the four extra conditions (subject to minor amendments) that the state has agreed to impose.

[117] In allowing the grant of the proposed tenements, as I have indicated earlier, I have come to the view that it is appropriate that the proposal of the Government to impose four extra conditions on the grant of the tenements be accepted and those conditions imposed upon the grant. These conditions will be imposed in the context of the information which has come to light in the various surveys the grantee party has conducted including the four sites discussed above. The additional conditions proposed by the Government will assist the native title party in ensuring that any such area within the tenements is protected. The first proposed condition of the Government makes it clear that the native title party may access and use the land the subject of the tenements without restriction, except in circumstances where mining or exploration operations, safety or security require their exclusion. The second proposed extra condition requires the grantee party to give notice of any proposed application under s 18 of the AHA, including the provision of all information that it intends to submit to the Aboriginal Cultural and Materials Committee, except sensitive commercial and cultural data, to the native title party. I do not understand why it would be that the State would exclude from that condition the provision of 'cultural data'. I can only assume that 'cultural data' relates to matters pertinent to Aboriginal heritage. I see no reason why the native title party should not also receive any cultural data, and therefore it is my intention to exclude that exception from the provision of extra condition two in relation to both the mining lease and the exploration licences. Special condition four binds any successors entitled to the mining tenements to all the conditions imposed on the grant of the tenement.

The third extra condition in relation to the exploration licence requires the grantee party to provide to the native title party with any plans or proposals relating to development, productive mining or construction activity in relation to those proposed activities, including material relevant to access routes, to the native title party at the time it presents it to the State Mining Engineer. The third condition in relation to the mining lease requires the grantee party to provide to the native title party, prior to commencing any development, productive mining or construction activity, all the materials and addendums which it is required to submit to the Director of Environment at the Department of Minerals and Petroleum at the same time as it provides materials to that office, exclusive of sensitive commercial data. The imposition of these extra conditions will provide substantial additional protection for the native title party in circumstances which will enable them, as far as is possible, to continue their activities on the land the subject of the tenements, protect sites of significance on the area and allow them to participate in further discussions as to how productive mining is to be progressed on the area the subject of those tenements.

Determination

[118] The determination of the Tribunal is that the acts may be done subject to the imposition of the extra conditions set out below. E47/1398 and E47/1399 may be granted subject to standard conditions and endorsements proposed by the state in [43] above, including the extra conditions condition contained in [44] above being:

i. Any right of the native title party (as defined in ss 29 and 30 of the Native *Title Act* 1993) to access or use the land the subject of the exploration licence 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 and security reasons relating to those activities.

ii. If the grantee party gives a notice to the Aboriginal Culture Material Committee, under s 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 data), on the native title parties.

iii. 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.

iv. Upon assignment of the mining lease, the assignees shall be bound by these conditions.

[119] The grant of M47/1431 may be done subject to the conditions proposed in [43] above and subject to the extra conditions being:

i. Any right of the native title party (as defined in ss 29 and 30 of the *Native Title Act* 1993) to access or use the lands 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 and security reasons relating to those activities.

ii. If the grantee party gives a notice to the Aboriginal Culture Material Committee, under s 18 of the Aboriginal Heritage Act 1972 (WA), it shall at all times 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 data), on the native title parties.

iii. Where, prior to commencing any development or productive mining or construction activity, the grantee party submits a plan of proposed operations and measures to safeguard the environment or any addendums thereafter to the Director of Environment at the Department of Mines and Petroleum for his assessment and written approval; the grantee party must at the same time give to the native title party a copy of the proposal or addendums, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure, including proposed access routes.

iv. Upon assignment of the mining lease, the assignee shall be bound by these conditions.

Daniel O'Dea
Member
17 June 2011