NATIONAL NATIVE TITLE TRIBUNAL

***Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna,* [2011] NNTTA 53 (24 March 2011)**

Application No: WF10/10

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

- and -

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

Seven Star Investments Group Pty Ltd (grantee party/Applicant)

- and -

The State of Western Australia (Government party)

- and -

Wilma Freddie and Others on behalf of Wiluna (WC99/24) (native title party)

FUTURE ACT DETERMINATION

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 24 March 2011

Catchwords: Native title – future act – application for determination for the grant of exploration licence – s 39 criteria considered – no evidence of effect on enjoyment of registered native title rights and interests – sites of particular significance – heritage protection agreement – prior conduct of grantee party in negotiations – breakdown in relationships between native title representative body and native title party and grantee party – real potential for conflict in future dealings – effect on traditional responsibilities of native title party to look after country – non-scientific approach to exploration – grant not in public interest – determination that the act not be done.

Legislation: *Native Title Act 1993* (Cth), ss 23F, 25-44, 47, 31, 35, 36(2), 38, 39, 148(a), 150, 151, 203B, 203BB, 203FE, 237
Mining Act 1978 (WA), ss 24, 25, 61(2), 63, 66, 111A(b)(c)
Aboriginal Heritage Act 1972 (WA), s 18
Land Act 1933 (WA), s 114
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), s 4
Equal Opportunity Act 1984 (WA)

Cases:	*Australian Manganese Pty Ltd v State of Western Australia & Ors* [2008] NNTTA 38; (2008) 218 FLR 387
	Evans v Western Australia [1997] 741 FCA; (1997) 77 FCR 193
	Freddy on behalf of the Wiluna Native Title Claimants v State of Western Australia [2010] FCA 1158
	Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner
	Minister for Mines (WA) v Evans [1998] NNTTA 5; (1998) 163 FLR 274
	Re Koara People [1996] NNTTA 31; (1996) 132 FLR 73
	Straits Exploration (Aust) Pty Ltd v Kokatha Uwankara Native Title Claimants [2011] SAERDC 2
	Western Australia v Thomas [1996] NNTTA 30; (1996) 133 FLR 124
	Western Australia v Ward (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28
	WMC Resources v Evans [1999] NNTTA 372; (1999) 163 FLR 333
	Wilma Freddie & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Seven Star Investments Group Pty Ltd, NNTT WO08/427, [2008] NNTTA 126 (5 September 2008), Hon C J Sumner
	Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd, NNTT WO10/365, [2011] NNTTA 23 (24 February 2011), Hon C J Sumner

Solicitors for the native title party:	Mr Malcolm O'Dell, Central Desert Native Title Services Limited Ms Monica Franz, Central Desert Native Title Services Limited
Solicitor for the Government party:	Mr Domhnall McCloskey, State Solicitor's Office
Representative of the Government party:	Ms Janice Goodwin, Department of Mines and Petroleum
Representatives of the grantee party:	Mr Charles Ghaneson, Seven Star Investments Group Pty Ltd Mr Donald Shanmugam, Seven Star Investments Group Pty Ltd

REASONS FOR FUTURE ACT DETERMINATION

Background

[1] On 19 December 2007, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) (NTA/the Act) of its intention to grant exploration licence E53/1356 (the proposed licence) to Seven Star Investments Group Pty Ltd (SSIG/the grantee party) and included in the notice a statement that it considered that the grant attracted the expedited procedure (that is, one which can be done without the normal negotiations required by s 31 of the Act).

[2] The proposed licence comprises 24.58 square kilometres located 27 kilometres north easterly of Wiluna in the Shire of Wiluna and is 100 per cent overlapped by the registered claim of Wiluna (WC99/24, registered from 24 November 1999).

[3] The native title party is Alan Ashwin, Barry Abbott, Billy Patch, Dusty Stevens, Friday Jones, Jimmy Morgan, Joyce Tullock, Judy Ashwin, Kenny Farmer, Kitty Richards, Les Tullock, Margie Jackman, Mickey Wongawol, Norman Thompson and Wilma Freddie on behalf of Wiluna (WC99/24) (Wiluna claimants/the native title party/NTP). The native title party has been represented throughout these proceedings by Central Desert Native Title Services Ltd (CDNTS).

[4] On 17 April 2008, the native title party made an expedited procedure objection application to the Tribunal in respect of the proposed licence.

[5] On 5 September 2008, I dismissed the objection application of the native title party pursuant to s 148(a) of the Act following notice from the Government party on 3 September 2008 that the expedited procedure statement included in the s 29 notification of 19 December 2007 had been withdrawn (*Wilma Freddie & Others on behalf of the Wiluna Native Title Claimants/Western Australia/Seven Star Investments Group Pty Ltd*, NNTT WO08/427, [2008] NNTTA 126 (5 September 2008), Hon C J Sumner).

[6] The matter then proceeded under the non-expedited procedure right to negotiate provisions of the Act. Under those provisions (Part 2, Division 3, Subdivision P (ss 25-44)) unless one of the conditions found in s 28 is met, the grant of the proposed licence will be invalid to the extent that it affects native title.

[7] Requests for mediation assistance by the Tribunal under s 31(3) made by the Government party on 11 September 2008, and under s 150(1) by the grantee party on 8 October 2010 did not result in an agreement of the kind mentioned in s 31(1)(b) between the three negotiation parties.

[8] On 30 May 2010, being a date more than six months after the expedited procedure statement was withdrawn by the Government party, the grantee party made an application pursuant to s 35 of the Act for a future act determination under s 38. The application was made on the basis that the negotiation parties had not been able to reach agreement within six months of the Government party giving notice of intention to do the act.

[9] The native title party did not challenge the Tribunal's power to make a determination on the basis that the grantee party and or the Government party had not negotiated in good faith (ss 31(1)(b), 36(2) NTA).

[10] On 25 June 2010, the Tribunal set directions for the substantive inquiry. The contentions and evidence of the Government party and grantee party were filed on 19 July 2010. The native title party lodged a statement of contentions and evidence on 20 September 2010

[11] Several listing hearings were held to discuss how best to proceed with the inquiry. Additional contentions and evidence were provided by all parties. On 19 November 2010 parties were afforded a further seven days in which to lodge any further submissions or formalised evidence relevant to the determination. All parties agreed that, following this time, the matter could proceed 'on the papers'. The parties were all provided with an opportunity to respond to the various contentions and evidence lodged. For the most part the evidence in the documents is not in dispute and I have accepted and relied on it. I am satisfied that this application can be adequately determined 'on the papers' (s 151 NTA).

[12] In compliance with the various directions, parties lodged contentions and submissions as outlined below:

Government party submissions

- Government party's Statement of Contentions (GVPSC) and supporting documents GVP1 to GVP33, lodged 19 July 2010.

- Government's further Statement of Contentions and supporting document GVP34, pursuant to directions made at the 24 September 2010 listing hearing, lodged 12 October 2010.
- Government party's submissions on the proposed draft conditions, lodged 16 November 2010.
- Government party's further Statement of Contentions, pursuant to directions made at the 19 November 2010 listing hearing, lodged 26 November 2010.

Grantee party submissions

- Grantee party's Statement of Contentions (GPSC) and supporting documents GP1 to GP12, lodged 19 July 2010 (amended 22 July 2010).
- Grantee party's further Statement of Contentions (GPSC part 2) pursuant to directions made at the 24 September 2010 listing hearing, lodged 8 October 2010 with supporting documents lodged 10 October 2010.
- Submissions from Mr Charles Ghaneson, for the grantee party, on the proposed draft conditions, lodged 9 November 2010.
- Submissions from Mr Donald Shanmugam, for the grantee party, on the proposed draft conditions, lodged 16 November 2010.
- Unsigned affidavit of Mr Shanmugam, for the grantee party, regarding the ongoing involvement of Mr Ghaneson, lodged 18 November 2010. Signed affidavit of Mr Shanmugam, made in revised terms, was subsequently lodged on 24 November 2010.
- Further submissions from Mr Ghaneson, for the grantee party, lodged 24 November 2010.
- Further submissions from Mr Ghaneson, for the grantee party, lodged 24 November 2010.

Native title party submissions

- Native title party's Statement of Contentions (NTPSC) and supporting documents NTP1 to NTP30, lodged 20 September 2010.

- Native title party's further Statement of Contentions and affidavit of Robert Wongawol, pursuant to the directions made at the 24 September 2010 listing hearing, lodged 25 October 2010.

- Native title party's submission on the proposed draft conditions, dated 10 November 2010 and lodged 11 November 2010.

- Native title party's further Statement of Contentions, pursuant to directions made at the 19 November 2010 listing hearing, lodged 26 November 2010.

Legal principles

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

- *Re Koara People* [1996] NNTTA 31; (1996) 132 FLR 73 (*Koara 1*);
- *Evans v Western Australia* [1997] 741 FCA; (1997) 77 FCR 193 (*Evans*). Federal Court, RD Nicholson J – an appeal from the Tribunal determination in *Koara 1*;
- *Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274 ('*Koara 2*') - Tribunal determination following the successful appeal in *Evans*;
- *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124 (*Waljen*); and
- *WMC Resources v Evans* [1999] NNTTA 372; (1999) 163 FLR 333 (*WMC/Evans*).

[14] Section 38 of the Act sets out the types of determination that can be made, being a determination that the act must not be done or may be done with or without conditions. No condition can be imposed entitling a native title party to payments worked out by reference to the amount of profit made, income derived or things produced by the grantee party (s 38(2)).

[15] 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.'

[16] The Tribunal's duty in making a determination requires the exercise of a discretion which involves a weighing of the various effects, interests and other relevant factors referred to in the s 39 criteria in accordance with the circumstances before it (*Waljen* at 165-166).

The Government party's contentions and evidence

[17] Government party documentation establishes the proposed licence is 100 per cent overlapped by Jundee Pastoral Lease 3114/1253.

[18] There are no Aboriginal communities identified within the area but the Government party contentions (GVPSC para 20) and evidence establishes the nearest Aboriginal communities are Emu Farm and Bondini, 12.15 and 19.86 kilometres respectively southwest of the proposed licence, and Kutkabubba community, which lies 18.32 kilometres to the northwest. Tribunal mapping locates four active Aboriginal communities within the near vicinity of the proposed licence, two of which are Bondini and Kutkabubba as noted in the evidence of the Government party. The town of Wiluna, which contains a significant Aboriginal population, is 27 kilometres to the southwest of the proposed licence. I can safely infer that these Aboriginal communities include many of the Wiluna claimants.

[19] Department of Indigenous Affairs (DIA) documentation provided by the Government party reveals there are no sites registered under the *Aboriginal Heritage Act 1972* (WA) (AHA) overlapping the area of the proposed licence.

[20] The history of mining activity over the area is limited to two exploration licences, one which was surrendered in 2000 and one which was forfeited in 1998, and two cancelled Temporary Reserves, none of which are of any importance in these proceedings. The entire area is within Mineralisation Zone MZ/2. Mineralisation zones are areas of high exploration and mineral activity, whereby the Department of Mines and Petroleum (DMP) restricts the size of exploration licences to seventy blocks as opposed to a limit of two hundred blocks for licences not within Mineralisation Zones.

[21] The *Mining Act 1978* (WA) entitles the grantee party to exercise the rights set out in s 66 subject to any conditions imposed under ss 24, 24A or 25 and such further conditions and endorsements that the Minister may at any time impose under s 63 of that Act. Section 66 permits a licensee to explore for minerals using vehicles, machinery and equipment and may include digging pits, trenches and holes and sinking bores and tunnels and removing bulk samples up to the prescribed limit of 1,000 tonnes (Regulation 20, *Mining Regulations 1981* (WA)) or such greater amount as may be approved by the Minister. A licensee is authorised to explore for minerals for a term of five years from the date of grant but that term may be extended for one period of five years and a further period or periods of two years. (*Mining Act* s 61(2)). The Government party will provide the grantee party with a copy of the Department of Mines and Petroleum publication '*Guidelines for Consultation With Indigenous People by Mineral Explorers*' (2004).

[22] The grant of the proposed licence will be subject to the standard conditions imposed on the grant of all exploration licences in Western Australia (see *Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd*, NNTT WO10/365, [2011] NNTTA 23 (24 February 2011), Hon C J Sumner at [11] Conditions 1-4). Additional conditions to be imposed require that the pastoral lessee is notified of the grant of the licences and of certain exploration activities (conditions 5-6).

[23] The Government party proposes (GVPSC para 46) to impose a further four conditions (Government's extra conditions) on the grant of the proposed licence:

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

[24] I note the extra conditions refer to a mining lease and any mining operations that might be carried out by the grantee party but in this case the subject tenement is an exploration licence. Despite reference to a mining lease, I accept that the Government party intends to impose the same conditions outlined above which are relevant to an exploration licence. My determination is made on the basis that this will be done if the grant is made.

[25] The grant of the proposed licence will contain the following endorsements (which differ from conditions in not making the licensee liable to forfeiture of the proposed licence for its breach):

- The licensee's attention is drawn to the provisions of the *Aboriginal Heritage Act 1972* (WA) and any Regulations thereunder; and

- The licensee's attention is drawn to the *Environmental Protection Act 1986* (WA) 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.

[26] Government party documentary evidence, numbered GVP1 to GVP34, includes land tenure maps and other supporting evidence pertaining to the underlying tenure of the proposed licence, site information from the DIA, DMP publication on mining tenement fees and charges, various correspondence and submissions between the native title party and grantee party which were originally lodged with the Tribunal in 2008 as part of the expedited procedure objection, including a memorandum by Mr Lindsey Langford relating to sites and other supporting documentation.

[27] The Government party and grantee party say the Tribunal should make a determination that the act may be done without conditions or alternatively that the act may be done with the standard conditions and endorsements, and the four extra conditions.

The grantee party's evidence

[28] The evidence of the grantee party includes DIA documents, land tenure documents and maps, a draft of the grantee party's work program and other supporting documentation. The grantee party has also submitted various documents previously lodged with the Tribunal in 2008 for the purposes of the expedited procedure objection, including the native title party's contentions, affidavit of Robbie Wongawol and memorandum by Lindsey Langford. The grantee party provided contentions in response to native title party allegations.

[29] The grantee party amended its application for the exploration licence after the native title party queried whether the original proposals to explore were authorised by the *Mining Act*. The original application said SSIG intended to explore for all types of 'minerals, petroleum or other fossil fuels, fossils, meteorites' which material apart from minerals was not authorised by an exploration licence. SSIG now propose to use the area of the proposed licence to explore for various minerals including diamonds, platinum, palladium, silver, gold, lead, zinc and copper. It is SSIG's intention to drill one hole on the proposed licence 'to intersect the "anomaly" to test whether the anomaly is explained by the presence of a metallic or non-metallic deposit' (GPSC para 23). The maximum depth of the drilling hole is

150 metres. SSIG's program of work states the total area disturbed to be five hectares and total tonnage disturbed to be 30 tonnes.

[30] If the one drill hole does not detect a deposit, the grantee party says there will be no purpose in further drilling and exploration activity will cease. Should the presence of a deposit be detected, the grantee party will conduct further exploratory drilling radiating outwards from the initial drill hole. SSIG considers it 'exceedingly unlikely' that drilling results will be promising enough to necessitate further exploratory drilling (GPSC para 24). If a potential deposit is discovered, however, SSIG suggests that a further five holes will be drilled to generate sufficient samples to test for the presence of metallic or non-metallic minerals.

[31] There is a possibility that an access road will not be required if the drilling rig can traverse the sparsely vegetated ground. The SSIG anticipates the drilling rig will be brought to the proposed licence area in the summer when vegetation is at its lowest or dead, so as to reduce any impact on the natural environment.

[32] The initial contentions of the grantee party related primarily to s 237 of the NTA which deals with the attraction of the expedited procedure to a future act based on whether there is likely to be direct interference with the carrying on of the community or social activities of the native title party or interference with sites of particular significance to them or cause major disturbance to the land or waters concerned. This matter does not fall within the expedited procedure process and, strictly speaking, s 237 is not applicable as the Tribunal is required to consider the evidence in light of s 39 of the NTA. However the issues arising under s 237 and s 39 have much in common and I consider much of the grantee party's contentions and evidence relevant and have had regard to them in these proceedings. The grantee party also lodged further contentions and evidence in response to native title party contentions in relation to s 39(1) (c), (e) and (f) of the Act which, in this unusual case, were the principal issues for consideration.

The native title party's evidence

[33] The native title party submitted a statement of contentions (NTPSC) and documents labelled Annexure 1 to 30 which include copies of various agreements exchanged between the native title party and grantee party, s 29 notification notice, various correspondence between the grantee party and native title party, documents in relation to the native title

party's expedited procedure objection application to the Tribunal, documents in relation to Tribunal mediation assistance and other supporting documentation.

[34] The initial contentions of the native title party did not address s 39(1)(a) or (b) of the Act but were focused primarily on ss 39(1)(c), (e) and (f). Further contentions and a response filed on 25 October 2010 included contentions addressing ss 39(1)(a) and (b) and a sworn affidavit of Robert Wongawal (RW Affidavit) made in the following terms:

> '**BACKGROUND**
>
> 1. I make this affidavit in support of the Native Title Party's Contentions in this matter.
> 2. The information in this affidavit is something that I know to be true.
> 3. I am a traditional owner in the Wiluna native title claim area (WAD 6164 of 1998).
>
> **THE WILUNA CLAIM GROUP AND LOOKING AFTER COUNTRY**
>
> 4. Important decisions that effect Wiluna country are not made by one person or a single group of people. Decisions need to be agreed by all people (the Wiluna Claim Group) who speak for country in each particular part of the Wiluna claim area and these decisions must be known by everyone in the Wiluna claim area.
> 5. Making decisions about looking after country is a very important job and is done in accordance with the rights and interests of the Wiluna claimants. The Wiluna claimants spend a lot of time doing this because of their cultural obligation to make sure Wiluna country is looked after the proper way.
>
> **THE WAY IN WHICH THE WILUNA CLAIM GROUP ENJOY THERE REGISTERED NATIVE TITLE RIGHTS AND INTERESTS**
>
> *The Wiluna claim groups right to look after country*
>
> 6. The Wiluna claimants must look after Wiluna land the proper way.
> 7. Looking after the land in the Wiluna claim area is a big job and it is very important because it shows respect for the land and makes sure that visitors also look after land the proper way. The Wiluna claimants have always looked after the land so that it is still good for our children and grandchildren.
> 8. Many people in the past who came into the Wiluna claim area did not look after the land. The Wiluna claimants do not want this to happen in the future.
> 9. To stop this happening the Wiluna claimants make sure that all people who come into the Wiluna claim area look after the land and show respect for the land. When a mining company wants to come into the Wiluna claim area the Wiluna claimants must make sure that they understand what looking after country means. The Wiluna claimants must be able to talk to the mining company and the mining company must understand the importance of the Wiluna claimants cultural obligations.
> 10. The Wiluna claimants look after sites and special places by making sure that all people and companies who come anywhere on to Wiluna country, including in the area where that mining company Seven Star wants to come, are told where they can and cannot go. Sometimes this means that Wiluna people will go with them when they go in to the Wiluna claim area and keep them away from sites and special places.
> 11. At other times the Wiluna claimants negotiate an agreement with a mining company which means that people go on country and point out places where the miner can or can not go before the miner does any work there. These agreements make sure that the sites and special places are protected in the proper way by the Wiluna claimants.

12. Looking after sites and looking after special places is a very big and important job that many Wiluna claimants spend a lot of time doing. If it is not done or is done badly then bad things can happen and the people who are meant to look after those places will be punished.

Seven Star

13. The Wiluna Claimants can only continue to look after country the proper way and as they have done for a long time if the mining company Seven Star understands this.

14. If the mining company Seven Star do not understand the cultural obligations of the Wiluna claimants or do not respect the cultural obligations of the Wiluna claimants, then the Wiluna claimants will not be able to look after country the proper way in accordance with their cultural obligations.

15. If the mining company Seven Star are allowed to come onto country without allowing the Wiluna claimants to look after the land the proper way, the land and its resources including bush tucker, soil and flora will be damaged and that damage will be over a bigger area then the area in which the mining company Seven Star go. Not looking after the country the proper way will have lasting effects for the Wiluna Claimants well after the mining company has left.

16. The country and how healthy the country is, is the most important thing to the Wiluna claimants and more important then the value of any mineral resources in the land.'

[35] Mr Robert Wongawol deposes to be a traditional owner in the Wiluna native title claim area. His evidence is uncontested by the Government and grantee parties. I am satisfied that Mr Wongawol has authority to speak on behalf of the native title party for the area of the proposed licence and I accept his evidence.

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

[36] The following rights and interests have been registered in respect of the native title party's claimant application:

'The native title rights and interests claimed are rights and interests as against the whole world (subject to any native title rights and interests which may be shared with any others who establish that they are Native title holders) and in particular comprising:

(a) rights and interests to possess, occupy, use and enjoy the area;

(b) the right to make decisions about the use and enjoyment of the area;

(c) the right of access to the area;

(d) the right to control the access of others to the area;

(e) the right to use and enjoy resources of the area;

(f) the right to control the use and enjoyment of others of resources of the area;

(g) the right to trade in resources of the area;

(h) the right to receive a portion of any resources taken by others from the area;

(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and

(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

Further or in the alternative enjoy [sic] the right to:

(a) possession of the land waters and resources

(b) occupation of the land waters and resources

(c) use and enjoyment of the land , water and resources

(d) own and control knowledge and information comprising and concerning the traditional laws and customs of the native title holders in relation to the land and waters and resources and the passing of this knowledge on to younger generations

(e) bear rear and teach children on the land

(f) conduct ceremonies on and for the land water and resources and to attend sites of cultural and religious significance

(g) live and erect residences and other infrastructure on the land

(h) move freely about the land and waters including camping and seeking shelter

(i) hunt and fish on the land and in the waters and otherwise collect food from the land and waters

(j) take and use the resources of the land including water plants medicines animals fisheries forests products and all other components and attributes of the land

(k) dig for take from the land and waters and use all minerals and ores including extractive and quarry minerals such as flints clay soil sand gravel rock and like resources

(l) manufacture materials artefacts tools and weapons from the products of the land waters and resources

(m) dispose of products of the land waters and resources and manufactured products by trade or exchange

(n) manage conserve and look after the land waters and resources including locating and cleaning water sources and drinking water on the land

(o) manipulating the environment by burning the land harvesting produce sowing seed and doing other activities

(p) grant or refuse permission to any person to do some of all of subparagraphs (a) - (o) inclusive either at all or subject to terms and conditions

(q) inherit native title rights and interest

(r) bestow and acquire native title rights and interests

(s) resolve amongst themselves any disputes concerning land waters and resources

(t) regulate access to parts of the land according to initiation status and gender and otherwise to exclude strangers from the land

(u) permit persons other than native title holders to enter the land

(v) exclude persons other than native title holders from the land'

[37] It is noted on the Register that the application contains the following statements (among others):

'(iii) Subject to paragraph (iv) the applicants do not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act [which includes a non-exclusive pastoral lease], as defined in section 23F of the NTA, was done in relation to an area, and, either the act was an act attributable to the Commonwealth, or the act was attributable to the State of Western Australia.

(iv) Paragraph (iii) above is subject to such of the provisions of sections 47, 47A and 47B of the Act as apply to any part of the area contained within this application, particulars of which

> will be provided prior to the hearing but which include such areas as may be listed in Schedule L.'

[38] For the purposes of the right to negotiate provisions of the Act, determined and registered claimed native title rights and interests are treated as being on the same footing. Registered claimed native title rights are assumed to exist as if they had been determined. However, there is still a need under s 39(1)(a)(i) of the Act 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 the other matters in s 39(1)(a) (see *Waljen* at 166-167 and *WMC/Evans* at 339-341). In other words, a determination is not based on a worst case scenario where all the registered native title rights and interests are assumed to exist and be exercised or enjoyed equally over the whole claim area just by virtue of their registration.

[39] The underlying tenure of the proposed licence area consists of pastoral lease 3114/1253 (Jundee). I am aware that the parcel identifier '3114' indicates that this is a lease issued under s 114 of the *Land Act 1933* (WA). Therefore, according to the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 at [187] to [190], it is a non-exclusive pastoral lease. It seems, therefore, that pursuant to s 4 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) and s 23F of the Act, it is a 'non-exclusive possession act' attributable to the State of Western Australia. As noted earlier, the entry on the Register states that the Wiluna claimants 'do not make claim to native title rights and interests which confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which' such an act has been done. There is no assertion in this case that either s 47 or s 47A applies to the Jundee Pastoral Lease and s 47B cannot, on its terms, apply. Therefore, I am of the view that the only registered rights claimed in relation to the tenement area are those of a 'non-exclusive' nature specified in paras (a) to (v) of the 'further or in the alternative' formulation of them. It is only these registered native title rights and interests which are relevant to this determination.

[40] There is really no evidence of the actual exercise or enjoyment of native title rights and interests over the proposed licence area. There is no evidence for instance that the native title party exercises or enjoys the native title rights and interests to conduct ceremonies, live or erect residences, camp, hunt, fish or collect food. The evidence does not support any weight being given to any effect of the future act on the enjoyment of native title rights and interests.

[41] The native title party's contentions on s 39(1)(a)(i) concentrate on the inappropriate conduct of the grantee party (the prior conduct issue) which is dealt with more fully below. The native title party says that the obligation to look after country as deposed to by Mr Wongawol includes looking after country in accordance with their rights and interests and cultural obligations (para 5); ensuring visitors to country understand how to look after country and respect the cultural obligations of Wiluna claimants (paras 7 and 9); and that this can only be done if visitors understand and respect these obligations (para 13 and 14). Mr Wongawol also says (para 10) the Wiluna claimants have an obligation to look after sites and special places. The native title party contends that the failure of the grantee party to understand these cultural obligations and to allow the Wiluna claimants to continue to practice their cultural obligations as evidenced by their prior conduct has a significant effect on the enjoyment of native title party rights and interests (s 31(1)(a)(i)); and on the way of life culture and traditions of the native title party (s 39(1)(a)(ii)). For the reasons given below, my finding is that SSIG's behaviour has been inappropriate; and that this is likely to continue to be the case after the grant, leading to a real potential for conflict between the CDNTS as representatives of the native title party and the Wiluna claimants themselves.

[42] The native title party does not elaborate on which of the non-exclusive registered native title rights and interests embrace the obligation to look after country. While the obligation falls within the exclusive rights (see para (b) – the right to make decisions about the use and enjoyment of the area) it is less clear that it is a direct manifestation of the non-exclusive rights particularly in relation to dealing with third parties who have rights under other legislation - existing rights in the case of a pastoral leases and potential rights in the case of an applicant of a mining tenement. It is not necessary to resolve this issue for the purposes of my determination. The evidence of Mr Wongawol and the grantee party's conduct is relevant to other criteria including s 39(1)(a)(ii) and I have had regard to it in those contexts. The effect (if any) of the proposed exploration on the enjoyment of the native title party's native title rights and interests is not on its own an obstacle to a determination that the act may be done.

Section 39(2) – existing non-native title rights and interests

[43] I have had regard to the existing non-native title rights and interests which will already have had an adverse impact on the enjoyment of native title and other matters dealt with in s 39(1)(a) through partial extinguishment of native title rights and interests within the

area of the proposed licence. The existence of pastoral activities over the years are likely to have had a practical effect on the enjoyment of the native title rights and interests.

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

[44] Apart from the Wongawol affidavit, which provides evidence of some aspects of the native title party's way of life, culture and traditions, there is no specific evidence from the native title party of the effect of the proposed licence on this factor.

[45] For the reasons already given and elaborated on below it is my view that, if the grant is made in circumstances where the grantee party continues to behave in the manner it has to date, then the conflict between SSIG and CDNTS is likely to continue and have some effect on the native title party's tradition of looking after country. This is something to which I am entitled to give some weight.

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

[46] The grantee party alludes to financial benefits to the native title party as a result of benefits to the Wiluna residents by way of expenditure through 'accommodation, food bought through retailers etc' (GPSC para 20). The grantee party considers the grant of the proposed licence will further benefit the native title party whereby unknown sites may possibly be discovered during the conduct of heritage surveys.

[47] The Tribunal has held that any positive effect of a future act can be taken into account under this criterion (*Waljen* at 170). However I do not consider the supposed benefits outlined by the grantee party will enhance the social, cultural and economic structures of the native title party. In the absence of a specific agreement which provides direct economic benefits to the native title party any expenditure on exploration would only be of minimal indirect benefit to them if at all. It is not clear to me that the locating of sites would contribute to the development of the native title party's social, cultural and economic structures.

[48] On the question of any adverse effect on the cultural structures of the native title party, I repeat my findings under s 39(1)(a)(i) and (ii).

Section 39(1)(a)(iv) - freedom of access - freedom to carry out rites, ceremonies or other activities of cultural significance

[49] There is no evidence of the native title party having access to, or carrying out, any rites, ceremonies or other activities of cultural significance over the proposed licence apart from Mr Wongawol's affidavit. The grantee party's contentions (GPSC para 21), indicate that exploration work on the ground will be limited in time and to a small area of the proposed licence which I accept. The actual exploration activity would therefore have little impact on the freedom of the native title party to continue existing access and activities even if there were evidence relating to them. Further, the grant of a proposed licence does not confer exclusive possession of the area on the grantee party and continuing access to the area will be preserved except for the minimal restrictions caused by the exploration activities. However, for the reasons already given in relation to s 39(1)(a)(i), (ii) and (iii) the continuing conduct by the grantee party of the kind exhibited to date will have some effect on the native title party's freedom to carry out its activities of cultural significance including looking after sites of importance to them as described in Mr Wongawol's affidavit.

Section 39(1)(a)(v) - sites of particular significance

[50] There are no Aboriginal sites recorded on the Department of Indigenous Affairs (DIA) Site Register for the purposes of the *Aboriginal Heritage Act 1972* (WA) on the proposed licence area. I accept that the Site Register is not an exhaustive list of all Aboriginal sites and that other sites might exist and be affected by activities on the land.

[51] The Tribunal has, on numerous occasions, considered the protective provisions of the *Aboriginal Heritage Act 1972* (WA) (AHA). Pursuant to s 146(b) of the Act I adopt the Tribunal's findings in *Waljen* on this topic (at 209-211). I also adopt the findings of the Tribunal in *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner at [31]–[38], [40]-[41]. The Government party's second extra condition will enhance the protective regime.

[52] Evidence provided in the expedited procedure inquiry which was also evidence in this matter included a Memorandum dated 15 August 2008 prepared by Mr Lindsey Langford, an anthropologist employed by CDNTS. Mr Langford says that the proposed exploration licence area is positioned in and amongst a network of known and significant tjukurrpa (dreaming) sites. Many of these sites form part of the Wati Kutjarra and Papanymaru

Tjukurrpa, aspects of which are restricted to certain men only. Mr Langford says that the proposed licence area is situated in country which is populated by sites of varying importance to the native title party and other Aboriginal people further away who visit the area at times for ceremony. There are frequent intersections between these two tjukurrpa imprinting the landscape with sites of particular significance. The Cork Well site (DIA registered site 2.022) which is a closed ceremonial site is not more than 10 kilometres from the proposed tenement area. This fact is confirmed by Tribunal mapping which places the edge of the buffer zone for this site within a few hundred metres of the western edge of the licence area. Mr Lee Sackett, an anthropologist who prepared a report for the Wiluna native title determination proceedings, also identified an important ceremonial place in the vicinity of the licence area which Mr Langford says indicates the high importance attributed to it.

[53] SSIG have criticised Mr Langford's evidence because he has described the location of the area wrongly by saying that the tenement lies inside the eastern portion of the Jundee pastoral lease and not more than 20 kilometres east of the western boundary of the Millillie pastoral lease. I accept that this description is in error. The licence area is in the western portion of Jundee and east of the eastern boarder of Millillie. However in my view this was an inadvertent or typographical error. The balance of Mr Langford's evidence locates the proposed licence area correctly and I have no doubt that his evidence relates to this area and not somewhere else. Apart from this criticism, the evidence of Mr Langford has not been challenged and I accept it.

[54] While not identifying any specific sites, Mr Langford's evidence is sufficient to support a finding that there probably are areas or sites of particular significance to the native title party on the licence area. Unless a proper site survey is carried out involving the native title party there is a possibility that they will be interfered with.

[55] SSIG have agreed to conduct a heritage survey (initially by way of a Regional Standard Heritage Agreement (RSHA) and later the Exploration and Prospecting Agreement (EPA) prepared by CDNTS) and, if it were not for other issues which had arisen relating to the grantee party's negotiating behaviour, this survey together with the Government party's regulatory regime would have been adequate to deal with this criterion and minimise the possibility of there being interference to areas or sites of particular significance. Absent the issues surrounding the grantee party's behaviour, a determination that the act may be done subject to conditions relating to site protection and the Government party's extra conditions

would have been appropriate. The native title party would have consented to exploration subject to an agreed heritage survey in ordinary circumstances.

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

[56] The evidence establishes that the native title party is not opposed to the future act as such but does not wish it to proceed with this particular grantee party based on the prior conduct of the SSIG. The law is clear that a native title party does not have a right of veto over a mining proposal under the NTA (*Australian Manganese Pty Ltd v State of Western Australia & Ors* [2008] NNTTA 38; (2008) 218 FLR 387 at 407-409 [55]-[57] and 412-413 [71]-[72]). Nevertheless, the fact that the native title party does not want the grantee party involved in the use of the land is a matter to which some weight can be given if justified on the evidence. For the reasons dealt with below relating to the SSIG's prior conduct and the likely unsatisfactory relationship in the future between in particular Mr Ghaneson and CDNTS and the native title party I have had regard to the native title party's wishes on the use of the land by the grant of the exploration licence to this particular grantee party.

Section 39(1)(c) - economic or other significance
Section 39(1)(e) - public interest

[57] There are common features to the contentions relating to s 39(1)(c) and s 39(1)(e) and I propose to deal with them together.

[58] The Government party contends that 'the grant of the proposed tenement will not be likely to be of great and immediate economic significance to the nation' (GVPSC para 67). However the proposed licence could lead to mining and State benefits such as royalty payments and export income as well as benefits to the local economy in and around the towns of the Wiluna Shire (GVPSC para 68).

[59] The grantee party contends that if the proposed licence area contains a mineral deposit in an appropriate quantity it could lead to a mine being established which would in turn 'provide jobs, income and an influx of money into the town of Wiluna' (GPSC para 75).

[60] The Government party says the public interest is served by the exploration for minerals as a prerequisite to the potential development of a mine or mines over the area of the proposed licence as a result of the economic benefits on a local, state and national level. The grantee party considers that the proposed exploration activity of a local resource is in the

public interest (GPSC part 2 para 4). It is contended that should the exploration result in the discovery of a mineral resource, the local community, Western Australia and Australia could benefit.

[61] Under s 39(1)(c) the native title party contends that the grant of the proposed licence to SSIG provides for little or no economic benefit to Australia or the State of Western Australia and that by tying up an exploration area for up to 10 years by a company that has: no expertise in exploration; insufficient funding to properly explore for mineralisation; and an exploration strategy based solely on 'astrological' and 'mystical' activity, thus depriving other exploration companies from the opportunity of exploring the area, means there is likely to be a negative economic impact to Australia or to the State of Western Australia.

[62] Under s 39(1)(e) the native title party contends that there is public interest in not granting the proposed licence because:

- there is no economic benefit in doing so for the same reasons as outlined above;
- the grant would have a negative impact on the mining industry due to SSIG's approach to exploration which would tie up land from other competent explorers;
- SSIG have difficulty in understanding their obligations under various relevant legislation and there is a high risk of inadvertent breach of legislation by the grantee party; causing damage to others including the native title party;
- the grantee party's prior conduct means the grant of the proposed licence would be inappropriate and unconscionable.

[63] It is the economic or other significance of the future act itself which must be considered under s 39(1)(c) (*Waljen* at 175). There is unlikely to be any real benefit to the Australian or Western Australian economics from this particular grant. I accept that some limited economic benefit would be brought to the local area through expenditure on exploration activities although the extent of this will depend on the results of the initial drilling and whether further drilling is undertaken. There is no evidence that the local Aboriginal community would benefit in a direct way although there would be some limited payments made to some of them for site surveys.

[64] There is a public interest in the grant of exploration licences as a necessary part of a viable mining industry in Western Australia (*Evans* at 215 per Nicholson J, *Waljen* at 176, 216, *Straits Exploration (Aust) Pty Ltd v Kokatha Uwankara Native Title Claimants* [2011] SAERDC 2 at [255]) and this is something to which weight should be given. In the absence of the factors special to this case relating to the grantee party's prior conduct, these are both matters that I would have had regard to in support of a determination that the act may be done.

[65] On the lack of expertise contention, the native title party asserts that in its original program of work SSIG were unaware of what material they were authorised to explore for pursuant to the grant and this required amendment. The native title party also relies on the fact that SSIG's sole director, Mr Shanmugam, is an accountant with no apparent mining expertise.

[66] The native title party also contended that the SSIG had insufficient funding to carry out the exploration, evidence for which was the attempt to reduce the standard fees of CDNTS for heritage surveys during discussions about the expedited procedure objection.

[67] The grantee party disputed both these contentions and I do not propose to make a finding on them. I do not regard them as factors I should take into account in making my determination. In my view the Tribunal is entitled to rely on the Government party (Department of Mines and Petroleum) as the regulatory body to deal with this type of issue. The issues are not of such an exceptional or serious nature to make it necessary to resolve them in order to make a determination. I don't imagine being an accountant should preclude a person from applying for an exploration licence. However, even if the facts alleged by the native title party were established, it is difficult to see how SSIG's tying up of the land would have any significant negative economic impact in Western Australia given the large number of prospecting and exploration licences which are granted each year.

[68] The native title party also contends that SSIG do not understand relevant legislation including the *Mining Act* and *Aboriginal Heritage Act* which means there is a high risk of it inadvertently breaching them which could have serious consequences for the general public, the State's interest and the native title party's interest. With respect to the *Aboriginal Heritage Act*, the native title party says that from the negotiations in relation to the expedited procedure objection it was clear to them that SSIG had a misunderstanding of how heritage

surveys are conducted. While I can accept that Mr Ghaneson, who was conducting the negotiations at that time, did not have a full understanding of the process, I do not think on its own this is a factor to which I can give any weight. There are many small explorers who have had to come to grips with the procedures under the *Native Title Act*, including the conduct of heritage surveys, and the understanding of many of them would not be complete. The grantee party has signed two heritage agreements (RSHA and EPA) and if it were not for the factors peculiar to this case involving Mr Ghaneson's prior conduct and relationship with CDNTS in particular then I accept that they would follow the procedures in the agreement even if their current understanding of the processes are not at this point complete.

[69] With respect to the *Mining Act* I have already dealt with SSIG's lack of understanding of what it was authorised to explore for under an exploration licence. In the absence of any factors which are specific to the issues arising under the NTA, I do not have regard to the native title party's concerns. Again, these are matters for the Government party to deal with as the regulatory body responsible for ensuring compliance with regulations.

[70] The contention that the exploration strategy is based solely on 'astrological' and 'mystical' activity requires further examination.

[71] The proposed tenement is marked out in the form of a cross. On 12 May 2008 Mr Ghaneson, on behalf of SSIG, attended a Wiluna claim group meeting at Wiluna and advised that the placement of the licence was based on a story of Constantine looking into the sky and seeing a cross. The location of the tenement was determined by looking into the sky and placing it under the sun. The placement of the exploratory drilling was also made with reference to the stars. Mr Ghaneson's approach to exploration is confirmed by other evidence referred to below. For reasons further dealt with below, I am satisfied that SSIG's exploration methods still involve to a significant extent the location of drilling sites according to Mr Ghaneson's alleged special mystical knowledge. After Mr Shanmugam took over representation of SSIG, he advised that the exploration would be conducted by a competent team with the advice of a geologist. However, Mr Ghaneson has resumed the role of representing the grantee party and still asserts that the exploration would be based on his special knowledge. I am satisfied that, to an important extent, SSIG's exploration activities will rely on the views of Mr Ghaneson, some of which involve what I can only describe as a non-scientific approach to exploration.

[72] The Tribunal is entitled to have regard to the Government party's view of the public interest in the making of its determination. The Government party appears to be of the view that exploration carried out on the basis of factors which have influenced Mr Ghaneson and SSIG do not conflict with the public interest. The Government party has chosen not to take action under s 111A(b)(c) of the *Mining Act* which provides that the Minister may refuse an application for a mining tenement if satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted. I have some difficulty in understanding the Government party's position but might have been prepared to accept that it was a matter for them in the absence of other issues directly relevant to matters dealt with under the NTA relating to the behaviour of SSIG. However, given the circumstances of this case which are peculiar to SSIG, I am not prepared to defer to the Government party's view of the public interest on this issue. Overall, and also taking account of the matters dealt with under s 39(1)(f), I am satisfied that the public interest is not served by the grant of the proposed licence to SSIG.

Section 39(1)(f) - any other relevant matter

[73] Section 39(1)(f) gives the Tribunal a wide discretion to take into account matters which it considers to be relevant (*Waljen* at 176). The most important contention of the native title party is raised under both s 39(1)(e) and s 39(1)(f) and referred to as the 'prior conduct' ground. The native title party contends that the prior conduct of SSIG is a matter particularly that should be taken into account by the Tribunal when making its determination and that the Tribunal should conclude that the grant of the proposed exploration licence is unconscionable and inappropriate due to the prior conduct of SSIG in which it has:

- made remarks intended to intimidate the representatives of native title party, escalating to threats of violence;
- made inappropriate and disrespectful remarks about the native title party and the area of the proposed tenement;
- made defamatory remarks about the representatives of native title party;
- provided voluminous amounts of information and material to the native title party and the Tribunal which fails to distinguish between relevant and irrelevant material;
- appears to have substantive difficulty distinguishing the real world from a fictitious world; and

- through its appalling behaviour prevented the native title party from fulfilling its obligations as described in the affidavit of Robert Wongawol.

[74] *Intimidating remarks and threats of violence:* The native title party contend that during the course of their dealings with SSIG, SSIG have consistently made remarks with reference to armed combat or battle and created violent imagery, which is intended to intimidate and threaten the native title party and/or their representatives. To this extent, representatives of the native title party feared for their safety.

[75] In support of this contention, the native title party rely on the following evidence:

a. on 30 May 2008, SSIG sent a letter to the native title party, the Tribunal and the Government party, which relayed the superstition surrounding Friday and the number 13. Signing off the letter 'IN HOC SIGNO VINCES' which is the motto of Constantine meaning 'with this as your standard you shall have victory' (NTPSC Annexure 10);

b. on 22 August 2008, SSIG in a letter to the native title party stated the following:

In the classic battles of history, a prudent military general would sometimes offer "Terms" (terms of surrender). This is to avoid further conflict, unnecessary casualties or for other reasons.

In a historical sense, terms would go along the lines of ... I give safe passage to all your women and children, ... to your soldiers, knights ... AND your queen.

Now, ... will you yield the city?

With reference to our matter;

CDNTS...are you willing to remove your objection to E53/1356, ... and simply walk away in peace?

...

My Grand Armee has arrived. This is not an army of soldiers; it is an army of 'words'. The words 'speak' to me.

Even a word wants to be part of something bigger than itself.

A word can be used like an arrow. Words can strike down an oppressor just as effectively.

My army is now waiting outside your city.

I give CDNTS until 11.59am Monday 25th August 2008 to discuss with their clients and accept terms.

"At high noon my arrows will block out the sun as they rain down upon thee" Charles Ghaneson Seven Star General

(NTPSC Annexure 13);

c. on 25 August 2008, SSIG submitted contentions in the inquiry to the expedited procedure. Relevantly, in those contentions, SSIG stated the following:

In 312 AD, a new war arose between Constantine and Maxentius. During this war, not long before the decisive battle, Constantine saw with his own eyes a shining cross in the sky. According to this premonition, he would have been victorious if he had substituted the imperial eagles on the soldiers' standards which [sic] the cross with the inscription: "By this conqueror" (NIKA in Greek). That night, the Lord appeared to him in a dream with the same sign of the Cross and said that by this sign he would defeat the enemy. On the following day, by Constantine's order, images of the Cross were made on all the standards of his army. Maxentius lost the battle and drowned in a nearby river.

...

'This inquisition is about "facts". (a wise man once said)

Therefore:

The Salem witch trials occurred during the 1600's.

An eye for an eye makes the whole world blind.

The grantee party has much more to say about your "facts" Ms Alexander but we choose not to lower ourselves into a cesspool of filth just to engage in a mudslinging match with thee....this is for the domain of...others, not SSIG.

Charles Ghaneson WILL use "YOUR WORDS AND LIES" to discredit you and make you drown in your own RIVER of WORDS.'

...

"'In order to pop an ego balloon with an arrow, one must first inflate it" CG08

Something had to be done about what was going on.

Now you have box seats at the SEVEN STAR INQUISITION.

(NTPSC Annexure 15);

d. on 28 August 2008, SSIG stated in a letter to native title party, the Tribunal and the Government party:

The ENJOYMENT of camping out in a tent under A MILLION STARS ...$8.

Average daily amount SPENT on food, beverages and other items in Wiluna ... over $100.

Keeping 20% of my arrows in reserve for use later on ... Priceless = © Mastercard.

(NTPSC Annexure 16);

e. on 3 September 2008, SSIG stated in a letter to the NTP:

During the RTN process it is hoped that there should be no reasonable excuse to justify a protest in a "garden bed" containing roses with genetically modified thorns....tipped with curare.

(NTPSC Annexure 18).

[76] *Inappropriate and disrespectful remarks*: The native title party contend that during the course of their dealings with SSIG, SSIG made inappropriate and disrespectful remarks about the NTP and the area of the proposed exploration licence, which illustrate the derogatory attitude of SSIG toward the native title party.

[77] In support of this contention, the NTP rely on the following evidence:

a. on 20 May 2008, SSIG in an email to native title party referred to the proposed exploration licence area and the purpose of a heritage survey as follows:

...just in case there are many sacred sites in the barren sandpit nobody is interested in exploring... If you can convince the NNTT dep pres [sic] of legitimate and significant sites in E53/1356 which coincides with proposed work areas, then you have saved us the time, money and need for a survey ...

(NTPSC Annexure 9);

b. on 13 July 2008, SSIG stated in an email to the native title party the following:

I hope there is no motivation to profit from cultural erosion via surveys ... after all there are many hard working people out there, doing far more physically and psychologically demanding jobs than what the 6 T/P's would be doing, and for far less money.

(NTPSC Annexure 12);

c. further in that letter, SSIG stated:

Considering the protection of heritage is a primary concern of the Wiluna claimants and even though the revised (proposed) work area is quite small, SSIG agrees to a heritage survey and to have 6 Traditional Peoples participate in the survey. After all, 6 pairs of eyes are better at detecting a site or artefact than the 2 which SSIG has previously requested, ... or none.

(NTPSC Annexure 12); and

d. on 7 August 2008, SSIG stated in an email to native title party:

Obviously, if cost-effectiveness, expediency or the real concerns of the NTP are of little consequence and hence the SSIG offer does not interest the CDNTS or the NTP in the least, then I suggest CDNTS disregard this letter.

(Government Party's Document 18, Attachment 6, p.5).

[78] The evidence also reveals other statements in the same vein. (See for example correspondence dated 13 July 2008 exchanged between CDNTS and SSIG during the expedited procedure negotiations relating to catering to be provided during any site survey.)

[79] *Defamatory remarks*: The native title party contend that during the course of their dealings with SSIG, SSIG made defamatory remarks about representatives of the native title party.

[80] In support of this contention, the native title party rely on the following evidence:

a. on 25 August 2008, SSIG submitted contentions in the inquiry to the expedited procedure. Relevantly, in those contentions, SSIG stated the following:

> *The grantee party has much more to say about your "facts" Ms Alexander but we choose not to lower ourselves into a cesspool of filth just to engage in a mudslinging match with thee....this is for the domain of...others, not SSIG.*
>
> *Charles Ghaneson [representative of SSIG] WILL use "YOUR WORDS AND LIES" to discredit you and make you drown in your own RIVER of WORDS'*
>
> ...
>
> *'The grantee party does not contend that Ms Alexander is an intelligent, attractive young woman with highly developed morals and ethics.*

[81] In order properly to deal with these contentions it is necessary also to examine other statements on the record from SSIG or persons acting for it at relevant times and the conduct of negotiations including those in relation to the expedited procedure objection.

History of negotiations about the expedited procedure objection

[82] On 27 August 2007, SSIG, in accordance with the Government's policy relating to the expedited procedure, provided to CDNTS a Regional Standard Heritage Agreement (RSHA) signed by Mr Charles Ghaneson. An RSHA is a standard agreement providing for the conduct of Aboriginal site surveys endorsed by the Western Australian Government but not currently endorsed by CDNTS or the Wiluna claimants. Following the s 29 notice, which asserted the expedited procedure, CDNTS sent to SSIG a letter on 2 January 2008 in which it advised that in order for the expedited procedure to be applied to the grant SSIG would need to sign their Exploration and Prospecting Agreement (EPA), a copy of which was attached to the letter.

[83] On 9 March 2008, SSIG sent a letter to CDNTS under the signature of Charles Ghaneson, Director, which said that SSIG were generally agreeable to most of the conditions listed in the EPA as in most respects the EPA is similar to the RSHA. However, the letter went on to say that in some aspects there is a great variation and Mr Ghaneson raised a number of queries about the EPA including whether a survey is required and if so the number

of participants on it, their associated costs and other likely fees. He pointed out that SSIG was not a multi-national mining company with unlimited financial resources.

[84] On 31 March 2008, there was a telephone conversation between Michelle Alexander of CDNTS and Mr Ghaneson about various aspects of the EPA.

[85] On 7 May 2008, the Tribunal made directions requiring the parties to provide contentions and evidence for the purposes of an inquiry into the expedited procedure objection lodged on 17 April 2008. These directions allowed a period until 11 August 2008 for the parties to attempt to negotiate with a view to reaching agreement that would led to withdrawal of the objection. The native title party's position as conveyed in its letter of 2 January 2008 was that, if the grantee party were to enter into its EPA, then the objection would be withdrawn.

[86] Mr Ghaneson attended a Wiluna claimants' meeting on 12 May 2008 and sought a discounted rate for the fees contained in the EPA. This was unacceptable to the native title party but the claimants considered whether, in order to reduce costs to SSIG, fewer people could be sent out on the heritage survey. After consideration, they resolved not to accept SSIG's request to limit the number of traditional owners specified in the EPA for heritage surveys. Following this meeting, there was correspondence between the parties (including the Government party) principally about the conduct of a heritage survey.

[87] On 25 August 2008, SSIG lodged its contentions and evidence for the expedited procedure inquiry, supplemented by a letter from Mr Ghaneson to the Tribunal on 28 August 2008. Following dismissal of the expedited procedure objection on 5 September 2008 the Government party activated the right to negotiate process.

[88] On 11 September 2008, the Government commenced the negotiating process in its usual manner by sending a letter to both the grantee and native title parties with information about the grant and the Government party's proposal in relation to it. It also referred the matter to the Tribunal for mediation assistance pursuant to s 31(3) of the Act. CDNTS responded by declining to participate in a mediation conference on the basis that the right to negotiate process had just commenced and it could not be said, as asserted by the Government party, that negotiations had stalled. In my view that was an unnecessarily technical position to take as there had been negotiations in the context of the expedited procedure which were directly related to the grant of the proposed licence. CDNTS also

asserted that because of the 'offensive and unconscionable behaviour' of the grantee party throughout the expedited process that it wished to have mediation with the State alone in the first instance. This mediation was to include whether the State has an obligation to ensure that the grantee party is a fit and proper entity with which to negotiate and ultimately to which a mineral tenement should be granted.

[89] On 25 September 2008, SSIG sent a submission to the parties in response to the Government party's initiating letter which set out the grantee party's intentions with respect to exploration. This document was signed by both Donald Shanmugam and Charles Ghaneson. On 25 January 2009 and 4 May 2009, SSIG sent letters to CDNTS providing further comments on the EPA. On 22 August 2009, SSIG forwarded an executed EPA of the same date to CDNTS with the addition of a further clause which does not appear to have been of major significance but which had not been agreed to CDNTS. The agreement was signed by Donald Shanmugam as sole Director. On 3 March 2010 at a claim group meeting, the native title party resolved not to execute the agreement from SSIG.

The personnel acting for SSIG

[90] Mr Shanmugam and Mr Ghaneson are brothers who initially were both shareholders and directors of SSIG. In the initial stages of their application for the proposed tenement and the negotiations about it with the native title party, it was Mr Ghaneson who acted for the company.

[91] On 11 August 2008, Mr Shanmugam advised CDNTS that to 'make for a smoother and easier management change, SSIG will continue to be managed by Charles Ghaneson until SSIG is no longer involved in the Tribunal Inquiry process'. He said that after this time he would be managing and funding SSIG; that he favoured the resolution of Aboriginal issues and other areas of concern to the native title party; and intended to approach the exploration project in a professional manner. He further said he would not be requesting any reduction on the industry rate for survey participants. He said 'this attitude will undoubtedly deliver better and more effective results than previously experienced'.

[92] In the Form 5 Future Act Determination Application the name and address of the representative of the applicant is given as Donald Shanmugam, C/- of Seven Star Investments Group Pty Ltd (SSIG) (para 4).

[93] Paragraph 14 under any other relevant information says that: the grantee party is Seven Star Investments Group Pty Ltd; the sole director and shareholder of which is Donald Shanmugam; to avoid any confusion it should be stated that Charles Ghaneson is not the grantee party; and Charles Ghaneson is not a director nor a shareholder in SSIG but was a previous director and member of SSIG and is a creditor to SSIG. However, paragraph 14 then contains the statement *'hence, Charles Ghaneson states that "I should be viewed as an interested party in this matter" CG'.*

[94] A statement from Charles Ghaneson then follows in which he says the following (in summary):

- 'I wish to submit historical statements and contentions from relevant parties during the forthcoming s 35 matter involving E53/1356.'

- The grantee party has agreed to provide Charles Ghaneson with access to SSIG documents 'either directly or alternatively, through a FOI request or other way' which makes him an interested party.

- CDNTS receives funding from the Commonwealth Government through FaHCSIA (Department of Families, Housing, community Services and Indigenous Affairs) to represent the Wiluna and other native title parties.

- CDNTS staff has engaged in 'unprofessional, unethical, misleading or improper conduct'.

- Some of CDNTS's prior contentions and statements are 'seemingly ambiguous, hypocritical or simply misleading' and some tantamount to 'idiotic professionalism'.

- The acts or statements of CDNTS are inconsistent with its constitution, annual report or sections of the *Native Title Act*. These include refusing to enter discussions, refusing to negotiate any heritage agreement, refusing to attend mediation sessions and refusing to accept the valid heritage agreement provided by the grantee party which was the standard form CDNTS Exploration and Prospecting Agreement.

- That CDNTS have acted in a 'contemptuous manner' in relation to their functions of representing and providing professional services to the Wiluna native title party.

- CDNTS has provided 'misleading statements in their web site and on annual company report and on to the NNTT' by saying that CDNTS 'virtually never declines nor objects further nor hinders the progress of an (unaltered) EPA document when signed and submitted by an explorer.'

- 'CDNTS has discriminated against SSIG.'

- That a determination of native title should not be made to the Wiluna claimants whilst they are under the control of CDNTS.

- That Mr Ghaneson should be provided with access to all previous documents submitted to the Tribunal to support his allegations and statements.

[95] It is pertinent to note that, despite Mr Shanmugam at this point (30 May 2010) being the sole director and acting for SSIG and being the address for service, he permitted Mr Ghaneson to include his statement, which was devoted to an attack on CDNTS (similar to that exhibited in his Federal Court proceedings referred to below), in the Form 5.

[96] At a listing hearing on 24 September 2010 Mr Shanmugam informed the Tribunal that Mr Ghaneson was no longer a director of SSIG and that the change of management meant that he would be running the company and that Mr Ghaneson was no longer a shareholder but a creditor to the company. He said that, if required, Mr Ghaneson would be used as a consultant but he could not say if this would involve him in any dealings with the native title party.

[97] At the listing hearing on 27 October 2010 Mr Shanmugam confirmed that the management and direction of the company were a matter for him but acknowledged that Mr Ghaneson would be involved in a research and consultancy capacity. Based on this information, I raised the possibility of making a determination by consent of the parties with a condition that Mr Ghaneson not have contact with the native title party or its representatives. The proposal was that Mr Ghaneson could not attend heritage surveys when the native title party or its representative were present and could not have discussions or contact with them at any time. Otherwise he would be free to be involved in the exploration and utilise his consulting and research services. Draft conditions for consideration of the parties were sent to them on 29 October 2010 which also included a proposed condition making the determination subject to the native title party's EPA.

[98] On 9 November 2010, Mr Ghaneson made a submission to the Tribunal in response to the Tribunal's draft conditions. He opposed the imposition of the conditions, including because, he submitted, it was unlawful under the *Equal Opportunity Act 1984* (WA) to discriminate against a person with an impairment. Mr Ghaneson provided evidence to support the existence of an anxiety illness. It should be noted that, until this point, the Tribunal was not aware that Mr Ghaneson had an impairment of any kind. He also said the condition would detrimentally affect his employment as a consultant for SSIG and essentially prevent SSIG from exploring. This was said to be because, if the condition is imposed, then he would not be able to use his 'unique mystical knowledge' to locate the anomaly if he could not access the places or have discussions with the native title party representatives. He says that he alone has the 'mystical knowledge' and without that knowledge, there could be no exploration as there will be no target for it which meant that no exploration could be conducted.

[99] In his submission to the Tribunal of 16 November 2010 Mr Shanmugam opposed the draft conditions as it would have a highly detrimental effect on SSIG's proposed exploration venture. 'Mr Ghaneson's knowledge based involvement is an important part of SSIG's proposed exploration venture', he said. He submitted that no 'out of the ordinary' conditions should be placed on the grant

[100] The Government party opposed the imposition of the draft conditions for a number of reasons which it is not necessary to further consider.

[101] The submission of CDNTS was that it would need to obtain instructions on the draft conditions in accordance with the processes outlined by Mr Wongawol and proposed that this could be done by way of a s 150 conference convened by the Tribunal at Wiluna which Mr Ghaneson would not be entitled to attend because he was not a party to the proceedings. CDNTS were of the view that a likely outcome of the conference would be a consent determination as proposed.

[102] In my view, it would not be appropriate to make a determination with these conditions except by consent. By their very nature, they require the cooperation of the parties, something which, on the evidence, is not likely to be forthcoming.

[103] On 24 November 2010, Mr Shanmugam lodged an affidavit sworn on the same day with the purpose to confirm the scope of involvement of Mr Charles Ghaneson within SSIG as follows:

> 'Mr Ghaneson has acquired knowledge through special means. Mr Ghaneson is the only person that can indicate the proposed drill site and this can only be derived through his unique knowledge. If the tenement is granted, Mr Ghaneson's fundamental role will be to locate a drill site that is not subject to heritage issues. Mr Ghaneson's role during the actual drilling process will be confined to the preparation of food, cleaning and other menial tasks.
>
> Based upon Mr Charles Ghaneson's previous legal submissions, I have decided not to discriminate against him under Equal Opportunity Act 1984 in relation to his consultancy work for SSIG within the scope of SSIG's current and future National Native Title Tribunal matters. In the best interests of the company, I have decided to reinstate Mr Charles Ghaneson as a non-managing director of Seven Star Investments Group Pty. Ltd. as of 24th November 2010 for the purposes of consulting and concluding the current Tribunal matters on behalf of SSIG, the grantee party.
>
> If the tenement is granted I will personally manage my chosen team of mining-related professionals to ensure the Wiluna lands subject to the exploration venture is looked after properly and the exploration venture is conducted professionally. SSIG's consultant geologist will oversee the exploration project, the drilling and sampling, the subsequent rehabilitation process and the exploration reporting obligations.'

[104] On 25 November 2010, Mr Ghaneson advised the Tribunal that he had been instructed to act on behalf of the grantee party. On 3 December 2010, Mr Ghaneson advised that the resumption of his formal directorship role with SSIG should be formally taken as being from 3 December 2010 and that he had signed the relevant forms and provided them to Mr Shanmugam.

[105] On 23 November 2010, Mr Ghaneson provided a signed 'formal apology' to the Wiluna claimants and CDNTS 'for any perceived disrespectful, offensive or other comments that I have made, unintentionally or otherwise'. The apology was also offered to the staff of CDNTS for comments which may have upset them even though Mr Ghaneson thought they were under a mistaken belief about the context of some of them.

Federal Court proceedings

[106] Despite the apology, on 24 November 2010, Mr Ghaneson requested the Tribunal give consideration to the decision of the Federal Court in *Freddy on behalf of the Wiluna Native Title Claimants v State of Western Australia* [2010] FCA 1158 (McKerracher J) and the submissions and evidence he had lodged in relation to those proceedings.

[107] The Federal Court proceedings relied on by Mr Ghaneson was a Notice of Motion filed by him on 25 June 2010 in the Wiluna native title claim application (WAD 6164 of 1998; NNTT WC99/24). The Notice of Motion sought orders that Mr Ghaneson be joined as a party to the proceedings, that CDNTS be investigated and its funding terminated and it be replaced as the representative of the Wiluna claimants. The Federal Court decided that it was not within its power to take action in respect of the allegations about the performance of CDNTS and that neither SSIG or Mr Ghaneson had demonstrated a sufficient interest to become a party to the Wiluna claim proceedings.

[108] Mr Ghaneson's Federal Court submissions (including his affidavit) contained 72 pages and principally relate to Mr Ghaneson's complaints against CDNTS. I have not considered it necessary to consider these submissions in detail or to repeat all the allegations. The evidence is principally an attack on CDNTS repeating the sort of material in Mr Ghaneson's statement attached to the Form 5 future act determination application. They are summarised in the Federal Court judgement (at paras [5]-[11]). I have had regard to the facts set out therein as corroboration of the serious breakdown in relations between Mr Ghaneson and CDNTS.

Role of the representative body

[109] CDNTS is a body funded under s 203FE to perform the functions of a representative Aboriginal/Torres Strait Islander body under the Act. Those functions are specified in that Act and include assisting native title parties in various ways, including in relation to future act matters (ss 203B, 203BB). CDNTS employs solicitors who are admitted legal practitioners and subject to the professional obligations imposed on them and who I can infer have been properly instructed to act for the native title party. The negotiations in this case were supervised by Malcolm O'Dell, the principal legal officer, an admitted legal practitioner. In accordance with the usual practice, CDNTS (through Michelle Alexander, the future acts officer) was engaged in negotiations with SSIG and, particularly, with Mr Ghaneson about withdrawal of the expedited procedure objection application. The CDNTS acted in accordance with their instructions to put forward its EPA for consideration by the grantee party. The correspondence makes it clear that, if this agreement had been acceptable at the time it was provided, then the objection would either not have been made or have been withdrawn. It is apparent from the evidence that Mr Ghaneson took serious objection to aspects of the EPA and it appears that this gave rise to his inappropriate conduct.

There is nothing in the evidence to suggest that CDNTS or its employees acted improperly or unprofessionally, let alone illegally, in their dealings with SSIG as alleged by Mr Ghaneson. It may be that they could have been more amenable to entering into s 31 mediation when this was requested by the Government in September 2008 but their concern about mediation while Mr Ghaneson had conduct of the negotiations on behalf of the grantee party is understandable.

Findings on the 'prior conduct' contention

[110] I do not propose to make a finding on whether the evidence establishes that Mr Ghaneson made threats of violence. CDNTS contend that representatives of the native title party feared for their safety but no evidence has been provided from any of them that this was actually the case. I am being asked to infer from the statements themselves and the circumstances of their making that members of the CDNTS staff would have feared for their safety. I cannot do that in the absence of more specific evidence. Whether what Mr Ghaneson said amounts to a threat of violence is also problematic in the absence of more evidence about his demeanour during any meetings. A person's reaction to what Mr Ghaneson said is likely to be subjective. People operating in a legal environment are often subject to robust and perhaps unfair comments. Some might regard Mr Ghaneson's comments as strange or eccentric but not threatening. Others may be more concerned about their seriousness. It is not necessary to decide whether Mr Ghaneson made threats of violence, which is a criminal offence, and I do not propose to do so. I can certainly accept that some people would be offended by his comments and accept that this is likely to be the case for some members of the CDNTS staff. The statements were inappropriate in negotiations of the kind mandated or encouraged by the Act, i.e. negotiation in good faith.

[111] I also do not propose to make a finding about whether the statements were defamatory. On the face of it they are. However, the law of defamation is complex and there are numerous defences available based on the circumstances in which statements are made. It is not necessary to make a formal finding of the kind contended for by the native title party but I do find that the statements were offensive and inappropriate in the negotiations.

[112] The evidence is clear that Mr Ghaneson is to have continuing and significant involvement in SSIG including in its exploration activities and, should the proposed tenement be granted, would be required to have discussions with the CDNTS and the Wiluna claimants about the location of a drill site. Mr Ghaneson would be involved in any site survey whether

conducted according to the terms of the EPA or if the Tribunal made a determination subject to the EPA or subject to conditions to similar effect.

[113] The first basis of my determination is that there has been an irretrievable breakdown in relationships between Mr Charles Ghaneson and CDNTS which means that any negotiations (which will, of necessity, involve officers of CDNTS) about the avoidance of sites are not likely to be productive and consistent with the underlying principles of the Act or the Wiluna claimants' obligation to look after country, including its special places. This breakdown can be attributed to the conduct of Mr Ghaneson. The native title party, as a registered native title claimant is entitled, while a decision on their native title claim is still pending, to be treated as a holder of native title with interests in the land covered by the Wiluna claim. A registered native title claimant has certain procedural rights under the Act and those who comprise the registered claimant and their representatives are entitled to be dealt with in an appropriate manner by persons required to negotiate with them.

[114] The second basis for my determination is that I am satisfied that, if the grant is made, there is a real potential for further conflict to develop between the officers of CDNTS and Mr Ghaneson. While less likely, there is also the potential for conflict between the Wiluna claimants and Mr Ghaneson when they would be required to meet over the site survey.

[115] The native title party says that the behaviour of Mr Ghaneson is to be attributed to the grantee party as SSIG authorised him to conduct the negotiations. I accept this contention but consider that the prior conduct contention must be dealt with not on the basis that past conduct is in itself sufficient reason to make a determination that the act may not be done but that the conduct is a predictor of what, on balance, will probably happen if Mr Ghaneson continues to be involved directly in further negotiations or discussion with CDNTS or the Wiluna claimants. If I had been satisfied that Mr Shanmugam was to have taken over the conduct of the negotiations and dealings with CDNTS after the grant, then another decision would have been open to me. But this is not the case. It is fair to say that most of the issues have arisen between officers of CDNTS and Mr Ghaneson, rather than with the native title holders themselves. Nevertheless, CDNTS is properly acting for the native title party and there is no evidence that it will not continue to do so. It is therefore relevant to have regard to the relationship difficulties between SSIG and CDNTS. There is no doubt that Mr Shanmugam recognised the problem and took steps to minimise Mr Ghaneson's involvement. However, it is clear from the final submissions made by him that Mr Ghaneson

will have a continuing direct involvement in the company's activities. A site survey is necessary and so there will be contact between Mr Ghaneson and CDNTS and the Wiluna claimants if the exploration licence is granted. Even though the prior conduct relates mainly to Mr Ghaneson's dealings with CDNTS, I consider that there is a real risk that the behaviour will continue to be exhibited to both CDNTS and Wiluna claimants.

Conclusion

[116] This is a unique case. Had it not been for the conduct of SSIG, to which the native title party took objection, the grant of the proposed licence would have been resolved by agreement by the signing of the EPA proposed by CDNTS in its original or modified form. Even if the Tribunal had been called on to make a determination, the inquiry would most likely have resulted in a determination that the act may be done with a condition relating to Aboriginal heritage and a site survey. Apart from the issues relating to SSIG's prior conduct, there is no evidence to show any effect of the grant on the enjoyment of registered native title rights and interests or the other factors in s 39(1)(a), except the effect on areas or sites of particular significance which would have been accommodated by the Government party's regulatory regime based on the *Aboriginal Heritage Act* and provision for a site survey. As is the normal case with exploration, the public interest would be served by continuing exploration and there would be the possibility of some small local economic benefit.

[117] However, the special circumstances of this case lead to a different conclusion. I have had some regard to the native title party's wishes in opposing the grant being made to this particular grantee party. More importantly, the case involves an assessment of whether the public interest is served by making the grant and whether the grantee party's prior conduct is a relevant factor to be taken into account. In my view, the prior conduct is a relevant factor under both ss 39(1)(e) and (f) because, if it continued, then both the capacity of the CDNTS to continue properly to represent the native title party and the capacity of the Wiluna claimants to exercise their traditional rights of looking after country including sites would be seriously impeded. Despite his apology, it is manifest from the evidence that Mr Ghaneson will continue to act or be directly involved on behalf of SSIG in dealings with CDNTS and the native title party. Despite making an apology Mr Ghaneson's contentions to the Tribunal on 24 September 2010 invited consideration of the material he had placed before the Federal Court criticising CDNTS which suggests that his animosity to CDNTS still exists.

[118] The only basis I can see for Mr Ghaneson's initial disgruntlement with CDNTS is his disagreement over the terms of the EPA or indeed whether any site survey was necessary. The RSHA sponsored by the Government party recognises the importance of site surveys for exploration tenements and this had originally been agreed to by SSIG. The EPA is in different terms and the costs and fees for conduct of a survey are higher but the principle of site protection remains the same. In the end, this was acknowledged by SSIG when Mr Shanmugam signed the EPA, albeit with an amendment.

[119] In weighing the relevant factors, I am satisfied that it is not in the public interest to grant this tenement: firstly, because the initial proposed exploration methodology of Mr Ghaneson has no rational or scientific basis; and secondly, because of the irretrievable breakdown in relations between CDNTS and SSIG and the real potential for further serious disputations and conflict in the future which will impact on the capacity of CDNTS to act for the Wiluna claimants and on the claimant's capacity to carry out their cultural obligations. While both factors give weight to my overall conclusion, each factor on its own, is in my view sufficient to support the determination made.

Determination

[120] The determination of the Tribunal is that the act, namely the grant of exploration licence E53/1356 to Seven Star Investments Group Pty Ltd, must not be done.

Hon C J Sumner
Deputy President
24 March 2011