NATIONAL NATIVE TITLE TRIBUNAL

Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011)

Application No: WF10/26

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

- and -

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

Weld Range Metals Limited (Applicant/grantee party)

- and -

The State of Western Australia (Government party)

- and -

Ike Simpson and Others on behalf of Wajarri Yamatji (WC04/10) (native title party)

SUMMARY

As this matter may be of public interest, the Tribunal has prepared a summary to accompany the determination that is delivered today. However, it must be emphasised that the summary forms no part of the Tribunal's determination. The only authoritative statement of the Tribunal's reasons is to be found in the reasons for the determination. This summary is intended to assist in understanding the principal conclusions reached by the Tribunal but is necessarily incomplete. The published reasons for the determination and this summary will be available on the internet at www.nntt.gov.au and on Austlii.

Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011)

Today the National Native Title Tribunal made a determination under s 38 of the *Native Title Act 1993* (Cwlth) (NTA) that certain future acts, namely the grant of four mining leases (M51/543-546) to Weld Range Metals Limited, must not be done. Weld Range Metals Limited applied for the leases primarily to mine for chromium and nickel.

The Wajarri Yamatji people have a registered native title determination application over the area concerned and so the registered native title claimant for that application is the native title party in these proceedings. Weld Range Metals Limited (WRML), as the company seeking the grant of the leases, is the grantee party and the State of Western Australia is the Government party.

The Tribunal's decision is based principally on the special significance of the Weld Range area, which includes the area proposed to be subject to the mining leases, to the Wajarri Yamatji people in accordance with their traditions.

Background of WF10/26

The NTA requires any person or organisation who applies for a mining lease to negotiate in good faith with any registered native title claimants or determined native title holders over the area of the proposed mining lease before it can be granted by the government party.

On 24 September 1997, the government party published a notice in the press advertising its intention to grant the four mining leases sought by WRML, as is required by s 29 of the NTA. This led to negotiations between WRML and the Wajarri Yamatji people's representatives.

However, negotiations did not lead to an agreement about the grant of the leases and so, on 8 September 2010, WRML applied to the Tribunal for a determination (known as a future act determination) that the future acts concerned (i.e. the grant of the mining leases) could be done.

Before it could consider WRML's application, the Tribunal was required to determine whether negotiations in good faith had taken place between the parties with a view to getting the native title party to agree to the doing of the proposed acts, with or without conditions applying, as required under the NTA. Deputy President Christopher Sumner decided on 19 December 2010 that such negotiations had taken place.

Parallel to the good faith inquiry proceedings, the Tribunal attempted to assist the parties to reach agreement on the issues in dispute by conducting mediation. However, no agreement was reached and so the Tribunal proceeded with the future act determination inquiry.

The inquiry

In this case, the native title party submitted that the Tribunal should make a determination that the mining leases must not be granted or should be granted only in accordance with a number of special conditions proposed by the Wajarri Yamatji people's representatives. The grantee and Government parties submitted that the Tribunal should make a determination that the leases may be granted without any additional conditions being imposed by the Tribunal or subject only to the conditions suggested by the Government party.

On 1 to 2 June 2011, as part of the inquiry, the Tribunal conducted an 'on country' hearing which incorporated visits to sites on the area of the mining leases and other sites in the Weld Range. All of the parties and their representatives attended. There was also a hearing in the Cue Shire Hall where Wajarri Yamatji people and an anthropologist and an archaeologist gave evidence, along with evidence from WRML's Chief Geologist and Managing Director. The Tribunal gave leave for all of the witnesses to be cross examined by the other parties' legal representatives. The Tribunal also convened a hearing in Perth on 24 June where parties made closing submissions.

The native title party's evidence was mainly directed to illustrating the cultural and spiritual significance of the area concerned, and wider Weld Range area, to the Wajarri Yamatji people in accordance with their traditions. The Wilgie Mia Aboriginal Ochre Mine is in the Weld Range area, about 8 kilometres south of the proposed mining lease area. Wilgie Mia is on the National Heritage List. It is also a registered site and protected place under the *Aboriginal Heritage Act 1972* (WA). It is located on the Wilgie Mia Aboriginal Reserve, an area set aside for the use and benefit of Aborigines. During the proceedings, it became apparent that the location of the resources intended to be mined is directly underneath a traditional Aboriginal quarry site which is of particular significance to the Wajarri Yamatji people.

The grantee and Government parties' evidence was largely directed at demonstrating the economic benefit of, and the public interest in, the mining project going ahead. The grantee party's proposed method of mining was open cut.

The Tribunal's role

The Tribunal's role in relation to the right to negotiate process is governed by the NTA. Parties can ask the Tribunal to arbitrate (determine) a future act matter if they are unable to reach an agreement through negotiation, provided the requirements for applying to the Tribunal are met.

When making a future act determination, there are certain criteria found in section 39 of the NTA the Tribunal must take into account. This includes taking into account the effect of the proposed mining on registered native title rights and interests and on any sites of special significance to the native title holders in accordance with their traditions and the native title party's opinions or wishes in relation to the management or use of the area concerned, as well as the economic or other significance of the proposed mine and the public interest in mining going ahead or not.

The Tribunal's findings

The Tribunal considered evidence about the Weld Range area, including the area of the proposed mining leases. Although the Wilgie Mia ochre mine would not be directly affected by the proposed mining, the Tribunal noted that the Weld Range and surrounding area is associated with a number of important Dreaming stories of mythological significance to the Wajarri Yamatji people in accordance with their traditions. It is historically an area of both intense occupation by Aboriginal people and traditional ceremony, including initiation. There are a number of sites of significance within the Weld Range, including quarries, rock holes, grinding stones and caves with rock art.

According to the evidence, because the Weld Range area is so spiritually and culturally important to the Wajarri Yamatji people in accordance with their traditions, they have developed a special agreement for exploration and mining in the area designed to protect it.

Deputy President Sumner concluded that the interests, proposals, opinions or wishes of the Wajarri Yamatji people in relation to the use of the area of the mining leases should be given greater weight than the potential economic benefit or public interest in the mining project proceeding. He found that the Weld Range area is of such significance to the Wajarri Yamatji people in accordance with their traditions that mining on it should only be permitted with their agreement. This conclusion was arrived at in the special circumstances of this case. Deputy President Sumner also found that certain quarries located on the mining leases are areas of particular significance to the Wajarri Yamatji people in accordance with their traditions.

The Tribunal's decision does not preclude the parties from resuming negotiations and reaching agreement if they wish to do so.

Alternatively, WRML or the Government party can appeal to the Federal Court against the Tribunal's decision. The NTA also provides for the Commonwealth Minister (in this case, the Attorney-General) to overrule the Tribunal's determination if the Minister considers it to be in the national interest or in the interests of the State of Western Australia.

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Ike Simpson and Others on behalf of Wajarri Yamatji (WC04/10) (native title party)

FUTURE ACT DETERMINATION

Tribunal: Hon C J Sumner, Deputy President

Place: Perth

Date: 21 September 2011

Catchwords: Native title – future acts – application for determination for the grant of mining leases – on country hearing – s 39 criteria considered – effect on area or sites of particular significance – significance of Weld Range area – significance of quarry sites – interests, proposals, opinions or wishes of native title party – economic or other significance of acts – public interest in doing of acts – native title party opposed to mining without agreement on Aboriginal heritage – determination that the acts must not be done.

Legislation: Native Title Act 1993 (Cth), ss 24MD, 29, 31, 35, 36, 38, 39, 75,

109(3), 146, 150, 151(2), 155, 156(5), 237

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

Aboriginal Heritage Act 1972 (WA), ss 5, 16, 17, 18, 28, 37(1),

38, 62

Environment Protection and Biodiversity Conservation Act 1999

(Cth), s 324JJ

Aboriginal Affairs Planning Authority Act 1972 (WA)

Cases:

Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People, NNTT WF09/30, [2010] NNTTA 101 (16 July 2010), Hon C J Sumner

Austmin Platinum Mines Pty Ltd and Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of the Wajarri Yamatji, NNTT WF10/26, [2010] NNTTA 212 (19 December 2010), Hon C J Sumner

Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia [2004] FCA 472; (2004) 207 ALR 539

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

Cadbury UK Ltd v Registrar of Trade Marks [2008] FCA 1126; (2008) 107 ALD 316

Cheinmora v Striker Resources NL & Ors; Dann v State of Western Australia and Others [1996] FCA 1147; (1996) 142 ALR 21

Evans and Another v Western Australia and Others [1997] FCA 741; (1997) 77 FCR 193

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

Hughes v Western Australia [2003] NNTTA 69; (2003) 182 FLR 362

Ike Simpson & Ors on behalf of the Wajarri Yamatji /Western Australia/Giralia Resources NL, NNTT WF07/42, [2008] NNTTA 15 (5 February 2008), John Catlin

Ike Simpson & Ors on behalf of the Wajarri Yamatji/Western Australia/Peter Andrew Wiltshire, NNTT WO08/299, [2009] NNTTA 119 (6 October 2009), Daniel O'Dea

Ike Simpson and Ors on behalf of Wajarri Yamatji/Western Australia/Diana Austin Trigg, NNTT WF09/21, [2009] NNTTA 144 (5 November 2009), John Catlin

Ike Simpson & Ors on behalf of the Wajarri Yamatji/Western Australia/Alchemy Resources (Murchison) Pty Ltd, NNTT WO09/957, WO09/958 & WO09/959, [2010] NNTTA 151 (15 September 2010), Daniel O'Dea

Ike Simpson and Ors on behalf of Wajarri Yamatji People/Sinosteel Midwest Corporation Limited/State of Western Australia, NNTT WF10/35, [2010] NNTTA 185 (10 November 2010), Daniel O'Dea

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, State of Western Australia v Evans [1998] NNTTA 5; (1998) 163 FLR 274

Harrington-Smith and Others on behalf of the Wongatha People v State of Western Australia and Others [2002] FCA 934; (2002) 121 FCR 82

Parker v State of Western Australia [2008] FCAFC 23; (2008) 167 FCR 340; (2008) 245 ALR 436

Re A Solicitor [1993] QB69, 77;

Re Koara People [1996] NNTTA 31; (1996) 132 FLR 73

Pochi v Minister for Immigration and Ethnic Affairs [1979] AATA 64; (1979) 36 FLR 482; (1979) 26 ALR 247

Robin Boddington and Others on behalf of the Wajarri Elders (WC01/3)/Western Australia/Hampton Hill Mining NL, NNTT WO01/486, [2002] NNTTA 43 (11 April 2002), Hon C J Sumner

Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/ Richmond Resources Pty Ltd, NNTT WO02/87, [2002] NNTTA 236 (18 November 2002) Hon C J Sumner

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

Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna, NNTT WF10/10, [2011] NNTTA 53 (24 March 2011), Hon C J Sumner

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

Walley v Western Australia and Others [1999] FCA 3; (1999) 87 FCR 565; (1999) 168 ALR 359

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

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

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

Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo), NNTT WF02/17, WF02/18 & WF02/27, [2003] NNTTA 4 (21 January 2003), Hon C J Sumner

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

Hearing dates: 1-2 June 2011, 24 June 2011

Counsel for the

grantee party: Mr Ken Green, Green Legal

Solicitors for the

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Counsel for the

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Solicitor for the

Government party: Ms Jade Harman, State Solicitor's Office

Counsel for the

native title party: Ms Carolyn Tan, Yamatji Marlpa Aboriginal Corporation

Solicitor for the

native title party: Ms Lisa Randall, Yamatji Marlpa Aboriginal Corporation

REASONS FOR FUTURE ACT DETERMINATION

Introduction

- On 24 September 1997, the State of Western Australia (the Government party) gave notice under s 29 of the *Native Title Act 1993* (Cth) (the Act/NTA) of future acts, namely the grant of mining leases M51/543 (863.4 hectares), M51/544 (880.8 hectares), M51/545 (851.07 hectares) and M51/546 (559.6 hectares) (the Tenements) under the *Mining Act 1978* (WA) to Austmin Platinum Mines Pty Ltd (Austmin). The Tenements are all located 85 kilometres south-westerly of Meekatharra, approximately 65 kilometres north-west of Cue and in the vicinity of the Weld Range.
- [2] The Government party's Mining Tenement Register Searches for all Tenements now show the applicant for the Tenements to be Weld Range Metals Limited (Weld), and who are 'the grantee party' in these proceedings.
- [3] There are eight other mining leases already held by Weld (granted Tenements) which are immediately adjacent to the Tenements and together with the Tenements comprise Weld's mining proposal (the mining proposal), which is to provide chromium and nickel ore for its Refined Stainless Alloys Project (the Project).
- [4] The Tenements are 100 per cent overlapped by the registered native title claim of the Wajarri Yamatji People (WY People/native title party/NTP) (WC04/10 registered from 5 December 2005).
- [5] On 8 September 2010, being a date more than six months after the s 29 notice was given, the grantee party made an application pursuant to ss 35 and 75 of the Act for a future act determination under s 38 of the Act. The application was made on the basis that the negotiating parties (Government party, grantee party and native title party) had not reached an agreement of the kind mentioned in s 31(1)(b) of the Act as to the doing of the future act.

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

The native title party challenged the Tribunal's power to conduct an inquiry and make a determination on the basis that the grantee party had not negotiated in good faith (ss 31(1)(b), 36(2) NTA). On 22 September 2010, I made directions to deal with the good faith challenge and substantive inquiry. On 19 December 2010, I found that the grantee party had negotiated in good faith with the native title party as required by s 31 of the Act, and that the Tribunal has power to conduct the inquiry and make a determination (*Austmin Platinum*

Mines Pty Ltd and Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of the Wajarri Yamatji, NNTT WF10/26, [2010] NNTTA 212 (19 December 2010), Hon C J Sumner) (good faith decision).

[7] On 22 September 2010, I directed pursuant to s 150 of the Act, that conferences be held to attempt to resolve matters relating to the inquiry. Several conferences were convened, however, no agreement of the kind mentioned in s 31(1)(b) of the Act or otherwise could be reached and the process was terminated by Member Daniel O'Dea on 9 March 2011.

Legal principles

- [8] 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 and Another v Western Australia and Others [1997] FCA 741; (1997) 77 FCR
 193 (Evans). Federal Court, RD Nicholson J an appeal from the Tribunal determination in Koara 1;
- Minister for Mines, State of Western Australia v Evans [1998] NNTTA 5; (1998) 163
 FLR 274 (Koara No. 2) Tribunal determination following the successful appeal in Evans;
- Western Australia v Thomas and Others [1996] NNTTA 30; (1996) 133 FLR 124 (Waljen);
- WMC Resources and Another v Evans [1999] NNTTA 372; (1999) 163 FLR 333 (WMC/Evans); and
- Western Desert Lands Aboriginal Corporation v Western Australia and Anor [2009] NNTTA 49; (2009) 232 FLR 169; (2009) 2 ARLR 214 (Martu/Holocene).
- [9] 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 (s 38(1)). 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)).

[10] 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:
 - 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.'
- [11] 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).

Evidentiary issues

Tribunal not bound by rules of evidence: In carrying out its function the Tribunal is not bound by technicalities, legal forms or rules of evidence (s 109(3) NTA). The Tribunal's approach to its inquiry function is summarised in *Waljen* (at 162-163) and involves, among other things, making a determination based on logically probative evidence and application of the law (see also *Koara 1* at 81; *Pochi v Minister for Immigration and Ethnic Affairs* [1979] AATA 64; (1979) 36 FLR 482; (1979) 26 ALR 247; *Hughes v Western Australia* [2003] NNTTA 69; (2003) 182 FLR 362 at [15]-[16]). In some cases, the rules of evidence will assist the Tribunal to make findings of fact, including in cases where the evidence is contested. The Tribunal is relieved of an obligation to take a technical approach to evidence but must be satisfied that the facts upon which its determination is based are properly established.

Admissibility of evidence: The Government party objected to the admissibility of some of the NTP's affidavit evidence. The Tribunal's general approach is to admit documentary evidence unless it is patently irrelevant or otherwise inappropriate. The List of Exhibits comprises the documentary evidence before the Tribunal and to which it has had regard, taking account of any submissions relating to its admissibility, relevance and weight to be given to it.

Evidence relating to good faith negotiations: Good faith negotiations are usually conducted on a confidential and without prejudice basis. The general principle is that the Tribunal will not have regard to the evidence presented in the good faith hearing in the substantive hearing, unless a party seeks to adduce it, although the Tribunal may refer to or adopt reasons in the good faith decision if appropriate (Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo), NNTT WF02/17, WF02/18 & WF02/27, [2003] NNTTA 4 (21 January 2003), Hon C J Sumner at [23]). In this case, the NNTT provided assistance under s 31(3) of the Act and, therefore, the more specific requirements of s 31(4) apply. It provides that:

'If the NNTT is the arbitral body, it must not use or disclose information to which it has had access only because it provided assistance under subsection (3) for any purpose other than:

- (a) providing that assistance; or
- (b) establishing whether a negotiation party has negotiated in good faith as mentioned in paragraph (1)(b);

without the prior consent of the person who provided the NNTT with the information.'

In the present case, all parties waived any confidential and without prejudice privilege and all the good faith evidence was before the Tribunal and has been taken into account where relevant.

Directions to witnesses: Although no formal submissions were made, Mr Ken Green, Counsel for Weld, raised the issue of whether any directions should be given about witnesses communicating with each other or with other persons once the taking of evidence had commenced (Transcript p 37). I did not consider such a direction necessary (cf Harrington-Smith and Others on behalf of the Wongatha People v State of Western Australia and Others [2002] FCA 934; (2002) 121 FCR 82 at [27]-[28] (Harrington-Smith)).

Non disclosure directions – s 155 NTA: In respect of a number of documents, the Tribunal, without objection from the parties, directed that the document must not be disclosed to anyone but the parties to the proceedings and must only be used for the purpose of the proceedings. These documents are identified in the reasons. Despite these directions I have found it necessary to refer to some of this evidence in these reasons and to this extent the directions are hereby varied. Some of the evidence referred to is already in the public domain and I have made an assessment that other evidence referred to can be disclosed without rendering the non disclosure direction pointless. Some of the evidence of the NTP which could be regarded as of a secret or sacred nature (such as the evidence in previous determinations of the Tribunal) has for the most part been publicly disclosed previously. It is important to refer publicly to evidence so that the Tribunal's reasons are fully understood and the factual basis of any determination is clear (*Parker v State of Western Australia* [2008] FCAFC 23; (2008) 167 FCR 340).

Description and location of key places

- [12] The following are key places; their locations are referred to in these reasons and identified on the map attached:
- Weld Range is a series of roughly parallel hills, ridges and valleys that extend for approximately 60 kilometres long from south-west to north-east and which is approximately four kilometres wide.
- Wilgie Mia Aboriginal Reserve (the Reserve) is Reserve R16670, for the use and benefit of Aborigines under Part III of the Aboriginal Affairs Planning Authority Act 1972 (WA). It comprises an area of 10,500 acres (4,250 hectares, 42.5 square

- kilometres). The Reserve is located in the Weld Range and the northern boundary is some three kilometres south of the Tenement area at the closest point.
- Wilgie Mia (Thuwarri Thaa) is an Aboriginal site under the Aboriginal Heritage Act 1972 (WA) (AHA) (DIA Site ID 11132, registered, closed, no restriction, mythological, skeletal material/burial, man-made structure, quarry, artefacts/scatter). It is also a protected area under s 19 of the AHA on the basis that it is an Aboriginal site 'of outstanding importance'. It is a traditional ochre mine located within the Reserve, approximately 8 kilometres south of the Tenement area.
- National Heritage Listed area (NHL area) is an area of approximately 2,000 hectares (20 square kilometres) which partly overlaps the Reserve and extends beyond it to the west, encompassing the sites of Wilgie Mia and Little Wilgie Mia. The NHL area was included on the National Heritage List (NHL) pursuant to s 324JJ of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) on 5 October 2010.
- The National Heritage Listing Report Application area (NHL Report area) is a rectangular area of 40 by 70 square kilometres (280,000 hectares, 2,800 square kilometres) and was the area originally submitted to the Commonwealth Minister in the application by the WY People for inclusion on the NHL. During the proceedings it was also referred to as the Weld Range Complex Area or the pink pin/pink box area (which referenced how it was marked out on various maps). This area encompasses the whole of the Weld Range and the mining operations area, including the proposed and granted Tenements.
- The Tenements are immediately adjacent to each other and comprise a total area (Tenement area) of 3,154.87 hectares (31.548 square kilometres). The granted Tenements (M20/246, M51/434, M51/442, M51/443, M51/457, M51/481, M51/498 and M51/719) are adjacent to the Tenements to the north, east and west and comprise a total area of 4,699.658 hectares (46.996 square kilometres).

Directions for the inquiry and hearing on country

[13] The original directions for the substantive inquiry programmed a hearing for the week commencing 14 February 2011, bearing in mind the requirement of the Tribunal to take all reasonable steps to make a determination as soon as practicable (s 36(1) NTA) and report to the Minister if a determination is not made within six months of the application (s 36(3) NTA). For various reasons, this timetable could not be met, principally because the Tribunal

considered an oral hearing, including an 'on country' hearing, was necessary to adequately determine the matter (s 151(2) NTA).

- [14] The NTP in its Response (para 21) of 18 March 2011 submitted that an on country hearing encompassing a site visit and members of the NTP giving oral evidence was appropriate for the following reasons:
- The Weld Range is one of the most significant sites in Wajarri Yamatji country.
- The Tenements encompass an area in respect of which an application for National Heritage listing (NH listing) was made, and lie approximately 6.5 kilometres from the site ultimately announced as the NH site.
- The Weld Range is comprised of a number of areas of significance, each connected through the stories and customs of the Wajarri Yamatji People.
- The NTP believe that the entire Weld Range Site Complex (pink box) is sacred and interconnected. It would be culturally appropriate for the traditional owners to explain this connection on country.
- A site visit will give the Tribunal and other parties a greater understanding of how the area of the Weld Range and proposed tenements are currently used by the traditional owners.
- [15] Although at an earlier listing hearing on 7 February 2011 all parties had indicated that a hearing 'on the papers' was appropriate, there was no formal opposition to the NTP's request at the listing hearing on 28 March 2011. Taking into account the evidence indicating the cultural significance of the Weld Range area and the nature of the mining proposal being an open cut mine, I was of the opinion that an on country hearing was necessary in order to adequately determine the matter.
- [16] The logistics involved in arranging the on country hearing and the availability of counsel for the NTP meant that the hearing did not commence until 1 June 2011. The hearing involved one day taking evidence on and in the vicinity of the mining proposal area and a hearing at the Cue Shire Hall on 2 June 2011. Parties were directed to file any written responses to the evidence by 22 June 2011 and a final hearing took place in Perth on 24 June 2011.

- [17] At the hearing on 2 June 2011, at the request of the Tribunal and grantee party, the NTP produced evidence electronically which had been referred to in early contentions and evidence but not provided in full, being:
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, 'National Heritage Listing Application – Weld Range, Wilgie Mia (Thuwarri Thaa) and Surrounds', not dated (Exhibit NTP 43) (NHL Report).
- Sarah Burke et al, Eureka Archaeological Research and Consulting, University of Western Australia, 'Aboriginal Archaeological Site Avoidance Assessment', 2 Volumes, Priority Areas 1, June 2009 (NTP 41) and Priority Area 2, August 2009 (NTP 42) (Eureka Report). These documents contain the results of a site avoidance survey carried out for Sinosteel and are subject to a s 155 direction.
- [18] At the hearing, the grantee party also agreed to the NTP's request to produce Weld's Scoping Study: ProMet Engineers, Snowden and Somerley Australia Limited, 'Weld Range Metals Refined Stainless Alloys Project Scoping Study', August 2010, which incorporates as Appendix 2 an Independent Technical Review (GP 143). This document is also subject to a s 155 direction.
- [19] At both hearings on 2 June 2011 and 24 June 2011 concern was expressed by the Tribunal, and Government and grantee parties, that the NHL Report had only been retrieved from the computer system of Yamatji Marlpa Aboriginal Corporation (YMAC) (the native title representative body assisting the NTP in these proceedings) and given to the parties via a USB stick and it was not clear whether it was a draft or the final application made to the Commonwealth Minister for inclusion in the NHL. As a consequence, on 27 June 2011 I directed the NTP to contact the Commonwealth Department of Sustainability, Environment, Water, Population and Communities (Commonwealth Department) with a view to verifying that Exhibit NTP 43 was the final NHL Report submitted and provide affidavit evidence in respect of its preparation and the decision to list a part of the area applied for on the NHL.
- [20] On 4 July 2011, following further submissions from the parties, I made the following directions:
- NTP to provide the NHL Report together with any anthropologist review of it and other information by 19 July 2011.

- Government and grantee parties to provide any submissions and documentary evidence on this issue by 26 July 2011.
- NTP be at liberty to file submissions in reply by 28 July 2011.

Final submissions relating to conditions on the determination were provided by the NTP on 11 August 2011 and responses from the Government and grantee parties on 19 August 2011.

[21] On several occasions I expressed concern that the NHL Report and the Eureka Survey had not been provided by the NTP until late in the proceedings, but I have taken the view that the documents cannot be rejected on that basis. The directions of 4 July 2011 were designed to ensure that procedural fairness was accorded to the other parties, taking into account the convenience of the Government party's Counsel on this occasion.

Details of hearing on country – 1 June 2011

- [22] On 1 June 2011 the Tribunal conducted a hearing involving a site visit to the Weld Range and the mining proposal area, including aspects of the Tenements. I was assisted by Tribunal staff and accompanied by Ms Helen Shurven (Tribunal Member who was observing the proceedings).
- [23] The following members of the Wajarri Yamatji claim group and NTP were present and gave evidence: Colin Hamlett, Brendan Hamlett, Ansell Egan, Carl Hamlett and Brian Jones. Kendall Hamlett also accompanied them.
- [24] The NTP was represented by Carolyn Tan (of counsel), YMAC; Lisa Randall, Lawyer, YMAC; Nathan Xu, Lawyer, YMAC; YMAC staff Silas Piotrowski, Archaeologist; Lara Whitton, Anthropologist, and other YMAC staff who provided support for the hearing.
- [25] The grantee party was represented by Ken Green (of counsel) and accompanied by Neale Edwards, Geologist, Weld Range Metals Limited and Peter Fisher, Managing Director.
- [26] The Government party was represented by Matthew Pudovskis (of counsel), State Solicitor's Office (SSO) and Jade Harman, Lawyer, SSO.
- [27] Everyone departed Cue in a convoy at approximately 9.00 am and throughout the day travelled to various areas as guided by the NTP. Maps were used and marked up to identify the various stops and places referred to (A1 size topographical map prepared by the Tribunal's Geospatial section (NNTT 21) and Weld Range Metals Tenement Holding map

with Aboriginal sites marked thereon and tendered by the NTP (NTP 39)). A summary of each area visited and the evidence given is outlined below.

- [28] The first stop was to the south of the Weld Range, near the compound of Sinosteel Midwest Corporation Limited (Sinosteel), which has an iron ore mining project in the vicinity (Sinosteel Project). I made opening remarks to explain the purpose of the hearing. The other areas visited (to the north of Weld Range) were:
- Quarry Stop 1 an area within Tenement M51/546, located in the middle of the other Tenements. It was identified by NTP witnesses as part of a quarry which runs to the east at least as far as Quarry Stop 2. This area was identified in the Eureka Survey (Weld Q 0997, DIA Site ID 28137) and is listed as an 'Other Heritage Place' on the Department of Indigenous Affairs (DIA) Database.
- Quarry Stop 2 also on Tenement M51/546. This site is some distance east of Quarry Stop 1 but forms part of the same quarry line which NTP witnesses think runs further to the east through another of the Tenements (M51/543) to an area called Wanderie Bore, which is just outside the Tenement area. This site has been identified but is not recorded on the DIA Database (affidavit of Victoria Winton, para 7).
- Vivienne's Granite located approximately two kilometres north of the northern most part of the Tenement area and one kilometre from a granted Tenement.
- Grinding Stone Stop approximately one kilometre from the nearest of the Tenements. Here the Tribunal was shown a grinding stone for ochre used in ceremonies and one used for grinding seeds to make damper.
- Quarry Stop 3 the last stop for the site visit day at an area called Airellas quarry. This site is located some five to six kilometres west of the nearest of the Tenements, on or nearby one of the granted Tenements. At this location Mr Carl Hamlett gave evidence of an area further to the west, close to Darbabuma Rock Waterhole called Cosmo or Galaxy, which was a training ground for young Wajarri Lawmen.
- [29] At the hearing in Cue on 2 June 2011 the following witnesses gave evidence: Colin Hamlett, Carl Hamlett, Silas Piotrowski, Lara Whitton, Neale Edwards and Peter Fisher.
- [30] All witnesses made an affirmation and on both days I gave leave for the witnesses to be cross-examined (s 156(5) NTA).

Government party's contentions and evidence

- [31] The Government party has provided the following contentions and documentary evidence:
- Statement of contentions in relation to s 39 criteria, 5 January 2011 (GVP Contentions).
- Response to the native title party's contentions in relation to s 39 criteria, 23 February 2011 (GVP Response).
- Closing Submissions, 22 June 2011 (GVP Closing Submissions).
- Closing Submissions dealing with the NHL Report, lodged in accordance with directions made on 1 July and amended on 4 July 2011, 27 July 2011 (GVP NHL Submission).
- Submissions in reply to conditions to be sought by the NTP in the alternative, 19 August 2011 (GVP Conditions Response).
- Government party documents (Exhibits GVP 1-51).
- [32] Government party documentation establishes that the Tenements are entirely overlapped by pastoral leasehold (Madoonga or Beebyn pastoral leases).
- [33] Tribunal Geospatial mapping shows that there are no Aboriginal communities identified within or in the vicinity of the Tenement area but the evidence establishes that the Reserve is used for camping by WY people from time to time.
- [34] DIA documents provided by the Government party reveal sites recorded on the Register of Aboriginal Sites as 'Other Heritage Places', overlapping three of the four Tenements. The Tribunal Geospatial Services map (NNTT 2) confirms that there are a number of DIA sites on three of the Tenements.
- [35] Section 85 of the *Mining Act 1978* (WA) sets out the rights which the holder of a mining lease may exercise, subject to the covenants and conditions in s 82, as well as any further conditions and endorsements that the Minister may, at any time, impose, pursuant to s 84. The grant of a mining lease is for a term of 21 years from notification of the grant and there is a right of renewal for a further 21 years.

[36] The standard Endorsements (the breach of which does not render the tenement liable to forfeiture) and standard Conditions to be imposed on the grant of the Tenements are as follows:

'ENDORSEMENTS

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

'CONDITIONS

- 1. Survey.
- 2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
- 3. All costeans and other disturbances to the surface of the land made as a result of exploration, including drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.
- 4. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.
- 5. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operation and separately stockpiled for replacement after backfilling and/or completion of operations.
- The lessee submitting a plan of proposed operations and measures to safeguard the
 environment to the Director, Environment, DMP for his assessment and written approval
 prior to commencing any developmental or productive mining or construction activity.
- 7. The Lessee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.
- 8. The lessee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
 - the grant of the Lease; or
 - registration of a transfer introducing a new Lessee;

advise, by registered post, the holder of any underlying pastoral or grazing lease details or the transfer.

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

- [37] In the course of negotiations, the Government party also offered to impose the following four 'Extra Conditions' on the grant of the Tenements:
 - '1. Any right of the native title party (as defined in Sections 29 and 30 of the *Native Title Act 1993*) to access or use the land the subject of the mining tenement is not to be restricted except in relation to those parts of the land which are used for the exploration or mining operations or for safety or security reasons relating to those activities.
 - 2. If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial and cultural data), on the native title party.
 - 3. Where, 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.
 - 4. Upon assignment of the mining tenement the assignee shall be bound by these conditions.'

The circumstances of the imposition of these Extra Conditions was considered by the Tribunal in *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People*, NNTT WF09/30, [2010] NNTTA 101 (16 July 2010), Hon C J Sumner at [35]-[40]. The Government party's position is that these Extra Conditions are offered by it during negotiations and need to be responded to by the other parties. Unlike the standard conditions, they are not automatically imposed. The Government party originally contended (and the grantee party agreed) that these conditions should not be automatically imposed by the Tribunal in this case unless justified by substantial, credible evidence provided by the NTP. In their final submissions, both of these parties conceded that the Extra Conditions could be imposed.

The grantee party's contentions and evidence

- [39] The grantee party has provided the following contentions and documentary evidence:
- Statement of contentions for determination hearing, 5 January 2011 (GP Contentions).
- Reply to native title party's statement of contentions addressing s 39 criteria,
 23 February 2011 (GP Response).
- Final submissions for determination hearing, 22 June 2011 (GP Final Submissions).

- Closing submissions for determination hearing dealing with the NHL application, lodged in accordance with the directions made on 1 July and amended on 4 July 2011, 28 July 2011 (GP NHL Submissions).
- Submissions on native title party document 44 (substituted), 19 August 2011 (GP Conditions Response).
- First affidavit of Neale Edwards, Weld's Chief Geologist, dated 30 November 2010 and received 1 December 2010 (relating to negotiations in good faith).
- Second affidavit of Neale Edwards, dated 5 January 2011 and received on the same date.
- Third affidavit of Neale Edwards, dated 30 May 2011 and received on the same date (NE Aff no 3).
- Grantee party documents (Exhibits GP 1-146).

Weld Range Metal's Refined Stainless Alloys Project

- [40] Neale Edwards, Chief Geologist of Dragon Mining Limited (holder of 40 per cent of the issued capital of Weld) has submitted three affidavits and gave evidence at the on country hearing for the grantee party. Weld was formerly named Dragon Resources Ltd. Mr Edwards' duties include acting as Weld's Chief Geologist and he has had the responsibility of dealing with native title related issues for the Project. I accept Mr Edwards' evidence, which, together with documents provided by the grantee party, reveal the key features of the Project as described below.
- [41] Weld's eight live mining leases (granted Tenements) were granted between 1992 and 1998. It also holds sixteen prospecting licences (P51/1564-1579) which lie under the area of the Tenements the subject of this determination. These prospecting licences were all granted on 14 May 1991, before the right to negotiate provisions of the NTA came into effect on 1 January 1994. The grantee party previously held mining leases on the area of the Tenements, but these were surrendered in 1991 in favour of the prospecting licences. As far as Mr Edwards is aware, the only ground disturbing work on the Tenements so far has been exploration drilling.
- [42] *Summary of the Project*: According to Mr Edwards, the Tenements and granted Tenements are prospective for the economic mining of chromium laterite ore (chromium resource); nickel laterite ore (nickel resource) and platinum group metals (platinum resource).

Weld's current plan is to mine the chromium resource, mine the nickel resource at a later time and continue exploration of the platinum resource. The grantee party has provided plans showing an outline of the location of the chromium and nickel resources within the proposed and granted Tenements. Most of the identified chromium resource is within M51/546 and the adjacent M51/544.

- [43] Stage One of the Project (after further evaluation by way of a feasibility study) is to mine and process the chromium resource for production of refined stainless alloys containing chromium, nickel and iron as feed stock for stainless steel manufacturing mills in Asia, Europe and the United States for the manufacture of stainless steel products, proposed to commence in 2013/2014. The exploration phase of the evaluation will involve an extensive drilling program. The scope of the Project being evaluated comprises low cut, open cut mining of 600,000 tonnes per annum of high grade ore within the chromium resource to produce 305,000 tonnes of refined stainless alloy per annum. Over \$10 million has already been spent identifying large areas of mineralisation containing chromium, iron, nickel and platinum group metals in the mining area; some by earlier holders of mineral tenements of various kinds.
- [44] Weld currently plans to mine and primary crush the chromium resource at the mine site or nearby, and then transport the crushed ore to an alloy production plant located at either the Narngulu or proposed Oakajee industrial estates near Geraldton.
- [45] History of activity in relation to the Tenements: Mr Edwards provides the following timeline of past activity on the Tenement area which has been the subject of extensive exploration activity:
- Initial exploration for nickel sulphides by International Nickel Australia Ltd between 1969 and 1971, then by Australian Consolidated Minerals NL during 1971 who entered a joint venture with BHP from 1972 to 1973.
- CRA investigated the area between 1976 and 1977.
- Weld and Austmin acquired adjacent tenements in the late 1980s and formed a joint venture to further explore the area.
- Copper mineralisation previously identified by BHP was explored by Austmin in 1990.
- Drilling by Austmin to ascertain nickel-cobalt laterite potential in the mid 1990s.

- Minara Resources Ltd (formerly named Anaconda Nickel Ltd) entered into a joint venture with Weld and Austmin in 1999.
- Minara carried out drilling to estimate the Nickel resource in 1999 and 2000.
- Weld purchased majority mining interests from Minara and Austmin in 2009.
- Weld commissioned ProMet Engineers Pty Ltd (ProMet) to complete the Scoping Study (completed August 2010).
- [46] *Outline of proposed mining activity*: Approximately 85 per cent of the chromium resource and 79 per cent of the nickel resource occurs within the area of the Tenements.
- [47] The mining of both the chromium resource and the nickel resource will be open pit mining. The proposal is to have a Chromium Starter Pit extending over 3,250 metres in length and 625-700 metres in width. The chromium resource goes down about 32 metres and the nickel resource about 40 metres. The nickel resource covers the total mining proposal area, including the central portion where a substantial part of the chromium resource is located. Rehabilitation plans have not yet been finalised but, according to evidence from the grantee party, because the stripping ratio of waste to ore will be very low, large waste piles, similar to those viewed by the Tribunal on the road from Cue to the Weld Range, resulting from gold operations, will not be necessary. Before rehabilitation plans are finalised, further exploration of the nickel resource (below the existing chromium laterite resource) will be carried out. Mr Edwards says that it is an easy mining operation compared to the deep open pits needed for gold.
- [48] Related infrastructure and logistics: In relation to the vehicles and process that will be used, Mr Edwards explained that one hydraulic excavator will operate 'pretty much all year round' on a day shift basis, loading a fleet of three 40 tonne rear dump trucks. Ore will be stockpiled in two areas adjacent to a primary crusher. Material from the stockpiles will be reclaimed by a front end loader and fed to the crusher at required rates. Sufficient material will be stockpiled to maintain production at required levels at all times. A mobile crusher will be erected on site, to complete crushing of material prior to the ore being transported to the process facility. It is likely that, if ore is trucked by rail, the mobile primary crusher will be located near the proposed Oakajee Port and Rail Authority rail loop, but otherwise near the mine pit. Other equipment will include a track dozer for road maintenance and pit work, a road grader and water truck for road works and maintenance, a single blast hole rig (in the mine pit) and vehicles for the personnel. According to the Independent Technical Review

carried out by Snowden Mining Industry Consultants as part of the Scoping Study, mining operations are likely to require an on-mine site workforce of 20 to 25 personnel. Weld's current plan for accommodating the workforce is to either base them in Cue, located approximately 65 kilometres from the mining area, or reach some agreement with Sinosteel to have Weld's personnel accommodated within Sinosteel's accommodation facilities.

[49] Transport of resource: Weld proposes to transport ore from the mining operations area by either rail or road. The Oakajee Port and Rail Authority has plans for a rail corridor from Oakajee to the Weld Range to transport iron ore from the Sinosteel iron ore project which is within a few kilometres of Weld's tenements. Mr Edwards says that rail is the preferred option but is subject to the construction of the Oakajee railway and the availability of capacity to haul Weld's ore. If the rail haulage option is used the ore will be trucked along a haulage road, to be constructed, to the Sinosteel rail loop which is currently proposed to be some eight to ten kilometres to the west of the Tenement area. If the road haulage option is used, a haulage road will be built approximately 18 kilometres to the west of the mine pit to link to the Beringarra - Cue Road from which the trucks will travel along the highway to Mt Magnet and then to Geraldton.

[50] Mr Edwards says 'If the Oakajee railway is not constructed within a timeframe acceptable to Weld, then Chromium project economics shows that road haulage is viable.' Rail is preferred to road because road transport is more expensive, but the Scoping Study considers the cost to be within acceptable limits. Further evidence relating to processing plant aspects of the Project is dealt with below.

Tribunal exhibits

- [51] At a listing hearing on 7 April 2011, Mr Green raised the issue of what mining tenements, apart from the Tenements the subject of this determination, exist in the Weld Range. I then directed the Tribunal to provide a series of maps showing other tenements in the area. The Tribunal's Geospatial Services created a series of maps of the pink box area (NNTT 13-18) depicting:
- All of the live and pending tenements in the Weld Range.
- Live and pending exploration licences in the Weld Range.
- Live and pending miscellaneous and prospecting licences and temporary reserves in the Weld Range.

- Live and pending mining leases in the Weld Range.
- The top seven grantees to hold the most number of live and pending tenements in the Weld Range.
- Tribunal involvement with live and pending tenements in the Weld Range.
- [52] A further map (NNTT 26) was also prepared showing the tenements in the pink box area or its vicinity in relation to which the Tribunal has made expedited procedure objection and future act determinations.
- [53] Each of these maps show the NHL Report area, the NHL area and the Tenements. These maps and evidence of the various tenement holdings in the Weld Range and pink box surrounds illustrate the following points:
- There are an extensive number of pending and live mineral tenements in the Weld Range.
- Active exploration licences surround the NHL area in a circumference of between 10 and 30 kilometres.
- There are few live prospecting licences in the area.
- There are 30 live or pending mining leases in the area.
- Sinosteel holds a substantial number of the live or pending mineral tenements (exploration and mining) in the area (44 tenements) with Weld being the next biggest holder (28 tenements).
- The Tribunal has been involved with the grant of some of the tenements (mostly by dealing with expedited procedure objection applications made in relation to proposed exploration licences).
- Many objections to the expedited procedure in relation to exploration licences were withdrawn, due to agreement being reached.
- [54] Three consent determinations that a future act may be done have been made in relation to mineral tenements in the Weld Range (exploration, prospecting and mining) (see below).

The native title party's contentions and evidence

- [55] The NTP has provided the following contentions and documentary evidence:
- Statement of contentions addressing s 39 criteria, 2 February 2011 (NTP Contentions).
- Reply to Government party's response and grantee party's reply to native title party's statement of contentions addressing s 39 criteria, 18 March 2011 (NTP Reply).
- Closing submissions, 22 June 2011 (NTP Closing Submissions).
- Closing submissions in reply, 21 July 2011 (NTP Reply to Closing Submissions).
- Affidavit of Akmal Raea Khan, affirmed 15 November and received on 16 November 2010 (relating to negotiations in good faith).
- Affidavit of Colin Hamlett, affirmed 1 February and received on 2 February 2011.
 On 2 June the NTP provided to the Tribunal and parties an updated and corrected affidavit of Colin Hamlett, dated 31 May 2011. This determination will refer to the updated affidavit, showing changes made (CH Aff).
- Affidavit of Lara Whitton, YMAC Anthropologist, affirmed 1 February and received 2 February 2011 (LW Aff).
- Affidavit of Sanna Nalder, YMAC Anthropologist, affirmed 18 March 2011 and received on the same date (SN Aff).
- Affidavit of Victoria Winton, Eureka Anthropologist, affirmed 20 May 2011 and received on the same date.
- Affidavit of Silas Piotrowski, YMAC Anthropologist, affirmed 20 May 2011 and received on the same date.
- Affidavit of Robin Stevens, affirmed 18 July and received on 19 July 2011.
- Affidavit of Lisa Randall, affirmed 20 July 2011 and received on the same date.
- NTP documents (Exhibits NTP 1-54).

Affidavit of Colin Hamlett

[56] The original affidavit of Colin Hamlett was made on 2 February 2011 but subsequently corrected on 31 May 2011 and in the evidence he gave on 2 June 2011 in a number of respects. Colin Hamlett lives in Morawa. The affidavit with the corrections shown is made in the following terms:

- '1. I am a winja/bardani [Elder] and an applicant of the Wajarri Yamatji claim.
- 2. Statements contained in this affidavit are made from my own knowledge or to the best of my knowledge information and belief.
- 3. I have seen a map, which shows the location of the tenements M51/543, M51/544, M51/545, M51/546 ("the Tenements") and it is an area I know very well. I visited the area of the Tenements with YMAC anthropologist Lara Whitton on Thursday 27 January 2011.
- 4. I am recognised under the traditional Wajarri laws as speaking for and protecting the sites and traditional stories of the Tenements area. It is my responsibility to care for and maintain the sites in this area. I regularly visit these sites to make sure they have not been disturbed. My great-grandmother is buried on Madoonga Station. around the area of Tenement M51/546.
- 5. The Tenements area is located in the area called the Weld Range. The Weld Range is important to my family and to all Wajarri people. It is a very sacred place. The area is important not just to Wajarri people but to Aboriginal people all around the state, as there are dreaming stories which link the Wajarri people with other Aboriginal groups. It is one of the most important areas in Wajarri country.
- 6. There are a few dreaming stories about the Weld Range. One story starts all the way on the coast near Kalbarri, where seven sisters ran away after being chased by an old man. They travelled through the Weld Range and stopped and rested or hid at many places there. The old man who was chasing the sisters also stopped and rested in the Weld Range. The story continues to the Western Desert and ends up somewhere in Queensland, linking many different Aboriginal groups.
- 7. There is also a dreaming story about the Weld Range of an injured *marlu* (red kangaroo) who travelled through the Murchison leaving red ochre deposits where he bled after being speared. The *marlu* dug out a cavern into which its blood and its bile turned into red, yellow and green ochre.
- 8. There are also several law grounds and ceremony grounds in the Weld Range with most of these relating to where the seven sisters and the old man stopped and rested. There are also places in the Weld Range where old tribal gear for ceremonies and law business were stored and some of it is still there.
- 9. The law grounds and ceremony grounds are not specifically located in the area of the Tenements. The area of the Tenements is however within the Weld Range, and I consider the whole of the Weld Range to be sacred to the Wajarri People, because the old people who would come to the Weld Range for ceremonies and to go through the law would use the entire area for various reasons, such as to hunt and to gather stones for the ceremonies. Most importantly, the old people would use various areas of the Weld Range to gather red, yellow and green ochre for the ceremonies, which is a very spiritual matter for the Wajarri people as it is connected to the story of the *marlu*.
- 10. The area of the Tenements is located in between two significant sites, being Wilgie Mia to the South and Vivienne's Granite to the North. Wilgie Mia is significant because that is where the *marlu* in the dreaming story died and left all of the ochre. That is the most important ochre quarry in the Weld Range. Vivienne's Granite is significant because this is where the old people used to camp and grind the ochre. The area of the Tenements was used as a kind of highway between these sites where the old people would hunt, gather stones and ochre and camp.

- 11. There are heaps of sites within the area of the Tenements where we have seen evidence of the old people having used the land previously. Most of these sites have been registered with the Department of Indigenous Affairs, but there are still plenty of sites that are not yet registered that we know about. The type of evidence at these sites vary, such as red ochre on the grind stones, stone dishes or soaks set up at more permanent camps.
- 12. There are a lot of stones in the area of the Tenements which were used by the old people to make shields, weapons and dishes, and to crush and grind seeds and other bush food. The stones were the heart and soul of the Aboriginal people before white people came, as without them they would not have been able to eat a lot of the foods that needed to be crushed or make shields and weapons for hunting and fighting. We still use the stones to show our children how the old people used to live and to pass on the knowledge and culture of the Wajarri people.
- 13. There are heaps of useful trees in the area of the Tenements. One of them is a flower which you suck the end off and eat. These were eaten by the old people, and are still eaten by the Wajarri people today when they are in season. There is also a tree which you use to make a spear after you straighten the branches out in a fire. I was taught how to make a spear using this method and I have passed this knowledge onto my children, but we do not hunt with spears anymore. There is also the *Waladarah* tree which has edible nuts and the *Gabawanna* tree which has big berries located all throughout the area of the Tenements.
- 14. Many Wajarri Yamatji people, including myself, regularly visit the Weld Range still with their families. Some families maintain rockholes and camp out during weekends and holidays to teach their children about the important places, collect bush food, gather ochre and hunt. Ochre is still gathered these days by the Wajarri people, including myself, for paintings and ceremonies. There are a few ochre quarries in various parts of the Tenements, some of which have been registered with the Department of Indigenous Affairs, but there are still more which have not been registered nor reported to the Department.
- 15. My sons Carl and Brendan Hamlett both used to live on the Weld Range with me on and off when they were younger. We now come out to the Weld Range on holidays and as often as we can to hunt and gather ochre at the quarries, and to pass on the stories and visit the sites of the old people. Carl and Brendan bring their children as well so we can pass on the knowledge. Carl is now employed full-time in the Weld Range in a position that requires him to identify sacred sites within the Weld Range for mining companies.
- 16. I am aware that there have been lots of mining leases tenements granted to various mining companies in the past within the Tenements area, but I believe all the ones I am aware of these have all been prior to the Government recognising our rights through the Native Title Act. I am aware of exploration and prospecting licences being granted since we have had rights under the Native Title Act. So far there have not been any mines constructed within the Tenements area, but there have been drill holes made in the ground without us having any say, which makes me very angry because the drill holes have gone into special sites. Also, the drill holes kill lizards and other native animals which fall in the holes.
- 17. The Wajarri people are taught, and I strongly believe, that if we do not look after our country, particularly the special sites, then the *Wudaji* and *Mondong* spirits will punish us and make us sick. As I am considered a guardian of the Weld Range, I fear that if I do not protect the sites in the Weld Range, me and my family will get very sick or even killed by the spirits.
- 18. I am concerned about any mining activity in the Tenements area because we were told by old people and we teach our young people that they need to look after country especially areas that are very important such as the Weld Range, including the Tenements area, and we need to prevent these from being damaged. If there are mines in the area, we will lose the ability to keep accessing sites to gather ochre, hunt and to share the stories and culture of the old people with our families.
- 19. I still consider that our native title rights have not previously been affected in this area as we have never been prevented from accessing any of our sites.

20. I believe that the conduct of mining activities within the Tenements will disturb the country greatly. The ground and vegetation would be disturbed by the creation of tracks through the tenement area and the drilling could disturb and anger the *Wudajis* and the sites around the Tenements.'

Evidence of Wajarri Yamatji people on site visit – 1 June 2011

[57] Quarry Stop 1: The first stop was at an area within the middle Tenement, M51/546, that exhibited a lot of artefacts such as cutting implements and shards of broken off rock. Mr Colin Hamlett gave evidence that the Hamletts are the family within the Wajarri group who speak for this area because it is where their ancestors came from. He gave evidence that the quarry runs for a substantial distance further east and that it is an area where Aboriginal people would get material to make stone tools such as spears and boomerangs. He said that he used to come to this area regularly but now he only comes here sometimes. He said that when he comes here he and other Wajarri people look for emu eggs and check the quarries to make sure people have not been removing artefacts. There are Wajarri laws and customs about who and what activities are allowed in this area; only initiated Wajarri people are allowed to come and collect stones or other items from here to take with them. When Wajarri people find artefacts they leave them at their original location.

[58] When asked about the importance of this quarry compared with other quarries in the area, Mr Colin Hamlett said that they are all important but that when people were travelling they would get material from this area because it was the pathway used when traditional law business was taking place. He demonstrated how a sharp rock rubbed against a fresh green stick was used to create objects for ceremony, such as corroborees. In relation to the features that mark out the Weld Range, Mr Hamlett talked about breakaways in the boundaries where people used to camp in the caves. There are prints on the walls of the caves. In the summertime the caves were used for shade and as a hiding place from which to hunt.

[59] When asked about the connection between this area and Wilgie Mia, Mr Colin Hamlett gave evidence that there is a connection in a radius of about 30 or 40 kilometres around where people used to 'go out and get stuff'; that people used to come from all around to hunt and conduct other activities and that there could be people buried anywhere in the soft ground around this area. Mr Colin Hamlett gave evidence about why people came to the Weld Range: to get ochre from Wilgie Mia and for traditional law purposes. He said that people came from all directions; as far as Mount Augustus, Wiluna, Badimia country and Mount Magnet area. He said that when people travelled to come to the Weld Range they would follow song lines.

- [60] Mr Colin Hamlett gave evidence about the songlines along which people would travel within the Weld Range, and said that there are songlines through this area. When asked about what happens if areas such as this are damaged, he said that Aboriginal people get sick. In another area where mining went ahead without the 'proper approvals,' the five people that wanted the mining to go ahead all died. He said that lots of Wajarri people are afraid of things like that happening and that the Weld Range is the most important area in Wajarri country. Mr Colin Hamlett said that when he talks about the Weld Range, he is not just referring to the line of hills which he understands to be the English language word for it, but a wider area (Guagabuna in Wajarri Yamatji language) which extends up to 30 kilometres on each side of the Range in the breakaway country. This area was marked on the Tribunal's Geospatial topographic map (NNTT 21) by Mr Carl Hamlett at his father's request on the basis that he was 'not very good with maps' (TR p 30). Mr Colin Hamlett gave evidence that Wajarri people have a different standard agreement for grantee parties in the Weld Range due to its significance and that the Wajarri have such an agreement with Sinosteel.
- [61] Mr Colin Hamlett's sons, Carl and Brendan, both initiated Wajarri men, also gave evidence. Mr Brendan Hamlett said that he comes to the Weld Ranges a lot and that he brings his children with him. His son who is also an initiated man, was with him during the site visit. Brendan talked about the purposes for which he comes to the area of the first quarry: respect for country and for the old people and to preserve and look after the area. He said that the artefacts seen at the quarry were created by hitting a rock with a stone tool or a hammer, to break flakes off and that the artefacts seen at the quarry are usually used for cutting, such as cutting out shields from trees, or skinning, and for making spears. The rocks were used for cultural business too. He said that there are a vast number of quarries, evidencing different kinds of material, in the vicinity, all used for the same sorts of reasons. Brendan gave evidence that the area is significant because his ancestors have been there. He said that this quarry in particular is significant because the rock material located at it is only found in the hills, on ridges such as this.
- [62] Mr Carl Hamlett spoke about rock pools (also called rock holes or water holes) in the Weld Range situated along the songlines. These are Cattle Pool, situated to the east of the Tenements, Darbabuma Rock pool, located to the south west of the Tenements, and Vivienne's Granite, to the north of the Tenements. The location of the rock pools determine where the songlines are because people travelled from one source of water to the next.

- [63] Mr Carl Hamlett talked about the breakaways on the outskirts of the Weld Range, and marked their location on the Tribunal topographic map (NNTT 21). The breakaways run in a circular shape, with Vivenne's Granite at the north most tip and the 'Weld Range' row of hills in the middle. These breakaways are all within the NHL Report area and the Tenements are located between the eastern part of the area marked and the Weld Range. According to Mr Carl Hamlett, the breakaways all connect to Wilgie Mia. He described the breakaways as areas of eroded rock, where there are caves in which Aboriginal people put their gear and made hand stencils and carvings.
- [64] Mr Brian Jones gave evidence that he and Carl are on the Weld Range subcommittee of the Wajarri Working Committee. Brian and Carl have been selected for the subcommittee because they speak for the area.
- [65] Quarry Stop 2: Quarry Stop 2 is also on the central Tenement, M51/546. This site is east of the first quarry site visited, but forms part of the same quarry line. Colin and Carl Hamlett gave evidence that they think the quarry, part of which is at the Quarry Stop 1 and 2 areas, continues to run east, out through another of the Tenements, M5/543, to an area called Wanderie Bore, which is just outside of the Tenements. This quarry site shows artefacts very similar to those seen at the first area visited. At this site Carl showed the group a cutting implement made out of chert stone that had been worked on, or retouched, to give it a jagged edge, like a carving knife. Carl gave evidence that he thinks that there are a number of quarries similar to this one, running in the same direction, parallel to each other, in the area of M51/546.
- [66] Vivienne's Granite: Vivienne's Granite is located approximately 1.5 kilometres north of the Tenements. The breakaways spoken about at Quarry Stop 1 could be viewed from this area. There is a rock hole at Vivienne's Granite. Mr Colin Hamlett described Vivienne's Granite as part of the travel path for Aboriginal people. He said that people would camp in this area on their way to Wilgie Mia and to Cattle Pool.
- [67] Mr Carl Hamlett showed the group a rock carving, located close to the rock hole, which acts as a map of the water sources in the area. He explained that the circles in the carving represent water holes and that when people travelled they would look at the carving to determine where they could go and camp and get water. Animals travel to the water sources during the wet season so people also camped near rockholes because there was good hunting. He pointed out prints in the carving that represent emu footprints, showing where

emus and emu eggs can be found, to be used as a food source. Mr Carl Hamlett confirmed that he thinks Vivienne's Granite was used as a camping place. He talked about an amphitheatre in the breakaways close by where people would have 'hid the young blokes.' Mr Carl Hamlett said that women and uninitiated people would not have been able to camp at Vivienne's Granite but would have had to camp further away from wherever they did the law business with 'the young blokes.'

- [68] At this stop Mr Carl Hamlett also showed the group a large balancing rock with a rock carving and hand stencils, made using red ochre, beneath it. He said that the hand stencils were made using red ochre from Wilgie Mia, indicating that that they were made by someone travelling through from Wilgie Mia. He said that he knows the red ochre used for the hand stencils has come from Wilgie Mia because it is not possible to get red ochre from anywhere else in this area. Mr Carl Hamlett showed the group the stencil of a kangaroo next to the handprints, made by carving the outline into the rock. He gave evidence that this area is important because the ancestors were here: Wajarri people follow in their footsteps to keep their culture alive.
- [69] At the area near the waterhole carving, Mr Carl Hamlett noticed a group of stones comprising different tools and artefacts that had not been there the last time he visited. When asked how he felt when seeing those stones there he said that they should not have been moved, but should have been left where they were found.
- [70] In cross examination, Mr Pudovskis for the Government party asked about restrictions that apply to accessing the area. Colin and Carl Hamlett said that non Wajarri people need a permit to attend here, but that everyone attending the site visit was able to be present because they were accompanied by the traditional owners of the land and were conducting a native title proceeding.
- [71] *Grinding stones*: At the Vivienne's Granite stop Mr Carl Hamlett gave evidence that rocks used to grind ochre had been found in the 'Wanderie area' where the site visit party had driven in from. He said that the rocks had red ochre from Wilgie Mia around them. Mr Colin Hamlett said that the location of the grinding stones is a place where they would grind up the ochre and 'paint the young blokes up in preparation for their initiation when they get to the Weld Ranges.'
- [72] The group subsequently drove to the area and viewed a grinding stone, used to grind ochre for ceremony, and showing red pigment on it. The location of the grinding stone is

north, outside of the Tenements, between the Tenements and Vivienne's Granite. On the way back to the vehicles from viewing the ochre grinding stone, Mr Brendan Hamlett came across another grinding stone used for a different purpose, for grinding seeds to make damper. Seeds are taken from trees and crushed up using the grinding stone. A wooden bowl is used to catch all the powder and then water is added to make the powder into a dough. The dough is put on the coals with bark on top of it and it rises.

- [73] Quarry Stop 3 (Airellas): The third quarry visited, and the last stop for the site visit day, was at an area called Airellas quarry. This site is located to the west, outside of the Tenements. Mr Carl Hamlett talked about lumps of red ochre Wajarri people had found near a fence line in an area west of the Tenements, on one of the mining tenements already granted to Weld Range Metals Limited.
- [74] Mr Carl Hamlett gave evidence that the Airellas quarry is different from the first two quarry sites in that it provides a different kind of rock material, called kanga. It is used for the same purpose as the other quarries, for tools and cutting implements. He pointed out a hammer site and gave evidence that this quarry is more significant than the others. He said that the same rules apply to this quarry as the others in that only initiated people can come here. Mr Carl Hamlett talked about an area close to the Darbabuma Rock Waterhole, west of the Tenements, called the Cosmo, or Galaxy: a training ground for young Wajarri lawmen. They trained so that they could navigate the area at night.
- [75] Mr Carl Hamlett told a story about non-indigenous people, geologists and drilling operators, who had been tricked or attacked by spirits in the Weld Range. He explained that Wajarri people worry about these sorts of events happening again.

Evidence of Colin Hamlett at Cue – 2 June 2011

- [76] At the hearing in Cue, Mr Colin Hamlett gave evidence to the effect outlined below. He said that he is an initiated Wajarri man, that his father was a Wajarri elder and that his family come from and can speak for the Weld Range area, which means the NHL Report area. He spoke of 'Wandarie country' which is soft and could be dug into for burials. Although not specific, he said that there is 'Wandarie country' in the Tenement area.
- [77] Mr Colin Hamlett said that only initiated men can take stones from quarry areas for making boomerangs, spears and shields. He has rights under Wajarri Yamatji laws and customs to live in the Weld Range and he has a camp in the Wilgie Mia Reserve. He talked

about rights to camp, hunt and gather plants and about younger people being brought to the Weld Range area and taught about it.

[78] Whether in the Weld Range hills or on the flats, quarries are important and there are 'lots of quarries' in and off the hills. The only time we find quarries is when we do surveys or go hunting, Mr Colin Hamlett said.

[79] Mr Colin Hamlett confirmed the existence of highways or pathways which were used by different Aboriginal groups to reach Wilgie Mia and were associated with songlines followed when young people were brought for initiation in the Weld Range. People no longer use the highways and the Wilgie Mia area is no longer used for ceremonies. The songlines remain spiritually important to Wajarri Yamatji people and adverse consequences flow if they are destroyed. There is no trading of the ochre today but it is taken to other places. The ochre from Wilgie Mia is still used for ceremony on Wajarri Yamatji country and by other Aboriginal groups. Mr Colin Hamlett said that it would be very possible to find grinding stones on the Tenement area.

[80] Mr Hamlett also gave evidence of his attitude to mining in the Weld Range and elsewhere, which is further considered below in relation to s 39(1)(b).

Consideration of Colin Hamlett's evidence

- [81] Mr Green submits that there are significant issues of credibility with respect to Mr Colin Hamlett's evidence in relation to the Tenement areas and raises the following arguments:
- Mr Green criticises the fact that Mr Hamlett amended his affidavit in the manner indicated above after the field trip evidence and says that these amendments are not trivial.
- The language and drafting of the affidavit do not bear similarity to the oral evidence given and do not seem to be in Mr Hamlett's own words.
- Mr Hamlett was asked leading questions and at times was involved in unsatisfactory joint oral evidence where he conversed with his sons to explain matters.

I am satisfied that Mr Hamlett gave his evidence in an open and frank manner and that there are no grounds for rejecting it on the basis that it is generally unreliable or not credible. The amendments to his affidavit did not fundamentally change the thrust of his evidence. The

examples given by Mr Green of conferring are in my view more a case of the witnesses giving evidence at the same time rather than conferring about it. In any event, these instances were not frequent and do not seriously call into question Mr Hamlett's knowledge or understanding of the issues. One example is the assistance given by Mr Carl Hamlett to his father by marking up the map showing the breakaways. Further, witnesses have been permitted to confer with others when giving evidence in some native title matters before the Federal Court (see *Harrington-Smith* case).

- [82] Mr Green says that the fact that Mr Hamlett was not aware of the quarry at Stops 1 and 2 until the recent site survey means that there is no modern or current tradition of the NTP linked to the quarry site, which would make it a site of particular significance to them. For reasons further explained below, the mere fact of Mr Hamlett not being aware of the quarry site does not necessarily disqualify it as a site or as part of an area of particular significance to the NTP. There is ample evidence of the special nature of the Weld Range (including the Tenement area) and that it is of sacred and spiritual significance to WY people, even though some of the traditional activities, including initiation ceremonies, are no longer carried out there.
- [83] Mr Green also criticises Mr Hamlett's evidence about the potential for harm to him and his family from the Wudaji or Mondong spirits, which Mr Green says is a belief for which no source or basis is given. In this respect, Mr Green says, the evidence compares unfavourably with that given in *Martu/Holocene* where much more detail of the nature of potential harm from spirit beings was given. Mr Green says that Mr Hamlett's affidavit evidence is that drilling 'could' (para 20) disturb the Wudajis and as such the evidence is of no probative value to the Tribunal.
- [84] The relevance of the existence of the spirit people in and around the Weld Range is dealt with later in these reasons. At this point, it is enough to say that there is ample evidence of belief in their existence by WY people and the consequences to members of the NTP and others if they are disturbed. These beliefs are relevant to whether the NHL Report area is a site or an area of particular significance to the NTP 'in accordance with their traditions' (s 39(1)(a)(v)). The evidence establishes that the belief in the existence of these spirit people is an important part of the Wajarri Yamatji people's traditional beliefs.

- [85] Mr Hamlett's evidence is generally consistent with other evidence before the Tribunal from other sources, particularly evidence given by other members of the NTP, including evidence contained in the NHL Report and in previous Tribunal determinations. Neither the Government nor grantee parties have produced evidence to contradict the main features of this evidence. I am satisfied that Mr Hamlett as a Wajarri Yamatji elder and as one of the persons comprising the applicant for native title determination application, brought on behalf of the Wajarri Yamatji people, has authority to speak on behalf of the NTP and I generally accept his evidence. The findings of fact which arise from this and other evidence and the parties' contentions in relation to them is considered later.
- [86] I am also satisfied that the evidence given by Carl and Brendan Hamlett is generally reliable and can be accepted as part of the basis for relevant findings of fact necessary for a determination.

Evidence of Lara Whitton

- [87] The affidavit of Lara Whitton is made in the following terms:
 - 1. I am an anthropologist with a degree in Anthropology and First Class Honours, from La Trobe University, Victoria. I gained specialised knowledge of Native Title during my honours year, in which I focused on Native Title issues in Australia. Following this I completed an internship at the Northern Land Council in Darwin, where I developed this knowledge further. I have been employed at Yamatji Marlpa Aboriginal Corporation (YMAC) since October 2010.
 - 2. I have seen a map, which shows the location of tenements M51/543, M51/544, M51/545, M51/546 ("the Tenements"). The Tenements are located entirely within the boundaries of the Wajarri Yamatji Native Title claim area known as the Weld Range.
 - Unless otherwise stated, all of the matters contained in this affidavit are within my own knowledge and are true and correct based upon my research and informed opinion as an anthropologist.

THE TENEMENTS AND THE LINK TO THE WELD RANGE AND WILGIE MIA

- 4. I have conducted desktop research into the cultural and spiritual importance of the Weld Range and the Tenements area. I have consulted earlier field notes and published materials. I have reviewed the internal YMAC anthropological records relating to the Wajarri Yamatji people, and records taken and maintained by my follow in-house anthropologist Sanna Nalder. Where identified, facts stated in this affidavit are based upon my knowledge gained from such sources.
- 5. On Thursday 27 January 2011, I visited the Tenements during a field trip to gather evidence for this matter with Wajarri Yamatji elder Colin Hamlett and his two sons Carl and Brendon Hamlett ("the Fieldtrip").
- 6. During the course of my employment and in preparation of the Fieldtrip I have considered both historical research material and research material conducted by external researchers and other anthropologists engaged by YMAC regarding the Wajarri Yamatji people. Through this consultation I have gained a general knowledge of Wajarri Yamatji sites, genealogies and law and custom.
- 7. The whole Weld Range area is considered a significant site, or a site complex. Reflective of this, the area encompassing Weld Range, Wilgie Mia, Little Wilgie Mia (and other significant sites) is currently under consideration for entry onto the Commonwealth

- National Heritage List. I have read the report attached to the National Heritage List application for the Weld Range area lodged on behalf of the Wajarri Yamatji in early 2008.
- 8. The significance of the Weld Range and associated sites is manifold. There are numerous registered and unregistered sites of significance in Weld Range. Weld Range is also a part of Dreaming Tracks or songlines, which connect it to other sites of mythological importance within and outside of Wajarri Yamatji country.
- 9. The Tenements are located between two important Wajarri sites, being Wilgie Mia to the South and Vivienne's Granite to the North. Wilgie Mia is significant because that is where the *marlu* in the dreaming story died and left all of the ochre. That is the most important ochre quarry in the Weld Range. Vivienne's Granite is significant because this is where the old people used to camp and grind the ochre. The area of the Tenements was used as a kind of highway between these sites where the old people would hunt, gather stones and ochre and camp.
- 10. I have also read a report entitled "The Cultural Significance of the Weld Range and Wilgie Mia to Aboriginal people" prepared by Kali Napier, an anthropologist, employed by YMAC at the time. Attached and marked "LW-1" is a true copy of that report. The report clearly highlights the special cultural significance Wilgie Mia and its surrounds holds for the NTP. The area comprising of the Tenements and therefore intrinsically important to Wilgie Mia itself as that ground comprising the Tenements was used as an essential "highway" allowing the NTP to access Wilgie Mia and linking it to surround sites, including sites within the Tenements themselves.
- 11. The red ochre mined from Wilgie Mia was traditionally traded and is still used in Aboriginal Law ceremonies in places like Jigalong, Wiluna, Warburton and Warakurna today. Wilgie Mia is thought to be the oldest mine in the world, has been the subject of many publications, both popular and scientific.
- 12. The knowledge and stories about the sites in Weld Range and the ochre from Wilgie Mia has been passed on from generation to generation to the present day and is not restricted to Wajarri Yamatji people, who are held responsible for looking after the site as the traditional owners. This became evident, for example, when the National Heritage Listing started, YMAC records show that representatives from Wanmulla, Wongawol, Martu and Badimia tribes came forward to support the protection of Weld Range, as the Dreaming stories and trade routes associated with Weld Range form part of a vast network linking significant places and indigenous groups from the coast at Kalbarri to Warburton Ranges and Eucla to south-west Noongar country all the way up to Jigalong in north.
- 13. Aboriginal Dreaming stories and Songlines are placed in the mythical past during which geological features we can see today were created by the ancestral beings. The stories and songs traverse the continent, one group picking up where the other leaves it, each responsible for maintaining and protecting their section of the Dreaming, song and associated places on the country within their boundaries. This creates the cultural landscape and the basis of the spiritual significance of all country.
- 14. The Dreaming stories passing through the Weld Range hold profound importance. Red ochre for Wajarri, and in Aboriginal mythology in general, is seen as the sacred blood of the ancestral beings throughout Australia and has been associated with notions of sustaining and regenerative powers for thousands of years. It has therefore been used, and is still used, in law ceremonies, mortuary practices, rock paintings and body and artefact decoration. Ochre can be found in the Tenements.
- 15. The Wajarri Yamatji story associated with Wilgie Mia is of an injured *marlu* (red kangaroo) who travelled east through the Murchison leaving red ochre deposits where he bled. Other variations of the story state that a great hunter speared a giant kangaroo, who, while thrashing about, dug out a cavern into which its blood spilled creating the red ochre, and its bile turned into yellow and green ochre. The Two Brothers myth tells a story of the kangaroo being chased by the brothers, then being hit by one of them with a fighting stick. His drops of blood formed the ochre deposits as it travelled to Weld Range, and Wilgie Mia is where it finally lay down to die. The Dreaming thus links Wilgie Mia with other important sites on Weld Range and beyond. Little Wilgie Mia,

- for example is an earlier red ochre mine and a yellow ochre site, and is located in Weld Range.
- 16. The *Marlu* Dreaming also links the Wajarri Yamatji with other groups who pick up their part of the story from where it continues on from Wajarri Yamatji country to south, east, north and west. The *Marlu* story has been continuously taught to Wajarri Yamatji men each year in tribal law, through song, dance, body painting and the use of Wilgie Mia red ochre.
- 17. Weld Range forms also part of the storyline of the Seven Sisters, Rainbow Snake and Two Women Dreamings. The numerous cave-like rockholes in Weld Range mark the places where Two Women rested or hid from the man, who was chasing them through Wajarri Yamatji country to the desert country. Similarly, the Seven Sisters and the Rainbow Serpent created important rockholes in Wajarri Yamatji country, enabling trade and travel over great distances.
- 18. The Wajarri Yamatji people regularly visit Weld Range with their families, while some live there permanently. Families maintain and look after numerous rockholes and camp out during weekends and holidays and teach their children about the culture and important places, collect bush food and bush medicine, and hunt kangaroo. The ochre is still collected and used annually in traditional law ceremonies in a number of law grounds throughout Western Australia.
- 19. Weld Range hosts a number of significant and sacred sites, including sites relating to both men's and women's Law business, secret sites, rock art sites, waterholes and the ochre mines. Dreaming stories and songlines connect the Weld Range and Wajarri Yamatji people to other Aboriginal groups. Weld Range is thus part of the living cultural heritage of a number of Aboriginal groups. Wajarri Yamatji, as the custodians for the Weld Range, have the responsibility of looking after and protecting the country and the people.
- 20. Parts of Weld Range (although not these Tenements) have already been disturbed by mining, which has caused Wajarri Yamatji great distress and partly launched the National Heritage Listing process as a supplementary measure to protect the Weld Range from any further damage.
- 21. The Tenements are a part of the site complex that is the Weld Range and are intrinsically connected to other important sites, such as Wilgie Mia, through the Tenements.

THE AREA LOCATED WHOLLY WITHIN THE TENEMENTS

- 22. During the Fieldtrip Colin Hamlett explained to me how important this area was to his family and his people, and how the Tenements contained many important sites and the area comprising the Tenements was an important link between various other surrounding sites, such as Wilgie Mia and Vivienne's Granite.
- 23. Within the Tenements traditional use of the land is evident and many of the sites are not yet registered. During the Fieldtrip I saw stone artefacts and grind stones.
- 24. The Tenements contain many stones used by the Wajarri Yamatji forbearers to make shields, weapons and dishes, and to crush and grind seeds and other bush food. Colin Hamlett told me that the stones are still used to show the children how the old people used to live and to pass on the knowledge and culture of the Wajarri people.
- 25. The Tenements also contain plant and tree varieties, including *Waladarah* tree (which has edible nuts) and the *Gabawanna* tree (which has big berries), used by the Wajarri people in bush tucker and bush medicine, both historically and today. Within the Tenement a special tree also grows which the Wajarri people use to make spears after the branches are straightened in a fire. Collin Hamlett told me that this method is still taught to the children.
- 26. In the South-Eastern part of the Tenement M51/543 Carl Hamlett pointed out an area of shiny worn stones about 5 metres squared which he said archaeologists would refer to as a quarry.
- 27. The Wajarri people believe that if they do not look after their country, particularly the special sites, then the *Wudaji* and *Mondong* spirits will punish them and make them and their families sick. Colin Hamlett takes his responsibility as a traditional custodian of the

- Weld Range area, including the Tenements, very seriously and he told me that he fears that if he fails to protect the sites he and his family will get very sick or even killed by the spirits.
- 28. In accordance with Wajarri Yamatji Law and custom, the landscape is spiritual and certain behavioural rules and protocols need to be observed to avoid repercussions. Wajarri Yamatji country is inhabited by spirits, *Wudaji* and *Mondong*, who look after the country and punish or play tricks on those who do not behave respectfully. Knowledge of some places in Weld Range is kept secret and some places are only accessible for people authorised to do so, such as initiated law men.
- 29. The Law and custom also places the responsibility of looking after the country on the custodians, whose duty it is to teach and pass it on, undisturbed, to the next generation. The country and knowledge, in this sense, encompasses physical, mythological, social and cultural value to the Wajarri Yamatji people.
- 30. As the physical, mythological, social and cultural are interconnected, any physical disturbance to a significant site is also harming to the spirit and the wellbeing of the Wajarri Yamatji people. The consequences of interfering with a Dreaming track would be felt in all the communities who hold their part of the song.
- 31. In my expert opinion the granting of the Tenements would adversely impact the Wajarri Yamatji people and have a negative impact upon their enjoyment of their registered native title rights and interests, their culture and traditions, and the preservation and passing of knowledge of such culture and traditions.'

The Napier Report

[88] The annexure to Lara Whitton's affidavit (para 10), is a report prepared by an anthropologist previously employed by YMAC: Kali Napier, 'The Cultural Significance of the Weld Range and Wilgie Mia to Aboriginal People', 20 November 2005 (Napier Report). The Napier Report 'considers the Weld Range as an Aboriginal site, or site complex, as it draws significance from its association with Dreaming songs and myths, its prominence in the landscape, and its containing of numerous registered and unregistered sites of significance to Wajarri people.' The Report primarily deals with the importance of Wilgie Mia (Thuwarri Thaa) which is a red ochre mine located at the north-east end of the Weld Range.

[89] The Napier Report traces the history of Wilgie Mia. The pre World War II Commissioner of Native Affairs, Mr A.O. Neville, was of the view that Aboriginal people should have the right to possession of Wilgie Mia, based on the understanding of it being a highly sacred place. In 1917, 10,500 acres of country surrounding Wilgie Mia was gazetted as a reserve for Aboriginal use under the *Lands Act 1898*. Two years later, due to the discovery of Aboriginal artefacts deemed to be of considerable ethnological interest and evidence of the secret and sacred nature of Wilgie Mia, one acre of this reserve containing the ochre mine was gazetted as a special reserve for Aboriginal use under s 10 of the *Aborigines Act 1905*. Subsequently, in the 1940s, mining leases were granted within the area of the Reserve containing Wilgie Mia, including a licence to mine the floor of the cave. This

resulted in significant alteration to the original features of the cave. Opposition to mining in the area of Wilgie Mia, by the WA Museum and the Department of Native Welfare in the 1960s, culminated in the cancellation of the licence to mine in Wilgie Mia and control being handed over to the Aboriginal Lands Trust in 1973. Wilgie Mia gained legal protection from damage in 1974 when it was declared a protected area under the *Aboriginal Heritage Act* and is now a Registered Site.

- [90] Wilgie Mia was traditionally mined by initiated Wajarri men, using digging sticks to pry ochre from the seams in the cavern walls. Scaffolding was used in the mine. Lumps of ochre were carried to the surface and pulverised using a grinding stone, mixed with water and moulded into balls for trading. The red ochre from Wilgie Mia was used for rock paintings and also as paint to decorate the body for ceremonies. The act of applying red ochre to the body was imbued with ritual and sacred significance as it symbolised the 'metamorphosed blood' of dreaming spirits; it was seen as extremely potent and the source of strength and courage. Red ochre is an extremely important element of Aboriginal law and custom associated with increase ceremonies and initiation and burial rites. Long expeditions were made to collect the substance.
- [91] The Napier Report (pp 12-13) describes a number of the many different versions of the myths associated with how Wilgie Mia was formed. This includes the myth of the injured marlu (kangaroo), referred to elsewhere by NTP witnesses. There is also a discussion of the creation and importance of Little Wilgie Mia in these myths and different views of its role and significance. Little Wilgie Mia is a smaller ochre mine about four kilometres south west of Wilgie Mia and has, according to other evidence, been substantially disturbed.
- [92] The Napier Report contains evidence of the importance of red ochre, not just to the Wajarri Yamatji people, but to Aboriginal people throughout Australia, and of the importance of Wilgie Mia as a source of the ochre. It refers to the importance of the Dreaming stories associated with the Weld Range area and the spiritual significance of the whole of the Weld Range (pp 18, 21).

[93] The Napier Report concludes (pp 21-22):

'This paper attests to the special cultural significance that Wilgie Mia holds for the Wajarri people and their neighbours and to its ethnographic and archaeological significance in general. Wilgie Mia red ochre mine achieves this distinction by providing evidence of Aboriginal material activity on a large scale over thousands of years using impressive quarrying techniques, as well as, indicating resource extraction during pre-contact times for the purpose of trade.

The site is the source of the supply of some of the most valuable red ochre in Australia in terms of its physical qualities, and certainly the most important in Western Australia, and the means by which the local group guarded, extracted and exchanged the substance demonstrates the exercise of native title rights over the site.

Economic factors were inextricably linked with the mythological and ritual significance of Wilgie Mia and the surrounding Weld Range. Each "Tribe" in the adjacent region possessed variants of the Wilgie Mia myth, but the essential features and structures of the songline is shared amongst all the groups. Wilgie Mia acts as a vital textual reference in an oral culture for maintaining the tribal practices and traditional culture of Aboriginal peoples.

For the Wajarri people, the central stories connected with Wilgie Mia are concerned with the marlu, which may be used to validate the boundaries of Wajarri territory to outsiders and to reinforce their traditional connection to particular sites within that territory. It's symbolic and mythological associates heighten the cultural affiliation the Wajarri people have with Wilgie Mia. Some of the most significant ceremonies in the religious and cultural lives of Aboriginal people simply cannot be held without the red ochre.

The Wilgie Mia site is set apart from the other sources of red ochre because of the major role it played and still plays in initiation rituals and Aboriginal Law. The "Wilgie Mia mark" is the only design painted on Wajarri novices, and is often interpreted as signifying Wajarri initiation. This intense association with Law and ritual justifies the traditional restrictions of access to the site. The restrictions were strongly enforced and were manifest in beliefs and customs that not only relate to the mine, but to the whole locality of the Weld Range.

The Weld Range comprises a number of registered and unregistered sites, of which Wilgie Mia has been singled out here for its immense cultural significance. The mine and its surrounding locality connect a number of sites, objects and stories which are integral to initiation practices. For these reasons, issues of control and access to the Weld Range are still relevant to the protection and maintenance of the identity and culture of the Wajarri people and to their standing in relation to adjacent Aboriginal groups.'

Consideration of the evidence of Lara Whitton and Kali Napier

[94] Mr Green submits that no or little weight should be given to the Napier Report for the following reasons:

- Ms Napier was not called to give evidence, could not be cross examined and her absence was not explained.
- There is nothing to establish her expertise.
- She was, at the time when the report was written, a recent graduate and employee of YMAC.

The Tribunal commonly relies on facts established by documentary evidence, particularly when they are not disputed by other evidence. Neither the Government nor grantee party have sought, by providing contradictory evidence, to challenge the evidence in the Napier Report which has been before the Tribunal since 2 February 2011, nor did they formally request that Ms Napier be called to give evidence or make application to cross examine her. Any difficulties with the expertise of Ms Whitton and Ms Napier or their evidence and opinions might have become more significance if there was a direct challenge by the submission of

contradictory evidence from the Government or grantee parties to the considerable body of evidence before the Tribunal on the importance of Wilgie Mia, the Weld Range or the pink box area. Neither the Government nor grantee party has done so. Ms Napier's evidence is clearly relevant to the issues before the Tribunal and I can see no basis for the wholesale rejection of it or for finding that it should be given little weight. Ms Napier is an anthropologist and her Report on the face of it has involved a considerable amount of research and is a credible document.

- [95] The Government and grantee parties correctly note that the Napier Report describes the Weld Range as a 'series of roughly parallel hills, ridges and valleys that extend up to sixty kilometres long from south west to north east and up to four kilometres wide (see Appendix 1).' Although the appendix was unfortunately not provided, I have acted on the basis that the area described by the Napier Report basically deals with an area Ms Napier has defined as the Weld Range and not the larger NHL Report area. Nevertheless, the evidence is relevant to the present proceedings in confirming the great importance of Wilgie Mia and the Weld Range to the Wajarri Yamatji people and provides an important context for consideration of the significance of the NHL Report area. It is also the case that, in various parts of the evidence, the Weld Range or Weld Range area is described in a broader way and is not taken to refer strictly to the Weld Range delineated by its contour lines. The statement of Ms Napier in the final paragraph of her conclusions about the importance of sites in the 'surrounding locality' suggests she may have been referring to a wider area. There is no doubt that much of the evidence of Wajarri Yamatji witnesses in this and other proceedings supports a finding that the sites to which Wilgie Mia is connected extend beyond the Weld Range as strictly defined. Both Colin and Carl Hamlett were clear in their evidence that references to the Weld Range area are not confined to the Weld Range proper, as defined by its contour lines.
- [96] Mr Pudovskis objects to the admissibility of some parts of Ms Whitton's affidavit on the basis that it is hearsay evidence of what she has been told by Mr Hamlett, who was personally present to give evidence. The objection is to the second sentence of paragraph 24, the last sentence of paragraph 25 and the second sentence of paragraph 27. Ms Tan argued that the evidence could be admitted on the basis that Ms Whitton is an expert witness and entitled to consider information given to her which assisted her to form her opinions. The Tribunal is not bound by the rules of evidence and in my view it would be an unduly technical approach to reject this evidence on the grounds given by Mr Pudovskis. In any

event, the matters to which Mr Pudovskis refers have been deposed to directly by Mr Hamlett and are before the Tribunal. I also observe again that none of the substance of this evidence, including that given by Mr Hamlett and as recorded by Ms Whitton, was contested by way of contradictory evidence from either the Government or grantee party.

- [97] Mr Green challenges Ms Whitton's creditability on the following grounds:
- She is not an expert in the field of anthropology. Mr Green says that, as a recent undergraduate, she has not provided evidence (including a curriculum vitae) of how her subsequent employment has qualified her as an expert.
- Ms Whitton is an internal anthropologist employed by YMAC who has read material prepared by the native title party lawyer and, as a result, she has become 'an advocate' for the native title party's position.
- She has not satisfactorily outlined the basis of her expert views.

Mr Green also criticised the adoption by Ms Whitton of the Napier Report in light of his criticisms of it referred to above. In her oral evidence, Ms Whitton confirmed that she had formed her opinions on the basis of the Napier Report, the NHL Report and what she had been told by members of the Wajarri Yamatji claim group who accompanied her on the field trips. She agreed that her opinion that the whole Weld Range area is a site complex came from the Napier Report and that this report describes the Weld Range as strictly defined and not the larger NHL Report area.

[98] In assessing the evidence of Ms Whitton I have had regard to and made allowances for the matters referred to by Mr Green. However, they do not lead to a wholesale rejection of Ms Whitton's evidence. She is an anthropologist, albeit a relatively inexperienced one. Most of her evidence is of a factual nature, gleaned from research of documentary material but most importantly from what she has been told by Mr Colin Hamlett. While that reliance has lead her into error about the presence of ochre quarries on the Tenement area (para 14) this was later corrected by Mr Colin Hamlett. The facts that she has recorded are, for the most part, confirmed by other evidence, including the direct oral and affidavit evidence of Mr Colin Hamlett and other members of the NTP given specifically for these proceedings. The major opinion she expresses as an expert about the effect of the grant of the Tenements on WY people is contained in paragraph 31, which I have not taken into account on the basis that the primary evidence of the WY people themselves enables the Tribunal to draw its own conclusions on this issue. As the Federal Court has noted in native title proceedings, while

anthropological evidence 'may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs', the evidence from Indigenous witnesses is what is central to the proceedings: *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472; (2004) 207 ALR 539, [89].

[99] Ms Whitton's evidence relating to the pathways or highways through the Tenement area and their association with Dreaming tracks or songlines is dealt with below under s 39(1)(a)(v).

[100] The Government and grantee parties have submitted that the evidence does not establish that the Weld Range Site Complex or pink box area is a 'site complex'. They say that the Napier Report was the first time that this concept was used and that it was subsequently adopted in the NHL Report and then by Ms Whitton. In my view, there is no need to make a finding about whether the area is a 'site complex' in the way the term is used by Ms Napier and Ms Whitton. Similarly, there is no need to make a finding about whether the term has any special archaeological or anthropological meaning or significance. Under s 39(1)(a)(v) of the Act, the issue for the Tribunal is whether the future act will have an effect on 'any area or a site, on the land and waters concerned, of particular significance' to the NTP 'in accordance with their traditions'. For the reasons given below, the primary factual evidence principally from members of the NTP, given in these and other Tribunal proceedings, and recorded in the NHL Report, combined with the Napier Report and Ms Whitton's affidavit, provide a more than adequate basis for such a finding.

National Heritage Listing of Wilgie Mia

[101] The NTP contends (NTP Contentions paras 23-26) that the Tenement area is located within the Weld Range Site Complex (pink box area) and is intrinsically connected to other important sites through the Dreaming stories and connecting pathways running through the Tenements. The NTP says that the importance of the Weld Range generally should be given appropriate weight, taking into account that an area around Wilgie Mia has now been included on the NHL.

[102] On 5 October 2011, Tony Burke (the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities), being satisfied that the NHL Area has National Heritage values specified in the Schedule, pursuant to s 324JJ of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), included the area in the National

Heritage List (Commonwealth of Australia Special Gazette No S 22, Thursday, 24 February 2011, Inclusion of a Place in the National Heritage List, Wilgie Mia Aboriginal Ochre Mine - GP 97).

[103] The reasons cited in the Gazette as justifying that listing include:

'The ochre mine at Wilgie Mia has outstanding heritage value to the nation because it demonstrates the importance of ochre in Aboriginal society. It is the largest traditional ochre mine in Australia with two large chambers and a number of tunnels dug by miners as they followed seams of ochre. Pole scaffolding with wooden platforms allowed the Wajarri to simultaneously mine seams at different levels allowing more ochre to be extracted. ... Ochre from Wilgie Mia was traded over a large area. ... This is the most extensive pre-contact ochre trade network recorded in Australia.'

[104] The Gazette mentions the techniques used to mine the ochre, the marlu creation story, the ceremonies and rituals associated with ochre mining and the striking pinkish hue and silvery sheen aesthetic of the Wilgie Mia ochre.

[105] The initial evidence provided by the NTP on the NHL Report area issue was the affidavit of Ms Sanna Maria Nalder (18 March 2011), an anthropologist employed by YMAC since November 2007. She says she has considered historical research material and research material collected by other anthropologists engaged by YMAC, regarding the WY people, to gain her knowledge of WY sites, genealogies, law and custom. She attaches a map (SN-2) on which she has plotted the boundaries of 'the Weld Range Site Complex' (which coincides with the pink box area), and in respect of which, she says YMAC made application for heritage listing in 2008. She also attaches a map (SN-1) received from Mr Brian Prince, Director of Indigenous Heritage West, Commonwealth Department of Sustainability, Environment, Water, Population and Communities. This map shows the area ultimately included on the NHL. This NHL area comprises the Wilgie Mia and Little Wilgie Mia sites. It covers part of the Reserve and extends some 3 kilometres outside it to the west. It shows a part of mining lease M20/118 (Atlas Mining) as excluded from the NHL area. Ms Nalder states, 'Importantly, the Grantee Party's tenements are located only approximately 6.5 kilometres from the NH listed site, Wilgie Mia, and are located within the Weld Range Site Complex, a site complex of recognised significant cultural importance, detailed evidence of which was provided in the affidavit of Lara Whitton filed 1 February 2011 (which I have read)' (para 8). She also states, 'It is my expert opinion that any disturbance in this area would have a negative impact on the traditional culture and beliefs of the Wajarri Yamatji people' (para 9).

[106] Mr Green criticises Ms Nalder's evidence on similar grounds to that of Ms Whitton and Mr Piotrowski (see below). With respect to the opinions expressed by Ms Nalder, I have already indicated my view in relation to the existence of a 'Site Complex'. I have not taken into account her opinion about the impact of mining on WY people for the same reasons given in relation to Ms Whitton's opinions on this issue.

[107] At the hearing on 2 June 2011, Ms Tan tendered an 'Outline of Position of National Heritage Listing Process' (NTP 40). The Outline was not verified by affidavit but I can infer it was prepared by the lawyers for the NTP, who are employed by YMAC, after appropriate inquiries. The Outline states that, 'In or about 2007, YMAC, on instructions from the Wajarri people, presented a draft proposal to DEWHA seeking NH listing for the Weld Range Complex area' which corresponds with the area indicated in the map annexed to the affidavit of Sanna Nalder and marked SN-2. The Outline says that meetings took place in August/September 2007 in relation to the application for NH listing, including a meeting on 26 September 2007 with the Department. Following these meetings, the Department was willing to recommend a smaller area surrounding Wilgie Mia for the NHL. Shortly before the deadline in December 2007, YMAC completed a formal nomination form for this smaller Wilgie Mia area based on the recommendation that this was the area accepted by the Minister for assessment. Assessment and negotiations continued until the Wilgie Mia area was placed on the National Heritage List.

[108] At the hearing in Cue, the NTP provided electronically (downloaded to USB stick) a document which is a version of the 'National Heritage Listing Application – Weld Range, Wilgie Mia (Thuwarri Thaa) and Surrounds' (NHL Report) (NTP 43), which was prepared in support of the application by Wajarri Yamatji for National Heritage listing.

[109] As already discussed, because of the late tendering of this document and concerns about its status, I made directions to clarify the issue. The NTP filed an affidavit of Lisa Randall, the lawyer acting for the NTP, outlining her attempts to verify the status of the NHL Application. After several attempts to resolve this issue with Mr Prince of the Commonwealth Department of Sustainability, Environment, Water, Population and Communities, Ms Randall was advised by Ms Jane Dewing of the Department's Perth Office that she had reviewed the Department's internal records which indicated that a draft report came to her office in Perth whereas the final NHL Report went to the Canberra Office. Ms Dewing advised that the Canberra Office could not locate a copy of the final report and that the Perth office did not have a copy of it. She advised that she had located a copy of the

draft NHL Report which she recalled to be the same as the final version, save for formatting and the inclusion of photos. She said she recalled the map attached to the draft and final versions to be the same. On 12 July 2011, Ms Dewing forwarded to Ms Randall a copy of an email received from Ms Teri O'Neill (of YMAC) on 28 September 2007 with two attachments, being a copy of the NHL Report watermarked 'draft' (NTP 43A) and a PDF copy of a map received with that report, marked as 'Annexure 1.' Ms Randall further deposes that she believes that NTP 43 (the Cue version) is the final version of the NHL Report presented by YMAC to the Department.

[110] The NTP also filed an affidavit of Robin Stevens (18 July 2011), anthropologist and archaeologist who was employed by YMAC between 2002 and 2008, during which time he oversaw the authoring of and edited the NHL Report. He says that between approximately April 2007 and July 2007, a Lucas Jordan was under his direct supervision, during which time a draft (without photos or formatting) version of the NHL Report was compiled. Between April 2007 and November 2007, a Teri O'Neill was under his supervision and a draft and a final version of the NHL Report was prepared which did not vary significantly. Mr Stevens says that he has viewed Exhibit 43 and confirms that it is the report which he had overseen the completion of. He says that the maps attached to the report and as SN-2 of the Nalder affidavit reflect the area in relation to which YMAC were instructed by the Wajarri people to seek NH listing. Mr Stevens asserts that the main author of the report was Lucas Jordan, supplemented by material and editing from Teri O'Neill and himself. Mr Jordan has tertiary qualifications and was employed as a Heritage Project Officer at YMAC from April to July 2007, specifically to work on the NHL Report. Ms O'Neill worked on the application from approximately April 2007 to November 2007 and generally provided administrative support for the process. Mr Stevens says that in approximately 2005, a meeting of Wajarri traditional owners was held in the Weld Range, at which was discussed the protection of the Weld Range, through, amongst other means, an application for NH listing. YMAC was instructed to prepare such an application and obtained funding for this purpose from the Commonwealth Government. Mr Stevens was appointed to lead the project.

[111] Mr Stevens provides information about the consultation and research action undertaken, the considerable extent of which is evident from the NHL Report itself. He says that throughout the process, senior Wajarri men unanimously supported continuing with the project and gave information to support it. Funding and time restraints meant that a report of the standard usually required to establish connection for the purposes of a native title

determination could not be prepared, but the document was sufficient to satisfy the NH listing criteria. Mr Stevens says that a draft of the report was handed to the Commonwealth Department, followed by the final report at which time his involvement with the project concluded. He is aware that meetings occurred with Commonwealth officials to discuss an area which all parties would support as suitable for inclusion on the NHL.

[112] The Government and grantee parties have criticised the NHL Report on a number of grounds. They say, among other things, that the continuing uncertainty surrounding its provenance means that its value is undermined as a basis for reaching a conclusion in relation to s 39(1)(a)(v) of the Act. It is an understatement to say that the manner in which this Report was provided to the Tribunal by the NTP is unsatisfactory. The fact that the Commonwealth Department cannot now find the final report which, I would have thought, was an important document to support its recommendation for inclusion of Wilgie Mia on the NHL, has also been less than helpful. While I share some of the concerns expressed about the Report, I am satisfied that the NHL Report can be accepted as evidence and relied on for certain purposes

[113] There are two versions of the NHL Report before the Tribunal: the Cue version (NTP 43); and the September 2007 draft (NTP 43A). There are some differences between them but the text is substantially the same in both. The Cue version has no page numbers and has a list of sites from the DIA Register which includes sites over a wider area than the NHL area, extending to Walga Rock and sites near Cue. The September 2007 draft has a list of sites which appear to be confined to the NHL area. The Cue version has photographs. There are no photographs in the September 2007 draft but there are places to insert them.

[114] I agree with the Government and grantee parties that Ms Nalder is wrong to say the application was made in 2008, although this is of little importance as it was made in late 2007. I also agree that Ms Randall is probably wrong in her view that the Cue version was the final version of the Report because the evidence suggests it predates the September 2007 draft. While there is evidence that a final report was lodged, which is not contradicted and I accept, the fact that it can't be located means that it is possible that the Commonwealth Minister acted on the September 2007 draft and that there is no final Report. Despite these issues, I am satisfied that the NHL Report was prepared in the manner described by Mr Stevens as an application for NH listing of the pink box area, which was subsequently reduced to the smaller area after discussions with the Commonwealth Government and ultimately included on the List. The Tribunal has evidence in the form of two versions of the Report which are substantially the same and contain relevant evidence. Unless otherwise

stated the references (including page numbers) in these reasons are to the September 2007 draft.

[115] The Government party also says that it is not clear what area is referred to in the NHL Report (GVP NHL Submission). The September 2007 draft version includes a topographical map of the pink box area but, although referred to as Appendix 1, there is no reference of this kind in the actual September 2007 draft. Despite this omission, I am satisfied that the September 2007 draft, when lodged with the Commonwealth Department on 28 September 2007, included this map and that it is the pink box area the Wajarri people submitted to the Commonwealth Government to be included on the NHL.

[116] I am satisfied that the NHL Report refers to an area beyond the strictly defined European Weld Range. Apart from the pink box area map, there are references in the Report to an area wider than just the Weld Range. There are references to:

- 'the entire mountain range, its foot-slopes, interfluves and valley floors as well as the rough breakaway country adjacent to the northern facing aspect of the range...'
 (p 5).
- 'Weld Range including the site rich breakaways and plains on either side of them...'
 (p 6).
- These places are considered sacred to Wajarri people and their neighbours. Strict laws and protocol exist as a code on how they should be approached or if they should be approached at all. Many places are secret and known to only a select few. This has always been to protect them. Wajarri people consider all of these places, many of which are in and around the base of the Weld Range, as being worthy of National Heritage protection' (pp 16-17).
- 'The National Heritage criteria for which the Weld Range and surrounding area comply with are all of the following ...' (p 18).
- 'Further reference to the natural and cultural history of Wilgie Mia/*Thuwarri Thaa*, Weld Range and its surroundings, are spoken of in greater detail in the relevant responses to this application...Wilgie Mia's ochre mine is a natural wonder; it, and the surrounding area's numerous culturally significant sites identified warrant National Heritage Listing...songlines, or Dreamings connect Aboriginal people to one another, as well as connecting them to the ochre mine, and surrounding area' (p 18).

- 'Other good places for camping were described as on the plains directly below the range itself where the land was flat and shade and firewood were plentiful' (p 19).
- 'Hunting is a common activity that Aboriginal people enjoy throughout the Weld Range, the adjacent breakaway country and low lying plains' (p 23).
- 'Similar examples of water and peopled landscapes can be found in the breakaway country that borders the northern face of the range' (p 26).
- The section quoted below (at para [121]) under Figure 36 in the Cue version (p 43) clearly refers to an area outside the Weld Range itself.
- The section quoted below (at para [121]) from the Report (p 27) also refers to an area outside the Weld Range.
- 'Occupation Site Cave # 1...This astonishing cave about 30m by 30m and in places up to 2.5m high, lies in the breakaway country northwest of the range itself ...' (p 29).
- 'Rich living areas; breakaways north and north west of Gnanagooragoo Peak, Weld Range, in the vicinity of Darbabuma rockhole...The Weld Range breakaway country features a staggering amount of living areas and pictographic art sites as well as man made structures and stone arrangements. Whilst the mythological significance of many of these sites is no longer known, they are considered sacred by Wajarri people and there is grave fear that uncontrolled development could severely damage what is likely to be the richest area of pictographic art sites in southern Western Australia' (pp 29-30).

Gnanagooragoo Peak (Mt Lulworth) is the highest peak in the Range and within the Reserve. The location referred to is within the pink box area outside the Weld Range itself and around the Darbababuma rockhole which is in the vicinity of the Galaxy or Cosmo site referred to by Carl Hamlett in his evidence.

• The list of references 'contain useful information relating to Wilgie Mia, the Weld Range and the surrounding area' (p 40).

Evidence of Dr Bill Kruse - Anthropological review of NHL Report

[117] At the request of YMAC, Dr Bill Kruse, a consultant anthropologist with experience in native title, performed a desktop review and analysis of the NHL Report and produced a report: Bill Kruse, 'Anthropological Assessment of the Report "National Heritage Listing Application Weld Range, Wilgie Mia (Thurwarri Thaa) and Surrounds", Canberra, 19 July

2011 (NTP 53). Dr Kruse draws a number of conclusions about the NHL Report. In his opinion, the purpose of the Report, to present information on behalf of Wajarri people to secure a successful nomination of the areas of the Weld Range associated with Wilgie Mia, is clear (p 4). He says that, from his experience, while the criteria for NH listing are broad, in practice the standards applied by the Australian Heritage Council in assessing applications have been high and the number of places successfully nominated have been few (p 5). Dr Kruse thinks that the Report strongly meets the requirements of its particular intended purposes and that the research methodology followed is adequate for the research project (p 6). Dr Kruse is of the opinion that the ethnographic information contained in the Report has a sound anthropological basis, is likely to be accurate and has high value as evidence supporting the significance of the Weld Range area and Wilgie Mia (p 15).

[118] Where first hand statements have not been attributed to individuals, Mr Kruse is of the view that the information is not as valuable (p 15). He says that opinions and findings made in the Report have value as anthropological opinion at the level of that provided by a junior practitioner; neither of the authors have qualifications in social anthropology (p 15). Dr Kruse says that there are a number of statements where the authors have not provided sufficient analysis to support their opinion and he provides (p 12) the following passage as an example (September 2007 draft p 5):

'Whilst the Weld Range draws much of its significance from its association with Wilgie Mia, the entire mountain range, its foot-slopes, interfluves and valley floors should be considered as an Aboriginal site or site complex of National significance; hence this application argues that the entirety of the Weld Range, as well as the rough breakaway country adjacent to the northern facing aspect of the range should be included in this application for National Heritage Listing.'

[119] Dr Kruse makes the point that much of the research material presented in the report is in the form of first-hand statements made by knowledgeable Wajarri or other Aboriginal persons and that these have high value as anthropological research and are pertinent to the purpose of the report. Dr Kruse says, 'This logically includes the statements having high value as evidence demonstrating the basis for the Weld Range area and Wilgie Mia having ongoing significance under Aboriginal law and culture' (p 10).

[120] In light of Dr Kruse's evidence, and consistent with the approach taken with other expert witness opinions, my approach to the evidence in the NHL Report is to rely on the primary evidence from Wajarri Yamatji people and other Indigenous people, rather than the opinions expressed in the Report. It is a document prepared for a specific purpose not directly connected to these proceedings and contains opinions (some quite strong) that advocate for

the inclusion of the pink box area on the NH List, the criteria for which is different to those the Tribunal must take into account. Dr Kruse has expressed concerns about some of these opinions. Apart from the one specifically identified by him, cited above, it is not entirely clear which opinions these are because Dr Kruse was working off the Cue version of the Report which did not have page numbers and (like the Tribunal and counsel have done) he has given it page numbers which differ because of the way the electronic version was printed. Therefore, the page numbers given by Dr Kruse do not necessarily coincide with the Tribunal's version or that printed by the other parties from the USB stick.

[121] Despite these difficulties, examples of the opinions which the Tribunal has not taken into account are the following:

• Mr Pudovskis (GVP NHL Submissions para 44) has identified the following statement as probably containing one of the examples of an opinion which Dr Kruse says is an unsupported anthropological opinion (September 2007 draft p 12):

'The storylines and Dreaming tracks which pass through the Weld Range are so profound and important that they could be described as archetypes of many of the Dreamings found around Aboriginal Australia. These include the dreaming of the red kangaroo or *marlu*, the seven sisters (*minyipurru*), the rainbow snake (*gujida*) and the story of 'two women' or ngarli gutharra.'

• Figure 36 (Cue version p 43) is a photograph of Lance Mongoo at Darbabuma Rockhole which contains the following statement:

'Wilgie Mia is directly behind the high peak in the distance; to the top right of the photo caves can be seen, these feature a staggering array of rock art, mostly hand stencils in red ochre. This breakaway country is of massive importance to Wajarri people; it is a storied and peopled landscape featuring waterholes, corroboree grounds, other sacred features and perhaps the highest density pictographic rock art in southern Western Australia.'

Neither this statement nor a place for this photograph appears in the September 2007 draft. It contains a very sweeping opinion about the density of the rock art which I have not taken into account.

• The September 2007 draft (p 27) under the heading '7.a) v: Artefacts, Living Areas and Rock Art' the following appears:

"Things that belong to the old people should be left where you find them. That's Aborigine Law." (Wajarri elder Ike Simpson)

The phrase "things that belong to the old people" refers to any 'site' exhibiting material evidence of Aboriginal activity. The Weld Range, and the breakaways fringing to the north are an outstanding example of a site rich area; artefact scatters, archaic living areas and pictographic art galleries are so abundant that

they warrant National Heritage Listing in themselves, adding to this the three major ochre mines including Wilgie Mia with its spiritual significance and fame across Aboriginal Australia, one begins to recognise the Weld Range as one of Australia's most significant natural and cultural areas.'

- The opinions expressed in the NHL Report (at p 29-30) and referred to above at paragraph [116] under the dot point beginning with 'Rich living areas'
- The NHL Report objective is said to be (p 1):

'The primary objective of this report is to have the Weld Range registered on the National Heritage List. The successful achievement of this aim will require the demonstration that the entirety of the Weld Range is of profound cultural and spiritual significance to the Wajarri Traditional Owners, other Aboriginal groups and to the wider Australian population. This significance has been described through a view of the landscape from both a spiritual and practical perspective, demonstrating how Wajarri and other Aboriginal people perceive and utilise this area...In order to reach this objective this report has attempted to display that the Weld Range:

- Has outstanding heritage value to the nation through its natural and cultural history;
- Possesses uncommon aspects of Australia's cultural (and natural) history;
- Exhibits particular aesthetic characteristics valued by the Aboriginal community;
- Possesses a strong social, spiritual and cultural association that is linked to the entire extent of the area; and
- These values are both traditional values and values which are still important and practiced today.'

[122] The above statements contain a number of assertions or opinions expressed for the specific purpose of advocating NH listing of the pink box area. Dr Kruse has expressed concern about the evidentiary basis for some of these opinions and, for the purpose of my determination, I have not taken into account this opinion evidence.

[123] The principal task of the Tribunal in relation to s 39(1)(a)(v) of the Act is not, for instance, to decide whether the Weld Range is 'one of Australia's most significant natural and cultural areas', has 'profound cultural and spiritual significance' or is of 'outstanding heritage value', but whether the area of the Tenements comprises, or is part of, any area or site of particular significance to the NTP in accordance with their traditions. While a broader finding could potentially be relevant to a determination under s 39(1)(c) (other significance) or s 39(1)(f) (other relevant matters), I have taken a cautious approach to the evidence in the NHL Report in light of the factors referred to above. It may be that, if the NTP had presented its case differently, a broader finding on the opinions in the Report may have been justified and of relevance to my determination.

[124] However, leaving aside the opinions in the NHL Report, I am satisfied by the whole of the evidence that the area around Wilgie Mia and the Weld Range is characterised by the existence of caves with rock art, waterholes and old corroboree and ceremonial grounds, all of which remain of particular significance to the NTP in accordance with their traditions. There is a considerable amount of evidence in the NHL Report which corroborates the other oral and documentary evidence, particularly that given by WY people, in these proceedings and previously, relating to the importance of the Weld Range and pink box area and activities currently undertaken in relation to it. This evidence in the NHL Report relates to the following factors:

- The importance of Wilgie Mia to the Wajarri Yamatji and to Aboriginal people generally and the significance of red ochre in Aboriginal culture and tradition, including in Dreaming and cave art (pp 7, 14-17).
- The existence of breakaways adjacent to the Weld Range in which there are caves that were once living areas that contain red ochre hand stencils (p 7).
- The importance of Wilgie Mia to other Aboriginal groups and the continuing use of other in places other than the Weld Range (p 15).
- The existence of Wadarji and Mondong spirit people in the Weld Range and wider vicinity (p 11).
- The story lines and Dreaming tracks associated with the Weld Range red kangaroo (marlu); seven sisters (minjipurru); rainbow snake (gujida) and two women (ngarli gutharra) (pp 12-14).
- Visiting the area for recreation and camping (p 19).
- The gathering of bush tucker and bush medicines (pp 19-23).
- Hunting kangaroo and emu and gathering emu eggs are regular activities (p 23).
- The existence of law grounds used in the past for the practices of Wajarri Law (p 27).
- The storage of sacred boards belonging to initiated men (p 27).

[125] The Government party has criticised the NHL Report because Mr Colin Hamlett and members of his family who have special responsibility for the Weld Range area were not involved in its preparation. While it is somewhat curious that they were not involved, I do not consider this fact discredits the information collated in the NHL Report. The Report's

informants included seven WY people, two of whom (Ike Simpson and Ron Simpson) are members of the group that comprises the applicant on the WY claimant application. Further, the material in the NHL Report is consistent with the evidence given by Colin and Carl Hamlett in particular.

Evidence of Silas Piotrowski

[126] The affidavit of Silas Piotrowski is made in the following terms:

- '1. I am an archaeologist with a degree in Archaeology with First Class Honours, from The University of Queensland. I have specialised knowledge of Aboriginal cultural heritage archaeology, focusing on stone artefacts and petroglyphs (rock engravings). I have developed my knowledge of Native Title and heritage archaeology though my university studies and during an internship in 2010 and subsequent employment since January 2011 at Yamatji Marlpa Aboriginal Corporation (YMAC).
- 2. I have reviewed maps, background information, reports and research pertaining to the proposed tenements M51/543, M51/544, M51/545, M51/546 ("the Tenements"), the DIA registered sites within the Tenements, and the Weld Range in general.
- 3. Unless otherwise stated, all of the matters contained in this affidavit are within my own knowledge and are true and correct and the opinions stated are based on my research and informed opinion as an archaeologist.
- 4. On 5 May 2011 I visited the Tenements during a fieldtrip to [sic] with Wajarri Yamatji elder Colin Hamlett and his son Carl Hamlett, and YMAC Anthropologist AnnMarie Volpe ("the Fieldtrip"). I have also read the affidavit of Colin Hamlett dated 1 February 2011 (Hamlett affidavit) and of Lara Whitton dated 1 February 2011 (Whitton affidavit).

ARCHAEOLOGICAL PERSPECTIVE OF THE GENERAL WELD RANGE AREA

- 5. In my opinion, the locations we visited in and surrounding the Tenements display patterns of land and resource use that supports the accounts in the Hamlett affidavit and Whitton affidavit in what Hamlett refers to as the Weld Range (paragraph 5 Hamlett affidavit). There is clear evidence of gathering of raw lithic material (quarrying) and stone tool manufacture, rock art and evidence of food processing (seed grinding) throughout the area within and surrounding the Tenements. This is consistent with statements made in paragraphs 11 and 12 of the Hamlett affidavit, which mention these kinds of activities being commonplace throughout the area of the Weld Range.
- 6. The area called Vivienne's Granites (DIA site 28146) is north of and close to the Tenements. In this area there is a waterhole and visible rock art motifs. The form of motifs at Vivienne's Granites support the assertion in the Hamlett affidavit in paragraph 10 that the area of the Tenements contains traditional tracks from the waterhole in that location to Wilgie Mia, as they depict the locations of waterholes between there and the Weld Range.

ARCHAEOLOGICAL PERSPECTIVE OF THE AREA WITHIN THE TENEMENTS

- 7. During the Fieldtrip, I was shown by Colin and Carl Hamlett several very large areas within the Tenements where fine-grained siliceous material has been collected for the purposes of producing stone tools ("Quarries"). These areas are identifiable by the presence of outcrops where material has been deliberately broken off, and large amounts of waste material from stone tool (debitage).
- 8. In my opinion, the number of recorded sites within the areas of the proposed tenement M51/546 (with DIA site numbers 27983, 27984, 27985, 28137, 28138, 28000, 28001, 28009, 28165) under- represents what is in fact a much larger and more complex area of archaeological material and evidence of human interaction with the landscape. During the fieldtrip, it was apparent there was a large amount of archaeological material present in the proximity of these sites that has not yet been recorded or registered with the DIA.

- 9. The varying stages of weathering of stone artefacts at locations and quarried lithic material at Quarry sites indicated that these sites have been utilised over a significant period. The lithology of stone artefacts at all of the locations visited shows that people have been gathering material predominantly from the surrounding outcrops, but also transporting a small amount of material in to the area from further afield. Therefore the archaeological landscape seen in the area of the Tenements represents extremely diverse pattern of continued and varied land use over a considerable time frame, by people from a large geographical area.
- 10. Due to their size and distribution, and apart from where vehicle tracks have already been cleared, the fact that the archaeological sites I have visited within the Tenements remain almost undisturbed makes them extremely valuable in terms of their archaeological research potential. Therefore, these sites in particular represent areas of high archaeological significance and importance. It is my opinion that any ground disturbing activity in any of the areas within the Tenements would undoubtedly and unavoidably result in the destruction of large amounts of archaeological material. This is made clear by the fact that most the archaeological material, in particular the chert outcrops from which material has been quarried, are themselves immovable, therefore leaving no possibility for these areas to be salvaged or relocated.
- 11. Only a small section of the Tenement area appear to have been surveyed and there are likely to be many more archaeological sites and objects of significance found. It is also possible that burial grounds could also be found in the Tenement areas and these would also be of great significance to the Wajarri Peoples. It is important that there should be surveys carried out and monitoring of any ground disturbance so as not to damage such sites, objects and ancestral remains.
- 12. Further, the archaeological significance of the area of the Tenements is greater than the individual artefacts or Quarry areas within them. Heritage principles, such as those set out in the Burra Charter which is annexed hereto and marked "SP1", recognises the cultural significance of places which include more than individual archaeological objects and sites of such objects but also the wider settings and physical locations, uses, meanings and connections with related places and objects. These are often encapsulated in the concept of cultural landscapes. Conservation principles include safeguarding such places, related places and objects and retaining the cultural significance. The physical location of a place is part of its cultural significance and components of a place should not be relocated and any disturbance to the fabric of a place should be minimised. Contents, fixtures and objects which contribute to the cultural significance of a place should be retained at that place. The preservation of the Quarry areas with most of its artefacts in place is important for the proper conservation of the significance of the Weld Ranges area. Annexed hereto and marked "SP2" is an article by Dr Luke Godwin and Professor James F Weiner which sets out fairly typical current archaeological understandings and examples of the important associations between archaeological objects and the cultural landscapes of which they form a part.

ARCHAEOLOGICAL PERSPECTIVE OF THE AREAS CONNECTION WITH THE WILGIE MIA AREA

- 13. In addition, the area around and including Wilgie Mia and Little Wilgie Mia has been listed on the National Heritage List. Annexed hereto and marked "SP3" is the gazette notice for the listing of the Wilgie Mia area on the National Heritage List and annexed hereto and marked "SP4" is the public information about Wilgie Mia as found on the Australian Heritage Database. This area is not within the Tenements but in my opinion, the area of the Tenements is part of the same cultural landscape of the Wilgie Mia area. The importance of the Wilgie Mia includes the cultural associations such as its connection to the dreaming stories and tracks, initiation tracks, relationships with spirit beings, and the rituals and cultural practices surrounding the gathering of ochre and the methods and controls of access to the area.
- 14. As a result, the significance of the Wilgie Mia area also includes the areas of the cultural practices related to it, such as, places away from Wilgie Mia where people camped when approaching or leaving Wilgie Mia, dreaming and initiation tracks and the like and the archaeological significance of such areas is further enhanced. It is of archaeological and cultural value to maintain and preserve the whole landscape, including its aesthetic integrity, as far as possible.'

Consideration of the evidence of Silas Piotrowski

[127] Mr Green has challenged Mr Piotrowski's creditability on the basis that he is only a recent university graduate and that he is not aware of his responsibility as an expert witness who must be independent of the parties and has a primary duty to a Court (or Tribunal). In particular, Mr Green says, there is no evidence that, as an expert, he was referred to the Federal Court of Australia's Practice Note CM7 'Expert Witnesses in Proceedings in the Federal Court of Australia' (25 September 2009) so as to be aware of his duty to the Tribunal. Mr Green also contends that Mr Piotrowski gave his evidence with knowledge (and reference to) the affidavits of other witnesses and that the Tribunal should infer that he has been involved in the preparation of the NTP's case as a whole, not just the provision of his opinions. Mr Green says that, in some respects, Mr Piotrowski's evidence is argumentative or partial (e.g. in paras 11 and 12) and he draws conclusions as to ultimate issues (para 10) and so it should not be received or given any weight (GP Final Submissions, Schedule A para 18).

[128] Mr Pudovskis objects to paragraphs 5 and 6 of Mr Piotrowski's affidavit on the basis that the evidence is more in the nature of a legal submission rather than an expert opinion: Mr Piotrowski had assumed what was properly the task of the Tribunal by comparing two sources of information and deciding whether they are consistent or not.

[129] In my view, there is no legitimate objection to the admission of Mr Piotrowski's evidence, on the basis that the Tribunal is cognisant of the fact that Mr Piotrowski is employed by YMAC and a recent graduate when assessing the weight to be given to it. Mr Green did not take the opportunity to cross-examine Mr Piotrowski about the limits of his expertise or his knowledge of his responsibilities as an expert witness. In my view, his affidavit and oral evidence do not exhibit advocacy characteristics of such a nature as to call it into question, and he has demonstrated sufficient expertise to give the evidence he has. The information contained in paragraph 5 is not really in dispute. Paragraph 6 contains an expression of opinion on the effect of the rock art motifs in indicating the direction of tracks based on waterholes and is an expert opinion which, in any event, is confirmed by Mr Colin Hamlett.

[130] Mr Piotrowski's evidence in paragraphs 7 to 9 is consistent with other evidence, including from the Eureka Survey, of the presence of Aboriginal people in considerable numbers over a long period of time in the Weld Range and its vicinity.

[131] Mr Green challenges Mr Piotrowski's evidence on the basis that contrary to his statement (para 2) that he has reviewed maps, background information, reports and research pertaining to the Tenements and his assertion (para 10) that the sites remain almost undisturbed, there is evidence of a report available from the Western Australian Mineral Exploration Index (WAMEX) of substantial rock chip sampling having occurred over the Tenement area in 1993-1994 and 1976 (GP 146). The evidence establishes that there has been a considerable amount of exploration done over the Tenement area and, on that basis, I accept that there may have been some rock chip sampling which has previously affected the quarry sites on the Tenement area. Apart from this qualification on Mr Piotrowski's evidence, it has not been substantially contradicted by evidence from the Government party or grantee party.

[132] There is no direct evidence to contradict Mr Piotrowski's opinion (para 10) that the archaeological sites within the Tenements are of high archaeological significance and importance because of their size and value for research potential. This opinion is corroborated by the affidavit evidence of Victoria Winton, whose experience and expertise is greater than that of Mr Piotrowski.

[133] Dr Winton deposes that she holds a BA Hons in Archaeology and Anthropology from the University of Oxford, United Kingdom (UK) and a D.Phil. (i.e. a Doctorate) in Palaeolithic Archaeology from the University of Oxford, UK. She is currently employed as a Senior Archaeologist and Project Manager at Eureka Archaeological Research and Consulting, University of Western Australia, a position she has held since June 2008. She has acted as Project Manager for the Sinosteel Weld Range Project since October 2009 (para 1). She says the statements in her affidavit are made from her knowledge of Aboriginal archaeology gained through advanced study and experience of Weld Range archaeology gained as Project Manager for Sinosteel's Weld Range Project (para 2). At paragraph 5 she says:

'The Nationally Heritage Listed Aboriginal ochre mine of Wilgie Mia is located approximately 7 km southwest of the tenements. The archaeological signature of the tenements is relevant to the interpretation of past Aboriginal use of the Wilgie Mia and as such, the results of surveys for Aboriginal archaeological material within the tenements would potentially be of State and National significance.'

[134] Although the Eureka Report says that no conclusion should be drawn about the archaeological significance of the area from its survey (because, I infer, it used the site avoidance methodology not site identification - see below), Dr Winton (as its Project Manager since October 2009) agrees with Mr Piotrowski about the significance of quarry

sites on the Tenement area from an archaeological perspective. The Eureka survey results also confirm Mr Piotrowski's evidence about the existence and extent of the quarry sites and that there are likely to be more of them in the Tenement area.

[135] Mr Green submits that any significance attributed by Mr Piotrowski to the quarries on the Tenements is on the basis of research potential. Mr Green contends that the research potential of an archaeological site is inherent in its physical state and that once that physical state is recorded, the archaeological significance is preserved and there is no requirement for the site to remain at its original location. Mr Green submits that it is the results of heritage surveys which are of significance as opposed to the archaeological site itself and that once the results have been captured the significance rests with the results (GP Final Submissions para 12).

[136] Ms Tan rejects the argument that the significance of the sites can simply be dealt with by an archaeological survey and salvaging as this is not the significance of them to the Wajarri Yamatji people. Their interest in the quarries and objects is that they are the tools of the ancestors and vital for passing on tradition (TR p 365).

[137] While there is no actual evidence to support Mr Green's contentions, I am aware as a specialist Tribunal that archaeological sites such as quarries, artefacts and scatters are disturbed or destroyed where they cannot be avoided and appropriate recording made of the material in accordance with the advice of the Aboriginal Cultural Material Committee (ACMC), following Ministerial approval for the interference. However, I am also aware (as is confirmed by the Eureka Survey recommendations) that, where possible, sites of this kind should remain undisturbed (see below).

[138] It is not necessary to decide on the level of archaeological significance of the quarry sites for the purposes of my determination. In my view, Mr Piotrowski's evidence supports a finding that there are quarry and artefact sites in the area of the Tenements which were utilised for some considerable time in the past by Aboriginal people and which have archaeological significance for their research potential. His evidence is corroborative of the fact that the quarry site or sites identified at Quarry Stops 1 and 2 is an Aboriginal site as defined in s 5 of the *Aboriginal Heritage Act* which it would be an offence to disturb unless permission is given under s 18 of that Act (see below).

[139] Ms Tan is correct to say that the issue is not whether these sites have significance for their archaeological research potential but whether they are areas or sites of particular significance to the NTP in accordance with their traditions. The evidence of Mr Piotrowski on its own is not a sufficient basis to make a finding that the quarry at Stops 1 and 2 or other sites identified in the Eureka Survey which are within the Tenement area are sites of this kind. The Tribunal's approach in previous determinations has been to accept that some sites more readily qualify as an area or a site of this kind because of their nature as, for instance, mythological, ceremonial or burial sites. In other cases, such as artefact, scatter and quarry sites, a decision on their significance depends on evidence from a NTP. In this case, based principally on the primary evidence of the WY people, I have found that the quarry sites identified on the Tenement area are of particular significance to the NTP in accordance with their traditions (see below).

[140] Mr Piotrowski (para 12) refers to the principles of the Burra Charter attached to his affidavit. The Charter is based on the International Charter for Conservation and Restoration of Monuments and Sites and Resolutions of the International Council on Monuments and Sites (ICOMOS). The Burra Charter was adopted by the Australian National Committee of ICOMOS on 19 August 1979 at Burra, South Australia but not given legislative force. It applies to all places of cultural significance, including Indigenous places with cultural values, and refers to the physical location of a place being part of its cultural significance (Article 9); says that contents, fixtures and objects which contribute to the cultural significance of a place should be retained at that place (Article 10) and that the contribution which related places and related objects make to the cultural significance of the place should be retained (Article 11). In general, I accept that the principles of the Burra Charter which support the desirability of maintaining heritage material in its location to ensure its cultural integrity need to be considered, as Mr Piotrowski says, in their overall setting. This applies in the context of a place such as the Weld Range and the numerous attributes it has as a place of cultural importance to the WY and other Aboriginal people and the places which are part of, or related to it. However, these principles need to be considered in the context of the whole of the evidence before the Tribunal and the other important factors which the Tribunal is required to consider and weigh in the balance. The Burra Charter principles are not decisive but express the desirable outcome that places of heritage importance, including Indigenous heritage, must be considered not in isolation but in their overall setting. This can hardly be said to be an unusual or contentious proposition as a general principle. Placing a fence around the Vatican while constructing a coal power fired station next to it is not likely to preserve its cultural integrity. In the context of this case, it would be artificial to say that the Weld Range area generally is an important heritage area which stops at the boundaries of the Tenements.

[141] Mr Piotrowski (paras 13 and 14) refers to the Tenement area being part of the same cultural landscape as the Wilgie Mia area. This is another way of referring to it as part of a site complex, an issue which I have already considered. His evidence about the importance of Wilgie Mia and the cultural practices associated with it in surrounding areas, including the pink box area, is established by evidence from the WY people.

[142] Mr Piotrowski (para 12) also refers to a paper by Luke Godwin and James F Weiner, 'Footprints of the ancestors: the convergence of anthropological and archaeological perspectives in contemporary Aboriginal heritage studies' (in Bruno David (ed) et al, 'Social Archaeology of Australian Indigenous Societies', The Canberra: Aboriginal Studies Press, 2006, Chapter 9, pp 124-138). It is not necessary to analyse this paper in detail. Its main thesis was not the subject of contrary evidence and, for the purposes of my determination, I have had regard to it to support the common sense proposition that archaeological sites can have contemporary cultural significance. The extent to which this is the case will depend on the evidence, particularly from the WY people.

[143] On 22 June 2011, late in the proceedings (NTP Closing Submissions) the NTP also submitted into evidence two academic papers that consider the modern practice of archaeology as requiring consideration of social, political and cultural factors: Anne Ross et al, 'Archaeology, Cultural Landscapes, and Indigenous Knowledge in Australian Cultural Heritage Management Legislation and Practice' (NTP 46) and Dale Kerwin PhD, 'Aboriginal Dreaming Tracks or Trading Paths; The Common Ways', dissertation, January 2006 (NTP 48).

- [144] I have not found it necessary to consider these papers in detail. Nor have I given great weight to them but I note there is nothing in the opinions expressed therein which suggests that my findings about the special significance of the Weld Range or pink box area is wrong.
- [145] The Ross paper contains a critique by reference to a case study from North Stradbroke Island, Queensland, of current approaches to Aboriginal cultural heritage management under existing legislation, which focuses on archaeological outcomes rather than considering a broader concept of cultural landscapes. The paper supports a concept of heritage that 'incorporates tangible places, such as archaeological sites; intangible heritage, such as stories,

songs and ceremonies, often set in the physical landscape as non-bounded places, such as broad cultural landscapes that were created by spiritual beings who occupied these landscapes in the distant past (the Dreaming); and living traditions played out as contemporary activities, such as hunting'. The paper states that a site focus to heritage management does not accord with Aboriginal understandings of place. The NTP (Closing Submissions para 29) says that cultural landscapes and site complexes are well known in anthropological literature and proffers the case described in this paper as an example. Suffice it to say that the Tribunal's task under s 39(1)(a)(v) of the Act involves consideration of a site or area which is not confined to a narrow heritage approach but involves an analysis based on its particular significance according to the traditions of the NTP.

[146] The Kerwin dissertation was part of a PhD thesis and a document to which I have not given detailed consideration. Relevantly it again contains what I would regard as unexceptional evidence particularly about the association of Dreamtime stories with the movement of Aboriginal people around Australia including along trading routes. It is corroborative of the specific evidence in this case about the Dreaming stories related to the Weld Range and the importance of trade in ochre associated with them.

Previous expedited procedure objection determinations of the Tribunal relating to the Weld Range area

[147] The Tribunal has made a number of expedited procedure objection determinations in relation to exploration licences in and around the Weld Range area, all of which were determined 'on the papers'. In paraphrase, s 237 of the Act says that a future act is an act attracting the expedited procedure if the act is not likely to interfere directly with the carrying on of the community or social activities of the native title party (s 237(a)); is not likely to interfere with areas or sites of particular significance in accordance with their traditions to the native title party (s 237(b)); and is not likely to involve major disturbance to any land or waters or create rights whose exercise is likely to involve major disturbance to any land or waters concerned (s 237(c)).

[148] Section 146 of the Act says the Tribunal may, at its discretion, receive into evidence the transcript of evidence of any other proceedings before the Tribunal (and other bodies) and draw any conclusions of fact from that transcript that it thinks proper (s 146(a)); and adopt any relevant report, findings, decision, determination or judgement from such bodies (s 146(b)).

[149] In the determinations considered in this section there was no actual transcript of evidence as the determinations were made 'on the papers', including affidavit evidence. Although there is no express statutory power to do so, the Tribunal as an administrative body is entitled to have regard to evidence that has been given in another proceeding, provided the evidence is relevant (in *re A Solicitor* [1993] QB69, 77; *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126; (2008) 107 ALD 316). I have had regard to evidence and adopted findings from these following cases where relevant.

[150] WO01/179 & WO01/180 - Walley v Western Australia [2002] NNTTA 24; (2002) 169 FLR 437 (Walley): This objection concerned a large exploration licence over an area of 207.58 square kilometres, 46 kilometres north of Cue. Most of the area is within the pink box at its eastern end. Sworn affidavit evidence was provided by Mr Colin Hamlett, Ike Simpson and Lance Mongoo, all elders recognised under traditional Wajarri laws as speaking for and knowing the sites and traditional stories of the area around Wilgie Mia. Mr Colin Hamlett and Ike Simpson are named applicants on the Wajarri Yamatji claim (WC04/10).

[151] At its closest point it is just over 10 kilometres from the Tenement area. The Tribunal found that the expedited procedure was not attracted based on s 237(a) of the Act. Evidence of the enjoyment of native title rights and interests which also constitute the NTP's community and social activities were given by the witnesses for the NTP. The evidence of the community and social activities of the native title party of hunting, camping and collecting bush tucker were of such a frequency and kind that exploration was likely to directly interfere with them (at [44]–[45]). Even though some distance from the Tenement area, I have relied on this evidence in a limited way. While it is corroborative of evidence given for the present proceedings, my findings are based principally on the direct evidence of the enjoyment of native title rights and interests given by the NTP in the proceedings at hand.

[152] With respect to s 237(b) of the Act, in *Walley* the Tribunal made the following findings (at [56]):

'My findings in relation to this evidence are that the Weld Ranges is a significant area to the native title party in accordance with its traditions and that there are sites of particular significance within them including Wilgie Mia. Jungar Pool may also be such a site. However, none of these sites are on the area of the tenement. Weld Ranges are 5-10 kilometres to the north-west of the edge of the tenement and Jungar Pool is some 2 kilometres to the east. There is no specific evidence of sites of particular significance on the tenement itself.'

[153] Relevant evidence about the significance of the Weld Range area comes from the affidavits of Colin Hamlett, Ike Simpson and Lance Mongoo as follows. Mr Colin Hamlett deposes to the fact that the tenement area is located in the vicinity of Wilgie Mia, the Weld Ranges and is an area of special importance to Wajarri and other Aboriginal people (para 2). He goes on to say:

- '14. One of the largest ceremonial areas in the Wajarri area is located in the Weld Ranges. People would come from all over to corroborrees at this place, there would be people from the *wanmalas* in the desert and Badimias and all different Wajarri people as well as coastal people coming to the ceremonies there. They camped all around the area and including within the tenement area.
- 15. Years ago my brother dug up a boomerang whilst we were camping in the Weld Ranges right near the tenement area and that must have been left by one of the groups camping there. Often after ceremonies people would bury important items and it is important that these are not disturbed. If he dug one of these up then there must be lots more artefacts buried in and around the area.
- 16. When I was a young boy and would dig sand up in the ground, my parents or any other adults would push the pile of dirt down and stop me from digging saying that I was killing people by burying them. This is part of our traditional Wajarri beliefs. If people dig up the ground near Wilgie Mia and the Weld Ranges, then this could affect those sites and have serious effects for Wajarris and other tribes.
- 17. There are lots of *wudajis* and *mundungu* [spirit people] that live in the hills of the Weld Ranges. They live in the hills and the caves of the area. That's their home. These people are little hairy men/spirits. If *wudajis* get upset then they upset Aboriginal people and they will make you get sick, sometimes they give people a flogging or they throw them out of bed and they're quite cheeky and will tip water out of containers, burst water bags or put holes in water containers.
- 18. If there are holes drilled or bush cleared within the tenement area then *wudajis* and *mundungu* could get upset and they could cause problems for us Wajarri people but also people that are doing exploration work in the tenement area.
- 19. We were told by old people and we teach our young people that they need to look after country especially areas that are very important such as the Weld range area and we need to prevent these from being damaged.
- 20. Some Wajarri people won't camp in the Weld Ranges by themselves or when there's only one or two people by themselves, and will only camp there in large groups because there are so many *wudajis* and *mundunu* there.
- 21. One time I camped in the Weld Ranges a few years ago with other old Wajarri man and a white person, the other Wajarri man I was with kept the fire going all night and wouldn't sleep because he was scared of the *wudajis* there.'

'Affidavit of Ike Simpson

- 4. Wilgie Mia and the Weld Ranges are some of the most important places and areas in Wajarri country. There is a dreaming story about Wilgie Mia and the Weld Ranges. A marlu [red kangaroo] from Kalbarri was speared towards the coast, it traveled east followed hills east and went to Barluwidi out of Twin Peaks then Junyidi just out from Meeka Station, to Mt Aubury and then to the Weld Ranges at Wilgie Mia where it stopped there and that is his blood at Wilgie Mia. The Dreaming keeps going along the Weld Ranges, through to Wiluna and Warrakuna. The story connects a lot of different groups and it is important to them as well.
- 5. Jungar Pool is an important place that is right next to the tenement area. Lots of Wajarris go camping there and hunting around there. There's always water in that pool and it's a good place to camp at. When Wajarris camp there they often visit the tenement area to

- get some *marlu*, *guwiyari or yalibirr* [emu], or collect other bush foods, because its right next to the pool.
- 6. The area in and around the tenement area, including Jungar Pool, Wilgie Mia and the Weld Ranges is one of the most visited and important areas for Wajarri people.
- 7. There are corroborree grounds in and around the Weld Ranges, which are right next to the tenement area.
- 8. Wilgie Mia ochre goes all over the country, it is important because it is used for painting in corroborrees and it is still used today.
- 9. Wajarri people still collect the ochre from Wilgie Mia and trade it with others. The ochre is used all over the country.
- 10. Other groups expect Wajarri people to look after that area and would be upset if they did not look after the area. We could get into trouble if the area is not looked after.
- 11. There are also lots of old camps in the Weld Ranges. When the old people came down for corroborrees there they would camp all around the Weld Ranges, including the tenement area.
- 12. A lot of *wudargis* live in the hills in the area and the rockshelters there. *Wudargis* are little spirit people. They are cheeky fellas. If people go drilling in or around the hills in the tenement area then that could upset the *wudargis*, they wouldn't want to stop there with all the noise and could cause trouble or get scared away.'

'Affidavit of Lance Mongoo

- 13. The Weld Range area is very important for Wajarris and also for Aboriginal people all around Australia. It is important because of Wilgie Mia and the dreaming stories about the Weld Range. The Weld Range is connected to the hills at Yalgoo and also to the hills at the west side of Wiluna. The dreaming goes out to the desert, the mob in the desert have the story about the sturt pea that comes from the Weld Ranges. Even the people at Yallatha in South Australia have a dreaming that comes from the Weld Ranges.
- 14. You can get good ochre from Wilgie Mia, people use it all over Australia and it gets traded across Australia. There's a plant in Queensland, that only grows in the Weld Range, the seed must have been taken over there with ochre from the Weld Range.
- 15. It's good ochre because it doesn't burn your skin and it's still used today in ceremonies and for dancing.
- 16. There are lots of Wudajis [spirit people] that live in the Weld Ranges and in the hills and caves in and around the tenement area. They would be in Beebynbeebynganna Hill too.
- 17. Wudajis are spirit people that live in the area and they can be cheeky if you upset or disturb them or if you go too close to where they're living.
- 18. A while ago when we were camped near the tenement area. We were camping there with my wife and 3 boys. We had about 30 kangaroo tails on the bonnet, 3 pots of sheep tripe on the coals and a camp oven full of kangaroo meat on the coals as well. We went to bed that night and in the morning all of the pots with the tripe had been dragged off the coals and two of them had been emptied with their lids thrown to the side and there was only one pot of tripe left. The camp oven with the kangaroo meat it it had been picked up and turned around because the handle was in the wrong way and the lid was opened up so it as only partially covering the pot and all of the meat had been taken out from the camp oven.
- 19. The Wudajis must have come and taken all the meat. They do things like that sometimes, they're very cheeky. They will take cooked meat but they mustn't have taken the kangaroo tails because they weren't cooked yet.
- 20. There were no tracks or anything around the pots, it was like something had come out of thin air and taken the meat. I looked everywhere for tracks, but could not see any tracks anywhere. It would have been impossible for a fox or dingo or anything to move the camp oven off the coals, because the coals were hot all night and foxes can't just turn around a pot like that and lift the lid half off a cast iron pot. My wife hasn't been camping back in that place again since then, but I still go out there.'

- [154] The findings and evidence in this matter confirm, among other things: the significance of the Weld Range area and sites within it including Wilgie Mia to the Wajarri Yamatji and other Aboriginal people; that the past camping places of persons who came to Wilgie Mia for ceremony and other purposes existed outside the Weld Range itself; and the belief in the *wudajis* and *mundunga* spirit people who live in the Weld Range and surrounding area and who may be upset if disturbed.
- [155] Robin Boddington and Others on behalf of the Wajarri Elders (WC01/3)/Western Australia/Hampton Hill Mining NL, NNTT WO01/486, [2002] NNTTA 43 (11 April 2002), Hon C J Sumner (Hampton Hill): This objection concerned an exploration licence over an area of 12.21 square kilometres, 55 kilometres north of Cue. The area is directly below the Wilgie Mia Aboriginal Reserve and partly covers the NHL area. The Tenements are approximately 8 kilometres to the north of it. Affidavit evidence in similar terms to that provided in Walley was provided by Colin Hamlett, Ike Simpson and Lance Mongoo. The Tribunal made a similar finding to that in Walley in respect of s 237(a). With respect to s 237(b) the Tribunal adopted findings relevant to the significance of the Weld Ranges from Walley (at [53]–[56]) and found that the exploration licence was located within an area of particular significance to the native title party in accordance with their traditions and that there are likely to be sites of particular significance within the tenement area itself (at [14]–17]). The Tribunal also found that the protective measures based on the AHA were not adequate to make it unlikely that there would be interference with areas or sites of particular significance. The Tribunal found the expedited procedure not attracted on both grounds.
- [156] Robin Boddington and Others on behalf of the Wajarri Elders/Western Australia/Richmond Resources Pty Ltd, NNTT WO02/87, [2002] NNTTA 236 (18 November 2002) Hon C J Sumner (Richmond Resources): This objection concerned an exploration licence (E20/473) over an area of 18.27 square kilometres, some 39 kilometres north-west of Cue. It is some 15 kilometres to the south of the pink box area, approximately 40 kilometres from Wilgie Mia, between Weld Range and Walga Rock, and 50 kilometres from the Tenement area. The Tribunal found that the expedited procedure was not attracted on the basis of s 237(a) and s 237(b) of the Act. With respect to s 237(a), the Tribunal found nothing of significance to distinguish it from Walley (at [17]).
- [157] Affidavit evidence of Colin Hamlett, Ike Simpson and Lance Mongoo was before the Tribunal, much of it in similar terms to that in *Walley*. Despite the distance from the Tenement area, some aspects of Mr Colin Hamlett's affidavit are of relevance in these

proceedings because it contains similar characteristics about not just the Weld Range but a larger area around it.

'[13] Affidavit of Colin Hamlett

- 7. The tenement area is located between Walga Rock and Wilgie Mia, which are both areas of special importance to Wajarri people. The old people used to go all through that country in the tenements area, camping there and walking between Walga Rock and Wilgie Mia. Wilgie Mia is important not just to Wajarris but to Aboriginal people all around the state, to *Wanmalas* in the desert and *Marlbas* in the Pilbara. It is one of the most important areas in Wajarri country and the stories and the ochre from the Weld Ranges go all the way out to the Western Desert.
- 8. The tenement is also close to Walga Rock which is an area that is an important rock art site for Wajarri people. That's part of my country. You can see Walga Rock from the tenement area that's how close it is. The Old people used to walk and hunt and camp all through there.
- 9. There are lots of sites all through the country between Wilgie Mia and Walga Rock. The area of the tenement is covered in rocky outcrops and breakaways. It is really old country all full of *nunggas*, that's a Wajarri word for caves, its doesn't matter how big or small they are. There could be anything in those caves, the old people used to camp in them and do paintings in them, like they did at Walga Rock. We found some rock art in a little *nungga* when we went out to the tenement just walking around.
- 19. We drove around the tenement area and saw that there were lots of rocky outcrops and breakaways full of *nunggas*. There would be more rock art in any of them, or artefacts scattered close by. We didn't have time to stop and look in all of them, you would need a proper heritage survey to do so.
- 20. These sites are important to us Wajarri people because they are part of our culture and our history. They are connected to our dreaming stories and our connection to this country. They are important because they are part of how we pass on our traditions and culture to the next generations, we can take the young ones there and teach them about these places and the stories that go with them.
- 21. There are lots of these old camping places and art sites within the tenement area that are important to us. This breakaway country is the type of country that you find these sites. Just because we were not able to document all of these places because we did not have the time during this trip, does not mean that they are not important to us. This is our country and this is how we feel and no one can take that away from us.'

[158] The Tribunal's findings, which I adopt, were:

- '[19] With respect to sites on the balance of the tenement, the evidence is that it lies between Wilgie Mia some 40 kilometres to the north and Walga Rock some 10 kilometres to the south. The Tribunal has already found the Weld Ranges is a significant area to the native title party in accordance with their traditions and that Wilgie Mia (a source of ochre) is one of the sites of particular significance within the Ranges. It is an area and site of significance to all Aboriginal people in the general region (see WO01/180 at paras [53]-[56] and WO01/486 at paras [14]-[17]). The evidence in this matter is that Walga Rock is also a site of particular significance being an important rock art site (Colin Hamlett paras 7-9; Lance Mongoo para 9).
- [20] The question to be decided is whether the evidence establishes on the balance of probabilities that there are other sites of particular significance to the native title party in accordance with their traditions on the tenement area. In my view it does, even though the precise location of each site is not identified. The basis for this finding is that the tenement is

located between two areas of acknowledged significance and the topography of the area suggests that there are other caves (nunggas) with paintings similar to those at Walga Rock or the site photographed by Ms Savage. The evidence establishes that in the past old people from the Wajarri group walked and camped through the area of the exploration licence. The area is covered by rocky outcrops and breakaways which contain caves which probably have rock art in them (Colin Hamlett – paras 7-9, 19-21; Lance Mongoo – para 11). Mr Hamlett (para 40) also deposes to the existence of wudajis and mundungu [spirit people] which live in the hills and the caves of the tenement area which is corroborative of the fact that there are sites of particular significance on the area apart from the rock art cave inspected on 25 August 2002. A site of particular significance under s 237(b) is one of special or more than ordinary significance and the nature of the significance must be capable of identification (see cases cited in WO01/180 at [22]). The evidence supports a positive finding on these matters.'

[159] The Tribunal determined that the expedited procedure was not attracted based on s 237(b) of the Act, including that the site protection regime based on the AHA was not sufficient to make interference with an area or site of particular significance to the native title party unlikely. The area the subject of the determination in *Richmond Resources* is some considerable distance from the Tenement area and not even within the pink box area. Despite this, I consider it of some relevance as it confirms that many of the matters which are important to the NTP in relation to the Weld Range and the Tenement area extend a considerable distance beyond the pink box area to the south. The evidence confirms the past occupation of the area, the existence of camp sites, cave paintings and Dreaming stories and highways associated with the area which in turn are connected to Wilgie Mia and the Weld Range and are of current traditional significance to the NTP. The features in this area also exist in the pink box area to the north of the Weld Range proper and in the vicinity of the Tenement area.

[160] The Government party provided a report by Esmee Webb, Centre for Human Genetics, Edith Cowan University 'Rock Art of the Cue Region', 1999 (GVP 48) which deals with a survey over a wide area extending from Cue to Walga Rock and to the Weld Range. It includes areas the subject of the *Richmond Resources* determination and is a further testament to the large number of Aboriginal sites in the area and the importance of 'breakaway country' as a location for these sites. Breakaway country is described as common in the Murchison Basin and sometimes runs for kilometres and contains hundreds of shelters.

[161] Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd, NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), John Sosso (Bacome): This objection concerned an exploration licence (E20/475) over an area of 61.02 square kilometres 60 kilometres north-west of Cue. It is wholly within the pink pin area, approximately 20 kilometres to the south-west of Wilgie Mia and 30 kilometres from the Tenements.

Affidavits of Ike Simpson, Colin Hamlett and Lance Mongoo in similar terms to those provided in *Walley*, *Hampton Hill* and *Richmond Resources* were before the Tribunal.

[162] The Tribunal found that the expedited procedure was attracted. With respect to s 237(a), the Tribunal was influenced by the fact that the community and social activities which were accepted to exist also took place over a very wide geographic area (at [44]).

[163] With respect to s 237(b), the Tribunal found that the evidence did not establish existence of any sites of particular significance in the exploration licence area (at [48]). Member (now Deputy President) Sosso reviewed the Tribunal's determinations in *Walley, Hampton Hill and Richmond Resources* and the evidence before him to come to the following conclusions:

'[26] In the earlier Walley determination, Deputy President Sumner inquired into a proposed tenement located south of the one considered in Hampton Hill. He made the following finding (at 466): "the Weld Ranges is a significant area to the native title party in accordance with its traditions and that there are sites of particular significance within them including Wilgie Mia.' The evidence about Wilgie Mia and the Weld Range he considered is substantially the same as that before me in this inquiry. I have reached the same conclusion, namely that Wilgie Mia and the surrounding area is of particular significance within the meaning of section 237(b) whereas the Weld Range area in general is an area of significance. It may well be that other sites within the Range, or much larger areas of the Range, will be found to be of particular significance. However that is a matter to be determined in future expedited procedure objection inquiries and on the basis of the material presented. On the evidence in these proceedings I am not prepared to find that the whole of the Weld Range is a "site rich" area, such that the whole of this landform is of particular significance within the meaning of section 237(b). Not only would such a finding go beyond that made by Deputy President Sumner in Walley but, in addition, such a finding cannot sensibly be made on the material I have before me. The focus of the evidence about the Weld Range is directed towards the eastern section in the region of Wilgie Mia. Certainly there are statements in some of the affidavits about the importance of the western sections of the Weld Range (see eg para 10 of Mr Simpson's affidavit), and particular sites in that region (eg para 11 of Mr Simpson's affidavit), but the cumulative effect of the evidence is not such that it would sustain a finding that the whole of this substantial range area is of particular significance. Finally there are three practical difficulties presented with contentions that the Weld Range is an area of "particular significance", namely:

- (a) no party has clearly defined the geographic extent and outer boundaries of the Range;
- (b) the native title party has not sought to explain what the deponents mean when they refer to the Range. In particular it is not clear if the deponents have a wider or narrower concept of the Range area than that which normal mapping would ascribe to it; and
- (c) at no stage has any of the parties clearly indicated to what extent the proposed tenement overlaps the Range area pursuant to (a) or (b) above if, indeed, there is a difference between (a) and (b).

[27] In this, as in other inquiries, the Tribunal applies a "common sense" approach to the evidence presented and I have proceeded on the basis that there is, in fact, a slight overlap between the proposed tenement and the Range. Nonetheless, if there was to be a finding that the whole of the Range was of "particular significance" in this or any other inquiry, it would be incumbent on the party so contending to present to the Tribunal and the other parities, specific evidence about the area that would be potentially impacted upon. To contend that a Range area is of "particular significance" without unambiguously explaining the geographic area involved is not helpful and militates against any such finding by the Tribunal.

[164] These findings of the Tribunal are relied on by Mr Green to say that the situation before the Tribunal is not dissimilar to that described by Member Sosso (para 12.36 GP Final Submissions 22 June 2011). He says that while the NHL Report refers to a number of areas or places of significance which are Aboriginal sites under the AHA, the Report 'is not by any measure' sufficient to ground a finding that the whole of the pink box area is of such significance that the existence of the Tenements within it justifies the denial of the grant or is otherwise a matter of weight for the Tribunal. For the reasons further elaborated on below, I reject this submission. DP Sosso correctly pointed out that his determination was based on the evidence before him and that further evidence could lead to a different finding. The area claimed to be of particular significance is now delineated by the evidence provided by the NTP in this matter and the NTP has made clear their understanding of the Weld Range area. In the present matter, I have had the benefit of more extensive evidence, I have heard oral evidence and undertaken the site visit. The evidence confirms Member Sosso's findings at [67], which I adopt, that this general area of Western Australia contains many camping grounds, ceremonial grounds, caves, rock holes and rock paintings. The affidavit evidence of Ike Simpson in *Bacome* (at [6]-[16]) confirms the importance of Wilgie Mia and the Weld Range and the evidence of camping and corroborree grounds which were used by Aboriginal people, particularly when travelling to the Weld Range, and also confirms the existence of caves and paintings in the breakaway areas.

[165] Ike Simpson & Ors on behalf of the Wajarri Yamatji/Western Australia/Peter Andrew Wiltshire, NNTT WO08/299, [2009] NNTTA 119 (6 October 2009), Daniel O'Dea (Wiltshire): This objection concerned an exploration licence (E20/666) over an area of 27.64 square kilometres, 55 kilometres north-westerly of Cue. Just less than a half of the area is within the pink box area. It is located some 40 kilometres to the south-west of the Tenements and some 30 kilometres to the south-west of Wilgie Mia. The Tribunal found that the expedited procedure was not attracted on the basis of s 237(b) of the Act: the site protection regime based on the AHA was not sufficient to make interference with an area or site of particular significance to the native title party unlikely.

[166] The Tribunal had regard to the statement (not sworn affidavit) of Carl Hamlett and Brendan Hamlett in the following terms:

'Statement of Carl Hamlett and Brendan Hamlett

1. We are the members of the Wajarri Yamatji people. Our father, Colin Hamlett, is an Applicant of the Wajarri Yamatji native title claim (WAD6033/98). He is recognized under the traditional Wajarri laws as winja/bardani [elder].

- 2. Our family speaks for the country, knows the country and belongs to the country including the Weld Range and the tenement E20/666.
- 3. We know the tenement area well, and we visited it as recently as last weekend.
- 4. We know the area in and around the tenement area. It is part of our country.

Site of Significance

- 5. The tenement area lies just south of the Weld Ranges. It in country that the old people from the old days would travel past frequently.
- 6. The tenement contains an old law ground. The area registered with the Department of Indigenous Affairs ("DIA") as the 'Aga Khan Bora Ground' contains the old law ground that we have been told stories about and that we protect.
- 7. Our father has passed onto us the responsibility for looking after that sacred place. He was given that responsibility by his father.
- 8. The Law ground is where our grandfather was initiated as a Wajarri law man. The old people conducted ceremonies and initiation rites at the place.
- 9. On the DIA Aboriginal Site register, it says that this site is 'mythological'. But there's nothing 'mythological' about it! It's a real sacred place, where the law is. Only initiated men should go there. If people who aren't suppose to be there go there, then they'll get sick, they'll get really sick.
- 10. The area around the law ground has sites that show you how important it is. There are rock and stone arrangements made by Wajarri's that show you boundaries. The rock and stone arrangements are so that people can always find their way to this place.
- 11. The rock and stone arrangements around this law ground are also special because they tell people something else. They are a boundary around the place, showing the woman that they can't go there.
- 12. Our grandfather told our father all about the old law grounds in this country. We work up here, to be near these places and protect them. That's why we're here.
- 13. We come out to these places regularly and check them, check out all our sites and see that nothing has been tampered with and check if vehicles have been around there and to make sure nothing has been taken away. I tell my boss that he knows that I have to go sometimes to make sure these places are okay.
- 14. The law ground forms part of the stories that go from the Weld Range to Walga Rock. The old people would get their ochre from Wilgie Mia and walk to Walga Rock. Along the way, they would stop and do ceremonies, and paint and make carvings. There are places all over this country where people live.
- 15. The site is a particular significance to our family, and to all Wajarri people. The reason we are giving this information is because it has become our personal responsibility, through our father and his father, to look after that place and ensure it is not disturbed. Only certain people know about this place, where it is and what is there and we have to protect it.

Site Rich Area

- 16. In the tenement, we've seen caves where people have lived the smoke still marks the walls. There are breakaways all through the tenement. In those breakaways there are nunnggas (caves), which have paintings and art. Only are [sic] couple are registered sites. So many aren't registered, but still need to be protected.
- 17. On the road into the Poona Mine, there are some big granites. There's carvings on those granites. There are engravings all through this tenement and paintings too.
- 18. The old people used to go all through that country where the tenement area is, camping there and walking there from Wilgie Mia and Walga Rock.
- 19. Wilgie Mia is one of the most important areas in Wajarri country and the stories and the ochre from the Weld Ranges go all the way out to the Western Desert.

- 20. The old people used to take the ochre from Wilgie Mia and paint in the caves on the west side of the range too. The caves in the Tenement Area have been painted by the old people taking ochre from Wilgie Mia.
- 21. In the past Aboriginal people wouldn't tell white people and some black people too where there sites were. This is because if people found out they would go there and destroy them. That's why there are lots of sites that aren't registered.
- 22. There are artefacts in the area that show where the Old people camped on this land, and how they lived, and they are important historical and cultural material for us. Any exploration activity in the rocky parts of the tenement could damage or destroy these sites.
- 23. There are lots of wudajis and mundungu [spirit people] that live in the hills and the caves of the Weld Range. They're in the Tenement area and the country round there too. That's their home. These people are little hairy men/spirits. If wudajis get upset then they upset Aboriginal people and they will make you get sick, sometimes they're cheeky enough to give people a flogging or they throw them out of bed.
- 24. People shouldn't go out to that area unsupervised; they need someone to go with them who knows the area so nothing gets touched. We need to negotiate with people who want to go to this area, to make sure the law ground is protected and that there is an exclusion ground around it and that no one goes there. Only the right people can go there.'

[167] The Tribunal's findings, which I adopt, were:

- '[34] The Hamletts state that the DIA registered site Aga Khan Bora Ground, No. 6826 contains a law ground of 'particular significance to our family, and to all Wajarri people' (WS15). The law ground is where 'our grandfather was initiated as a Wajarri law man' and 'It's a real sacred place, where the Law is. Only initiated men should go there' (WS9). The Hamletts state that the area around the law ground has sites that show you how important the area is. They refer to the caves in the tenement where people have lived 'and the smoke still marks the walls' (WS16). They state that the law ground also forms part of stories that relate to the Weld Range to the Walga Rock. The Wilgie Mia area which they explain 'is one of the most important areas in Wajarri country' and the 'old people used to take the ochre from Wilgie Mia and paint in the caves on the west side of the range. The caves in the Tenement area have been painted by the old people and by ochre from Wilgie Mia' (WS20). The Hamletts conclude in their statement that people should not go to the area unsupervised to protect the law ground and they say an exclusion ground should be placed around it so only the right people go there (WS24).
- [35] The evidence of the native title party is uncontested and I am satisfied that there are sites of particular significance within the tenement, including the Aga Khan Bora Ground. Aga Khan Bora Ground is specifically referred to by the Hamletts as having 'particular significance' (WS15) but the descriptions of other sites, including areas of rock and stone arrangements around Aga Khan (WS10-11), caves and paintings on the road to Wiglie Mia [sic] (para 14, 16 and 20), and the granites on the road into Poona Mine, appear objectively to be sites of particular significance to the native title party (WS17).
- [36] The Tribunal has found, on numerous occasions, that the Weld Range is an area of particular significance to the Wajarri People, the native title party in this matter. That finding is foundered on the magnitude of the sites of significance in the area, both in terms of numbers and ceremonial importance (refer [33]).
- [37] The proposed tenement is either in or near the Weld Range but that of itself is insufficient to establish that the area contains sites of particular significance. In coming to the conclusion that there are sites of particular significance within the area of the proposed tenement, I have relied on the uncontested evidence of the native title party. However, the fact that there are areas of particular significance to the native title party in much of the surrounding vicinity of the Weld Range, particularly between Walga Rock and Wilgie Mia, does assist me in making the 'contextual' evaluative assessment that is required of me (see French J in *Smith* at 451-452 [27])' (*Smith v Western Australia and Another* [2001] FCA 19; (2001) 108 FCR 442).

[168] I adopt the findings of Member O'Dea at [34]-[35], which largely relate to an area outside the Weld Range as strictly defined but within the pink box area. The edge of the important site, Aga Khan Bora ground, overlaps the pink box area (see map attached). Also, apart from actual sites of particular significance, Member O'Dea found that there are areas of particular significance in much of the surrounding vicinity. Although located to the south west of the Tenement area, the evidence of the Hamlett brothers in *Wiltshire* has similar features to the oral evidence given by Colin and Carl Hamlett in this matter in relation to the vicinity of the Tenement area about important sites such as paintings and rock carvings in the breakaways and which are not confined to the Weld Range itself. The evidence is also consistent with other evidence about the WY belief in the existence of spirit people outside the Weld Range.

[169] Ike Simpson & Ors on behalf of the Wajarri Yamatji/Western Australia/Alchemy Resources (Murchison) Pty Ltd, NNTT WO09/957, WO09/958 & WO09/959, [2010] NNTTA 151 (15 September 2010), Daniel O'Dea (Alchemy): This objection concerned three prospecting licences over a total area of 8 hectares, 57 kilometres north of Cue. The tenements are in close proximity to Wilgie Mia and Little Wilgie Mia. I adopt the following findings of the Tribunal in that matter:

'[39] The evidence of Mr Hamlett corroborated by the evidence of Ms Nalder, establishes the proposition already accepted by the Tribunal in numerous previous matters (see Robin Boddington and Others on behalfof the Wajarri Elders (WC01/3)/Western Australia/Hampton Hill Mining NL, [2002] NNTTA 43 (11 April 2002) ('Boddington') at [16]-[17] and Ike Simpson and Others on behalf of the Wajarri Yamatji/Western Australia/Peter Andrew Wiltshire [2009] NNTTA 119 (6 October 2009) ('Simpson') at [36-37]) that the Weld Range area in general and the Wilgie Mia and Little Wilgie Mia sites, in particular, are of enormous significance to the Wajarri Yamatji people who make up the native title party in this objection and to Aboriginal people, more generally, across the State. The reasons for this relate both to the area being a source of ochre, which is used for ceremonial purposes across the State, and for the importance of numerous dreaming stories, including that of the marlu which move through the Weld Ranges and well beyond into the interior.'

[170] The Tribunal found that the expedited procedure was attracted. Member O'Dea found on the facts of this case that the hunting and collecting activities occurred beyond the tenement area, which covered only 8 hectares in total, and was not just concentrated in the subject area. He concluded that community or social activities would not be directly interfered with (at [35[-[36]). He also found that, on the basis of the evidence, he could not reach the conclusion that there were sites of particular significance to the NTP within any of the three tenements, even though they are located in close proximity to sites of particular significance within a broader locale which is accepted to be of great and particular

significance to the NTP and other Aboriginal people (at [49]). Member O'Dea found that the protective provisions of the AHA combined with the Regional Standard Heritage Agreement would make interference with sites of particular significance including those in the close proximity unlikely (at [49]).

[171] In my view, these findings (which relate to three very small prospecting licences) do not detract from the findings made in the present matter based on the more extensive evidence before me.

Aboriginal sites and the Aboriginal Heritage Act 1972 (WA)

[172] The *Aboriginal Heritage Act 1972* (WA) (AHA) establishes a regime for the preservation and protection of 'Aboriginal sites' which are defined to mean:

'5. Application to places

This Act applies to —

- (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;
- (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.'

[173] The AHA provides for a Registrar of Aboriginal Sites (s 37(1)) and for an Aboriginal Cultural Material Committee (ACMC) (s 28) as an advisory body.

[174] The Tribunal has on numerous occasions considered the effect of the AHA in respect of future act determination applications (s 39(1)(a)(v) NTA) and expedited procedure objections (s 237(b) NTA). I adopt the Tribunal's findings in *Waljen* (at 209-211) and in *Maitland Parker (Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner) at [33]-[38] and [40]-[41] and other cases referred to therein which describe the site protection regime.

[175] In summary, the AHA covers all Aboriginal sites, whether recorded on the Register or not. It is an offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site (s 17) without authorisation by the Registrar (s 16) and by the Minister (s 18) and that offence is punishable by fine or imprisonment or both. If Ministerial consent to disturb a site is sought under s 18 of the AHA, as a matter of administrative practice, the ACMC requires the applicant to outline the nature and extent of consultation with key Indigenous stakeholder groups (which include native title parties), outline strategies to minimise impact on sites and complete a declaration that it has read and understood any heritage survey reports tendered in support of the application. Applications will not be considered by the ACMC until sufficient information has been submitted by the applicant (*Martu/Holocene* at [142]). It is a defence to a prosecution under the AHA if the person charged can prove that he or she did not know and could not reasonably be expected to know that the place was a site covered by the AHA (s 62).

[176] The Registrar is required to maintain a register in such manner and form as the Minister may determine of all protected areas, all Aboriginal cultural material and all other places and objects to which the AHA applies (s 38).

[177] On behalf of the Registrar the DIA maintains an Aboriginal Heritage Inquiry System, Aboriginal Sites Database (the DIA Database) which is a public database and constitutes the Register of Aboriginal sites. The sites recorded are categorised as 'Registered Aboriginal Sites' or 'Other Heritage Places.'

[178] Sites are recorded by:

- Site ID.
- Status.
- Access (C closed, O Open, V Vulnerable).
- Restriction (N no restriction, M male access only, F female access).
- Site Name.
- Site Type (e.g. artefacts, scatters, quarry etc).
- Site number.

- Except for closed sites the coordinates are given as reliable or unreliable. For some categories of sites no coordinates are given and the site is identified with a buffer zone.
- For some sites information is also provided under the headings of 'Additional Info' and 'Informants'.

[179] The Registrar has established an administrative process for determining whether a site becomes a Registered Aboriginal Site. The Database describes the status labelling of sites on the Register. Sites are first 'L – Lodged' status (information lodged, awaiting assessment), then move to 'IA – Information Assessed' status (information awaiting ACMC decision assessment), and then are either 'R – Registered Site' status, 'I – Insufficient Information' or 'S – Stored Data' depending on the ACMC decision made. The sites on the Tenements are all at the 'Information Assessed' stage, awaiting ACMC assessment.

[180] There are also DIA internal status categories for sites on the Database (and recorded on the Register) where a Site Assessment Group (SAG) assesses sites under the direction of the Registrar but which are not considered the final assessment. Relevantly in this case these are: 'IR – Insufficient Information' (provisionally considered to have insufficient information to complete assessment), 'L – Lodged' (Lodged with Registrar, placed on Register, not assessed) and 'PR – Permanent' (provisionally assessed as meeting the terms of s 5 of the AHA).

[181] *Sites on the proposed Tenements*: The original documentation provided by the Government party (GVP 27-30, 38-47) reveals the following twelve sites recorded on the Register (but not yet assessed by the ACMC as Registered Sites) overlapped by the Tenement areas either wholly or partially.

• 1 site on M51/543

- Site ID 28002, IA Weld-A-09139, information assessed, open access, no restriction, artefacts/scatter IR

• 4 sites on M51/544

- Site ID 28002 details as above
- Site ID 28009, IA Weld-A-09148, information assessed, open access, no restriction, artefacts/scatter, L

- Site ID 28141, IA Weld-RL-09108, information assessed, closed access, no restriction, water source
- Site ID 28144, IA Weld-RLa-09134 information assessed, closed access, no restriction, artefacts/scatter, water source
- No sites on M51/545
- 9 sites on M51/546
 - Site ID 27983, IA Weld-A-0998, information assessed, open access, no restriction, artefacts/scatter, L
 - Site ID 27984, IA Weld-A-0999, information assessed, open access, no restriction, artefacts/scatter, IR
 - Site ID 27985, IA Weld-A-09100, information assessed, open access, no restriction, artefacts/scatter, PR
 - Site ID 2800, IA Weld-A-09133, information assessed, open access, no restriction, artefacts/scatter, PR
 - Site ID 28001, IA Weld-A-09137, information assessed, open access, no restriction, artefacts/scatter, PR
 - Site ID 28009 details as above
 - Site ID 28137, IA Weld-Q-0997, information assessed, open access, no restriction, quarry, PR
 - Site ID 28138, IA Weld-Q-09101, information assessed, open access, no restriction, quarry, PR
 - Site ID 28165, IA Weld-Qa-09150, information assessed, open access, no restriction, quarry artefacts/scatter, PR

[182] In her affidavit (NTP 31), Victoria Winton, Senior Archaeologist and Project Manager at Eureka, gives evidence that she met with Colin and Carl Hamlett, YMAC archaeologist Silas Piotrowski and YMAC anthropologist Ann Marie Volpe on 5 May 2011 and discussed the archaeology of the tenements and wider area with them. Dr Winton gives evidence that ten of the above sites have already been recorded on the Tenement area as Aboriginal sites covered by the AHA. The exceptions are Site ID 28141 (Weld-RL-09108) and Site ID 28144 (Weld-RLa-09134) both said to be on M51/544 but which it now appears are not located on any of the Tenements – see below. I note that, technically, Dr Winton's

evidence is not correct because while the sites are recorded on the Database, they have not yet been assessed by the ACMC and placed on the Register as Registered Sites. However, for reasons explained below, whether the sites have the status of a Registered Site is not of importance as I am satisfied that they are likely to be covered by the AHA, as per s 5 of the AHA.

Dr Winton gives evidence of the following additional matters:

- A quarry and artefact scatter site (Quarry Stop 2, discussed above) has been identified but not yet recorded with the DIA, near a bulldozed track north of 'Boundary Gate.' Eureka recommends that use of the track be discontinued due to the potential for further damage to the site (para 7). Dr Winton says this site is protected under the AHA, which I take to mean that in her opinion it is a site covered by the AHA even though not recorded as a Registered Site.
- The eastern boundary of Aboriginal archaeological site, DIA Site ID No 28002 Weld-A-09139 on M51/543 and M51/544 has not yet been determined. In order to avoid breaching the AHA, it will be necessary to determine the eastern boundary of this site prior to conducting any nearby ground disturbing works (para 8).
- Available mapping indicates that Site 28002 is located on the same watercourse as other extensive Aboriginal archaeological sites, including Site ID No 28776. Dr Winton considers it likely that other archaeological material/sites associated with the past Aboriginal use of this watercourse will occur on the Tenements (para 9). Site 28776 is some four kilometres from the Tenement area at its closet point and seven kilometres from Site 28002. Dr Winton's evidence suggests that further sites will be found on Tenement M51/543 which is located between these two sites.
- [183] The relevance of Dr Winton's evidence is to confirm that further site survey work over the Tenements is required to be done, that the parameters of some sites are unclear and that there are likely to be other archaeological sites on and in the vicinity of the Tenements.
- [184] All of the sites on the Tenements came to be listed on the DIA Database as a result of the Eureka Report. The Eureka Report summarises the results of an Aboriginal archaeological site avoidance survey of nominated priority work areas within the Sinosteel Weld Range Project Area (NTP 41 Executive summary on page i of volume 1). Sixteen survey areas in the Weld Range were nominated by Sinosteel for archaeological survey:

drilling target areas, tracks and areas for proposed future mining infrastructure including, for some unexplained reason, a survey of the Tenements. It appears that surveys by Eureka occurred on the Tenements either by mistake or because Sinosteel viewed parts of the Tenements as suitable for its infrastructure (presumably after some agreement with Weld). WY claimants took part in the surveys. The Eureka Report concludes:

'Survey results confirm that the Weld Range was intensively occupied by Aboriginal people at times in the past. The archaeological signature of the survey area which includes large numbers of stone quarries, artefact scatters, grinding material and rock shelters with art, confirms predictions of the types of sites expected to be encountered during the survey. It is evident that a range of Aboriginal archaeological sites exist in a variety of environmental zones across the Weld Ranges and associated open plain.'

[185] The Eureka Report is of the opinion that all sites constitute Aboriginal archaeological sites to which s 5(c) of the AHA apply. With respect to each of the relevant sites, the Eureka Report notes that it has been recorded to site avoidance level only and that no archaeological significance assessment is provided. The Aboriginal Site Recording Form submitted to DIA by Eureka notes that an archaeological assessment should not be made based on the current level of recording.

[186] In relation to all of the sites on the Tenements, the Eureka Report (Eureka 1 (i)-(ii), NTP 42 and Eureka 2 (vi)-(viii), NTP 43) recommends that Sinosteel ensure that its employees and contractors:

- Are advised of the existence of each site to which Eureka considers the AHA applies and should, therefore, be avoided.
- A 30 metre buffer or work exclusion zone should be observed to avoid potential damage to sites by any nearby ground disturbing activity.
- If a site is to be disturbed and a s 18 application made under the AHA, the WY people should be consulted, detailed recording and significance assessments of the site by an archaeologist must be undertaken and WY people should be engaged to monitor any ground disturbing works.
- In consultation with the Wajarri Yamatji, recorded Aboriginal archaeological sites are to be listed on the DIA Register of Aboriginal Sites.
- In view of the number of sites identified, it is recommended that an archaeological survey of all future disturbance areas be conducted by qualified archaeologists prior to any ground disturbance.

- If any archaeological material is encounted, all work should be stopped, the Wajarri Yamatji people notified and the material left in situ until assessed and agreed by them as to their management.
- If human skeletal material associated with a human grave is uncovered, work should be stopped and the police, DIA and WY notified.

[187] Conclusion with respect to sites on the Tenements: The Government party and grantee party contend that it is of some importance that these sites have not yet been placed on the Register as Registered Sites. I have considered the description of the sites from the Eureka Report and, in my view, it is probable that all of them fall within the definition of Aboriginal sites in s 5(c) and would be covered by the AHA. The fact that they are still waiting assessment by the ACMC and not on the Register yet as 'Registered Sites' is not of great importance in these proceedings. They are likely to be sites covered by the AHA and, in my view, it will be an offence to disturb them unless ss 16 and 18 approvals are sought under the AHA. The Eureka Survey was conducted by a consultant affiliated with the University of Western Australia and there is no reason to question their expertise. Eureka has assessed all these sites as falling within s 5(c) AHA. In addition, some of them have a DIA internal PR status meaning that they have been provisionally assessed by DIA as meeting the terms of s 5 of the AHA. In my experience, it is commonplace for sites of the kind under consideration (artefacts, scatters, quarries) to be Registered Sites. Rock holes and watercourses with a closed status also commonly qualify.

[188] The chromium resource is located principally on the area of M51/546 but also on M51/544 and M51/543. According to the current proposal for mining the chromium resource, Site ID 28002 is not likely to be directly affected by the mining operations even though it will be very close to them. However, it could be affected by subsequent mining stages, the footprint of which is not entirely clear at this stage. Based on the proposal to mine the chromium resource, this site could probably, on its own, be dealt with under the provisions of the AHA.

[189] All of the other sites (except sites 28144 and 28141 – see below) are likely to be directly affected as it will not be possible to carry out the chromium mining operations without disturbing and probably destroying most of them. Of those directly affected, six have been internally assessed by DIA as PR and thus are highly likely to be accepted by the ACMC as s 5(c) AHA sites. Three of them are quarry sites, including part of the quarry

identified at Quarry Stop 1 which extends across M51/546 to at least Quarry Stop 2. Mr Edwards conceded that it would be very difficult to mine the chromium without disturbing the quarry site identified on the site visit (TR p 260). My finding is that it will not be possible to conduct the mining operations for the chromium resource without disturbing and probably completely destroying some of the identified sites, including the quarry site seen at Quarry Stops 1 and 2.

[190] In his closing submissions Mr Pudovskis said that, as a consequence of a closer examination of the Eureka Reports, Sites 28144 and 28141 do not appear to be located within the area of mining lease M51/544 although they had been shown on the DIA Database as intersecting with it. This accords with Dr Winton's view that there are only 10 sites within the Tenement area (affidavit para 6). The Tribunal's Geospatial site map (NNTT 2) shows these sites to be partially covered by M51/544 because of the buffer zone around them. The coordinates of the sites are not shown on the Register because of their closed status but it appears that the actual sites are probably not on the Tenement area. On this basis, I consider that they should not be affected by the chromium mining proposal. Even though they will be close to the mining operations, Weld is aware of their existence and probably would be able to take steps to avoid interference with them, even for any activity incidental to the mining operations. In the case of these sites, the AHA is likely to be effective in ensuring that they will not be affected.

[191] Other sites on the Tenements: In addition to the Quarry Stop 1 and 2 site, Colin and Carl Hamlett say that there are likely to be other quarry sites on the Tenements and possible burial sites. This is also the view of Ms Whitton, Dr Winton and Mr Piotrowski. Mr Edwards (TR p 258) also says that there is the potential for other artefact sites on the chromium resource area. The DIA's Heritage Survey Database records that the Eureka Survey covered approximately 50 per cent of M51/543, 80 per cent of M51/544 and 50 per cent of M51/546, meaning that it was not an exhaustive survey of the area. I find that there are likely to be other quarry sites on the Tenement area and the possibility of some burial sites.

[192] Sites in the Weld Range generally (pink box): Dr Winton (para 10) says that Eureka and WY traditional owners have recorded more than 320 Aboriginal archaeological sites in the Weld Range since 2007. It may be that she was referring to an area greater than the pink box, because a Tribunal search of the DIA Aboriginal Heritage Inquiry System Aboriginal Sites Database, using the coordinates supplied by the NTP of the Weld Range Complex area

(pink box), shows that there are 225 sites listed with the DIA within the pink box area. Twelve of these are Registered Sites (ACMC decision made), including:

- Wilgie Mia, Site ID 11132 (see above).
- Wilgie Mia Bora Ground, Site ID 6825, closed, no restriction, ceremonial, mythological, man-made.
- Aga Khan Bora Ground, Site ID 6826, closed, no restriction, ceremonial, mythological, man-made structure.
- Other Registered Sites within the pink box area but not in the vicinity of the Tenements include painting, rock shelter, man-made structure and artefacts/scatters sites, some with a 'Breakaway' site name e.g. Site ID 10768 is 'Kakawama Breakaway 1' and is described as open, no restriction, painting and rock shelter.

[193] Categories of sites: Of the 255 sites listed on the DIA Database in the Weld Range Complex pink box area, there are: 21 closed sites; 38 painting sites; 3 man-made structure sites; 9 painting, artefacts/scatter sites; 80 artefact/scatter sites; 3 repository/cache sites, 9 quarry sites; 3 artefacts/scatter, grinding patches/grooves sites and 56 quarry, artefacts/scatter sites. Nine of the sites are not categorised. There are also man-made artefacts/scatter; ceremonial, painting, structure. engraving; painting, engraving, artefacts/scatter; repository/cache, painting, artefacts/scatter; engraving; mythological; skeletal/burial; ceremonial and grinding patches/grooves sites. The majority of the sites are listed as 'Lodged' and 'Information Assessed' and based on the names given to them it appears that 155 of the sites came to be listed with the DIA through the Eureka report commissioned by Sinosteel. A search of the DIA Survey Report Catalogue using the pink box coordinates reveals that 18 survey reports covering the area have been listed with the DIA. I can safely infer that not the whole area has been surveyed and that there are likely to be further sites within the area. The profile of the sites currently identified corroborates my findings about the nature and extent of the sites in the area and the importance of the area generally to the NTP.

History of negotiations and proposed agreements

[194] The good faith decision (at [67]-[70]) outlines the history of the negotiations between the NTP and Weld (including Tribunal mediation) up to 12 October 2010. At a mediation meeting on that date, Weld indicated a willingness to accept an invitation to attend a WY Working Group meeting initially scheduled for 9-10 December 2010 but subsequently

rescheduled for 12-13 January 2011. Although aware that mediation continued through the s 150 conference process, I am unsure whether these or any other face to face meetings took place.

[195] During the good faith negotiations, on 7 May 2010, Green Legal provided a draft 'Agreement for grant of M51/543 to 546 inclusive' (GP 29) (Weld Agreement) to YMAC. The draft agreement deals with some of the issues which the Tribunal is aware are customarily found in mining agreements between native title parties and grantee parties under the right to negotiate scheme. There are provisions for compensation (\$35,000 per Tenement upfront payment which was to be in full settlement of all compensation liabilities), Aboriginal heritage protection including site surveys, cross cultural awareness training for Weld's employees and its contractors, and environmental protection.

[196] On 8 February 2011, YMAC provided to Green Legal a draft 'Mining Agreement between Weld Range Metals and Wajarri Yamatji Claim Group' (WY Mining Agreement) which contained as Schedule 2 the 'Weld Range Heritage Agreement' including an Aboriginal Heritage Protocol (both subject to s 155 directions), which was to be signed by Weld contemporaneously with the signing of the Mining Agreement. The WY Mining Agreement provides for:

- A royalty payment at the stipulated rate based on the value of royalties payable to the State under the *Mining Act*.
- A signing fee payment to the NTP.
- Weld to maximise training and employment opportunities for the NTP from the mining operations by making the NTP aware of employment and contracting opportunities, meeting with the WY Working Group and giving preference for employment to any suitably qualified WY persons or any entity comprising WY persons in respect of contracts where the relevant tender criteria are met.
- Environmental protection and rehabilitation of the land.
- Permitting the WY people to access the Tenement areas subject to any reasonable restrictions imposed by the grantee party for the purposes of the mining operations, safety or security or the requirement of any law, including access for the purpose of obtaining ochre, quartz or other minerals solely for cultural purposes.

[197] The Schedule 2 Weld Range Heritage Agreement is in similar terms to the Standard Weld Range WY Exploration and Heritage Agreement (NTP 33) and includes an Aboriginal Heritage Protocol WY (Weld Range Heritage Agreement). As provided to Green Legal, it contains reference to exploration and no attempt seems to have been made by YMAC to adapt it for mining. The Weld Range Heritage Agreement includes provision for: twice yearly liaison meetings; contracting, employment and economic development opportunities for the NTP; environmental protection and rehabilitation of the land; a small annual payment; and for ceremonies on areas of Aboriginal cultural significance which includes the need to remove or relocate artefacts.

[198] The Weld Range Heritage Agreement also contains the following provisions for the protection of sites:

'7.1 Avoidance Areas

- (a) The Grantee agrees not to undertake any activity, including any Exploration Activity or any Mining Activity, on any Avoidance Areas within the Project Area.
- (b) The whole of the Aboriginal Reserve shall be an Avoidance Area together with an exclusion area of 20 metres from the boundary of the said Reserve, except on the Western side of the Reserve where the exclusion area shall be 40 metres from the boundary.
- (c) All Aboriginal sites registered with the Department of Indigenous Affairs within the Project Area at the Commencement Date shall be Avoidance Areas, together with an exclusion area of 20 metres from the boundaries of each such site.
- (d) Any other Avoidance Areas shall be identified by the Native Title Party upon completion of Heritage Surveys within the Project Area and shall be Areas of Cultural Significance as certified by a qualified anthropologist agreed to by the Parties, in conjunction with the Heritage Survey Team.
- (e) Within 28 days of completion of a Heritage Survey within the Project Area, the Native Title Party will notify the Grantee in writing of any Avoidance Areas (together with any proposed exclusion area from the boundary) likely to be impacted by the Grantee's Exploration Activities within the surveyed tenement.

7.4 Applications under the Aboriginal Heritage Act

- (a) The Grantee agrees that in relation to any Avoidance Areas or any Aboriginal site registered with the Department of Indigenous Affairs within the Project Area it will not:
 - (i) make an application under section 16 or section 18 of the Aboriginal Heritage Act in relation to that Aboriginal Site or Avoidance Area; or
 - (ii) enter upon that Aboriginal Site or Avoidance Area; or
 - (iii) undertake any activity, including Exploration Activities or Mining Activities, within the agreed exclusion area surrounding that Aboriginal site or within the Avoidance Area.

(b) The Grantee agrees that in relation to all other areas within the Project Area, it will not make an application under section 16 or section 18 of the Aboriginal Heritage Act, without the prior written consent of the Native Title Party, such consent not to be unreasonably withheld by the Native Title Party.

7.5 Mining Activity

- (a) The Grantee agrees not to undertake any Mining Activity on any Granted Mining Tenements until a Mining Agreement has been negotiated in good faith and agreed between the Native Title Party and the Grantee.
- (b) Subject to sub-clause 7.5(c) below, the Grantee agrees not to undertake any Mining Activity pursuant to any future mining tenement which may be granted to the Grantee or to any mining tenement in which the Grantee acquires an interest within the Project Area, until a Mining Agreement has been negotiated in good faith and agreed between the Native Title Party and the Grantee.
- (c) The Grantee agrees not to seek a determination under sections 35, 36A, or 38 of the Native Title Act in relation to any such future mining tenements so long as good faith negotiations towards a Mining Agreement continue between the Parties.'

[199] Relevant definitions are:

- **Exploration Activity'** means the conduct by the Grantee of any of the activities within the Weld Range permitted under the terms of an exploration licence or prospecting licence and includes the exploration activities the Grantee conducts pursuant to any Granted Exploration Tenements.
- 'Mining Activity' means any activity, not including Exploration Activity, undertaken by the grantee pursuant to a mining lease granted under the *Mining Act* within the Weld Range.
- 'Mining Agreement' means an agreement under which the NTP agrees to the grantee conducting Mining Activities pursuant to any Granted Mining Tenement or any other mining lease the Grantee may be granted within the Weld Range.
- **'Project Area'** means any land outlined as the 'Weld Range Project Area' on the map in Schedule 2 (this is the same as the pink box area).
- 'Aboriginal Site' has the meaning set out in the AHA.
- **'Aboriginal Reserve**' means Reserve No. 16670/194 (i.e. Wilgie Mia Aboriginal Reserve).
- **'Granted Mining Tenements**' means a Mining Tenement granted to the grantee, or acquired by the Grantee, prior to the date, or during the operation of this Agreement.

[200] The Aboriginal Heritage Protocol, which is part of the Weld Range Heritage Agreement, permits low impact exploration within the Project area defined by a map of the pink box without an Aboriginal Heritage Survey, provided the NTP does not have reasonable concerns that it may impact or disturb an Aboriginal site. Otherwise, the Protocol provides for the conduct of a survey which includes:

- Provision by the grantee to the NTP of details of the proposed exploration.
- Engagement of a Heritage Officer by the NTP acceptable to the grantee to manage and conduct the survey and write the report.
- Payment by the grantee of the costs of the survey.
- Establishment by the NTP of a heritage survey team consisting of from four to eight Aboriginal consultants chosen by the NTP, the Heritage Officer and an Aboriginal Liaison officer
- A WY person being engaged and paid by the grantee as a monitor for any new ground disturbing work.
- Certain procedures to apply if an Aboriginal site is discovered during exploration including the immediate cessation of work, notification of any human remains to appropriate authorities including the police and the ACMC.
- A site evaluation to ascertain the cultural significance of the site and provision for negotiation in good faith with a view to reaching agreement as to appropriate action in relation to the site.
 - The conduct of Aboriginal ceremonies in relation to culturally significant areas, including the retrieval of important objects.

[201] In summary, the Tribunal understands the WY Mining Agreement to mean that: mining activity is prohibited on an Avoidance Area (being the Reserve or a Registered site and other areas identified as such in a heritage survey by a qualified anthropologist); a s 16 or s 18 application cannot be made in relation to an Avoidance Area; and mining (including exploration) cannot take place on any already granted mining leases or on any future mining leases without agreement. Although there may be some ambiguity about the meaning of Clause 7.5(b), the intention seems to be that no mining will occur unless the parties are in agreement. This is supported by the definition of mining agreement to include both granted and future mining leases. It is also the view of Sinosteel whose agreement in this respect is

the same as that in the WY Mining Agreement (see below at para [219]). Even if there is some doubt about the meaning of the WY Mining Agreement there can be no dispute that, at this point, the WY people have not consented to mining in the Weld Range Area (pink box) area. Further, their draft Agreement is indicative of their strong views about the terms under which any mining in the Weld Range area should occur.

[202] The Weld Range Heritage Agreement, provided to Green Legal with the WY Mining Agreement, is in similar terms to the standard heritage agreement used by the NTP for exploration in the Weld Range Project Area which is defined by reference to a map of the pink box area viz: 'The Weld Range Wajarri Yamatji Exploration and Heritage Agreement' (NTP 33) (subject to s 155 direction). The evidence establishes that this agreement differs from the agreement for exploration used by the NTP in other parts of their claim area and that a number of applicants for exploration licences have entered into this agreement.

[203] The NTP also provided evidence of a similar heritage agreement between Midwest Corporation Ltd (now Sinosteel Midwest) and the Wajarri Yamatji of 19 April 2006 (NTP 37) (subject to s 155 direction) which covers a number of pending exploration licences and tenements already granted to Sinosteel, including granted mining leases M20/402 and M20/403. This agreement contains the same site protection provisions set out above. There is also publicly available evidence of key features of the agreement in the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation Annual Report for 2006 (Yamatji Annual Report) (p 79):

'The agreement is among the most comprehensive exploration agreement packages ever reached. It covers exploration for iron ore in the Weld Ranges, located in the Midwest region of Western Australia.

The agreement requires considerable sensitivity and understanding on behalf of the company because the Weld Ranges is an area of exceptional cultural significance for the traditional owners. It addresses the concerns and considerations of Wajarri People to ensure the highest level of protection for their country. The company has also agreed to special conditions to ensure that exploration will be undertaken in close consultation with traditional owners.

Midwest has agreed to exclusion zones for culturally sensitive areas of the Weld Ranges, including Wilgie Mia, which will be overseen by a monitoring and liaison committee and liaison officers, funded by the company.

The agreement also allows traditional owners to continue to have access to the area, with consideration always being given to issues of safety, the group will also be able to maintain its practice of removing ochre from Wilgie Mia.

A series of dedicated funding provisions were agreed, including training and education strategies, as well as a share issue, which will provide the Wajarri Yamatji group with some equity in the company.'

[204] The Sinosteel agreement also contains provision for the employment of a Wajarri Yamatji person to assist with heritage issues, which the Tribunal understands is Mr Carl Hamlett (CH Aff at 15).

[205] The key differences between the Weld Agreement and the WY Mining Agreement relate to:

- Compensation payments a one off payment of \$140,000 in full settlement of Weld's compensation obligations to the NTP, compared to ongoing royalty type payments for the life of the mine.
- No provision for employment and contracting opportunities for the NTP in the Weld Agreement.
- Significant differences in Aboriginal heritage protection. The WY view that the Weld Range requires special heritage measures was not recognised in the Weld Agreement and there was no provision for monitors or the conduct of ceremonies.

[206] The Tribunal in inquiry mode is not privy to the reasons for agreement not being reached but it is reasonable to infer that the NTP was not satisfied with the compensation offer as it contained no provision for royalty type payments. The Tribunal is aware from its own knowledge that such payments are now a very common feature of mining agreements. I can infer that the NTP was not satisfied with the heritage protection provisions offered by Weld, particularly in light of the acceptance (at least in the context of exploration by other grantee parties) by Sinosteel of the NTP's Weld Range Standard Heritage Agreement.

[207] The NTP in its Closing Submissions (22 June 2011 para 58) refers in favourable terms to the exploration agreement for the Weld Range and particularly the agreement entered into with Sinosteel with its provisions for heritage protection and benefits for the NTP.

[208] I can infer that Weld would have been dissatisfied with the heritage protection provisions, which would have meant, based on the evidence before the Tribunal, that it could not mine on the area. Strictly interpreted, the NTP's proposal did not even permit mining with the approval of the NTP because mining was prohibited over Avoidance Areas. While the Reserve would not have been interfered with by Weld's proposal, and at the time the agreement was being negotiated there were no Registered Sites, the evidence given in this matter establishes that the quarry areas are likely to have been included as Avoidance Areas pursuant to s 7.1 of the Agreement as Areas of Cultural Significance following a survey.

Further, the restriction on Weld making an application under s 16 or s 18 of the AHA to interfere with a Registered Site is absolute and not dependent on when the site was Registered or the consent of the NTP. As already found, it is highly probable that some of the sites identified on the Tenement area will be given the designation 'Registered Site.'

Past and current mining in the vicinity of Weld Range

[209] It is generally accepted that mining activity has occurred in the past and that, particularly, exploration activity continues in the Weld Range.

[210] The NHL Report (September 2007 draft p 8) states:

'The Weld Range has an important pastoral and mining history...A long history of prospecting for gold and other minerals also exists, evidence of these excavations can be found throughout the Weld Range in the form of abandoned shafts, scrapes and overburden. Old camps and living areas are also common. Small scale mining operators...continue to mine in the Weld Range and its breakaways today...The Weld Range, particularly the ironstone and jaspilite peaks, contain a rich source of haematite or iron ore that is commercially very valuable. In recent years, two mining companies have come to negotiated agreements with other land users including the Wajarri Traditional Owners to mine for iron ore in the Weld Range.'

[211] With the exception of the last sentence, I accept this evidence. The assertion in the last sentence does not accord with evidence given by the NTP that they have not agreed to mining in the pink box area. The NHL Report (September 2007 draft p 2) notes that Midwest Corporation (now Sinosteel) and Murchison Metals Ltd have signed off on 'negotiated agreements with the Wajarri People that allows them to mine in the Weld Range...' (my emphasis). The reference given is the Yamatji Annual Report for 2006. That Annual Report (p 80) indicates that Wajarri Elders and Murchison Mining Metals entered into an agreement in September 2005 for a small gold mining operation near Cue (which is not in the Weld Range or pink box area) and that Wajarri Elders and the Ngoonooru Wajarri People and Murchison Metals entered into an iron ore mining agreement in August 2005 in the Jackhills area of the Murchison (which is some considerable distance to the north of the Weld Range). With respect to the Midwest Corporation, the Annual Report records the signing of a 'range of future act agreements, including the unprecedented exploration agreement between Midwest Corporation and Wajarri Yamatji' (p 15). In a more detailed account of the agreements, the Annual Report (p 79) makes it clear that the agreement between the WY people and Midwest Corporation entered into in April 2006 was 'a comprehensive exploration agreement.' As discussed above, I am satisfied by this and other evidence that the Midwest Agreement for the Weld Range only covers exploration at this stage and that the NHL Report is not accurate in this respect.

[212] In relation to previous mining activity on the Tenements, the Government party states (GVP Contentions para 41):

"...much of the area comprising the four Mining Leases has been subject to various "dead" (surrendered, cancelled or withdrawn) mining tenements. Each area has a history of mining activity dating back to the early 1970s. For example, each of the 4 tenements has had at least 21 cancelled, surrendered or withdrawn incidents of mining tenures (such as exploration licenses, mining leases and mineral claims). Each of the 4 areas has in the past been encroached upon by at least 60% by mining leases. That history indicates that a substantial portion of the areas of the Mining Lease may have already been affected by mining activity, indicating that the exercise or enjoyment of native title rights and interests has already been limited, impaired or adversely impacted to some extent."

[213] The evidence, particularly that of Mr Edwards, does not support this contention. My finding in relation to mining on the Tenement area is that there has been a considerable amount of exploration conducted by various companies but no large scale mining of the kind now envisaged by Sinosteel or Weld. Although mining leases have been held over the Tenement area, there is no evidence that they have been utilised for productive mining.

[214] On 6 July 2011, the Tribunal made available to parties a table showing the details of the 30 live and pending mining leases in the Weld Range pink box area. An analysis of this table demonstrates the following facts:

- 13 mining leases were granted prior to 1 January 1994 when the right to negotiate provisions of the NTA came into effect, eight have been granted since 1 January 1994 and nine are pending (awaiting grant).
- Six of Weld's eight granted Tenements (M51/442, M51/434, M5/443, M20/246, M51/457, M51/481) were granted prior to 1 January 1994 and two afterwards (M51/498 on 8 March 1994 and M51/719 on 24 March 1998).
- Three mining leases M20/311 (3 April 1996) and M20/402 and 403 (27 April 1998) were granted to Sinosteel (presumably Midwest Corporation at that time) after 1 January 1994.
- A further three mining leases were granted after 1 January 1994 to various grantee parties, being M20/75 to Udo Eugin Kascher on 23 May 1994, M20/286 to Leslie McDougall on 3 March 1995 and M20/392 to Carlo Gonella on 15 June 1998.
- Of the nine pending mining leases, four are Weld's Tenements, another four involve Sinosteel (M20/419 previously Stanley Alan McDonald, M20/503, M20/518 and M51/869) and there is one other to an unrelated grantee (M20/516).

[215] The NTP contends (NTP Closing Submissions paras 55-62, TR Ms Tan pp 316-318 and TR Mr Green pp 351-353) that the WY have only agreed to the grant of one mining lease in the Weld Range (pink box) area, being M20/419, which was the subject of a future act consent determination (*Ike Simpson and Ors on behalf of Wajarri Yamatji People/Sinosteel Midwest Corporation Limited/State of Western Australia*, NNTT WF10/35, [2010] NNTTA 185 (10 November 2010), Daniel O'Dea).

[216] In light of the possible conflict between the evidence of the grant of mining leases after 1 January 1994 and the NTP's submissions, the Tribunal invited the NTP to provide clarification of the circumstances in which the post 1 January 1994 mining leases were granted and whether agreement was reached. Ms Lisa Randall, solicitor for the NTP responded by affidavit and said that neither the WY claim (registered 5 December 2005) nor its predecessor claim (Wajarri Elders, registered on 9 July 2001) covered the areas of the mining leases granted after 1 January 1994 at the time the s 29 notices under the NTA of the proposal to grant the mining leases were given. She also says that YMAC had no documentation indicating an agreement was reached with the NTP or the Wajarri Elders claimants in relation to them. The Tribunal has confirmed that there were no registered native title claims over the areas of these granted mining leases at the time of the s 29 notices, nor any claims lodged in response to the notices. I understand this position is accepted by the Government party. My finding, based on this evidence, is that WY people have not, in a positive sense, entered into any agreement for mining over the Weld Range (pink box) area. I also do not think it is possible to infer that the failure to respond to the s 29 notices by lodging and registering a claim amounts to an agreement for the mining leases to be granted, particularly given the evidence that the NTP is opposed to mining in the Weld Range area unless a satisfactory agreement is reached about it.

[217] The Tribunal has made three future act determinations with the consent of the NTP in relation to tenements in the pink box area. One of these related to the grant of exploration licence E51/916, which was the subject of the expedited procedure determination in *Walley* (see above)(*Ike Simpson & Ors on behalf of the Wajarri Yamatji /Western Australia/Giralia Resources NL*, NNTT WF07/42, [2008] NNTTA 15 (5 February 2008), John Catlin). The determination was made on the basis of the logistical difficulties involved in having all named applicants sign the State Deed (s 31(1)(b) agreement). The evidence was that an Alternative Heritage Agreement had been signed between the NTP and grantee party. The second consent determination was in relation to prospecting licence P20/1792 (*Ike Simpson*

and Ors on behalf of Wajarri Yamatji/Western Australia/Diana Austin Trigg, NNTT WF09/21, [2009] NNTTA 144 (5 November 2009), John Catlin) made because of logistical difficulties involved in signing a State Deed (s 31(1)(b) agreement) and on the basis that a satisfactory Heritage Agreement had been signed.

- [218] Neither of these determinations detract from the NTP's submission as they relate to exploration and prospecting and were agreed to because a Heritage Agreement acceptable to the WY people had been entered into. These consent determinations are consistent with the NTP's approach to agreement to the grant of exploration tenements, namely that they will agree to exploration in accordance with their standard agreement for the Weld Range area.
- [219] The third consent determination, involving mining lease M20/419, requires further explanation. Consent determination WF10/35 had the effect that mining lease M20/419 may be granted to Sinosteel Midwest Corporation Limited, which now holds the tenement in place of Stanley Allan McDonald (the initial applicant). Correspondence between solicitors for the NTP and Sinosteel (NTP 49) establishes that the NTP consented to the determination because the parties had agreed that the grant would be subject to the Weld Range Wajarri Yamatji Exploration and Heritage Agreement, dated 19 April 2006, and, in accordance with that Agreement, no mining is to take place until a mining agreement has been negotiated and entered into between the parties. The lawyers for Sinosteel (letter of 16 February 2009) acknowledge that Sinosteel were 'contractually bound under the Agreement to negotiate a mining agreement once the tenement has been granted'. I am satisfied that, while the NTP has consented to the grant of the mining lease, the NTP has not agreed to mining in respect of M20/419, which will only occur when a satisfactory mining agreement is entered into.
- [220] There are also a number of other exploration licences which were granted after agreement with the NTP was reached, leading to withdrawal of the expedited procedure objection.
- [221] My finding in relation to this evidence is that the NTP have agreed to exploration with companies other than Weld on the Weld Range (pink box) area, subject to their Standard Exploration and Heritage Agreement for the area, but have not yet agreed to mining.
- [222] The grantee party provided an extract, printed on 24 May 2011, from the website of Atlas Iron (GP 136), previously Weld Range Iron Ore Pty Ltd, and holder of mining lease M20/118 (granted on 27 October 1988), which is located close to Wilgie Mia and within the NHL area. In relation to mining activity on the Tenement, the extract states:

'The project, in the Wilgie Mia area of the Weld Range, includes particularly high grade haematite mineralisation which has historically been mined for ochre, and mined on a commercial scale for specularite to be used in paint manufacture ... The project has an exploration target of 15 to 20 million tonnes at between 60% and 66% Fe. Atlas is working with the Wajarri People to assist in the protection of the nearby Wilgie Mia Aboriginal ochre mine.'

[223] This evidence indicates that there is likely to be mining on the part of this mining lease which is in reasonably close proximity to Wilgie Mia and excluded from the NHL area. My determination is made on that basis.

[224] The grantee party has submitted into evidence various documents relating to Sinosteel Midwest Corporation's Weld Range Iron Ore Project (GP 103-135), including the Public Environment Review (GP 103). The grantee party contends (GP Final Submissions para 12-38) that:

- Immediately adjacent to, and all but surrounding the proposed Project, Sinosteel Midwest Corporation Limited (Sinosteel) is proposing a 15,000,000 tonnes per annum iron ore project (compared with GP's 600,000 tonnes per annum project) which will necessitate the clearing of an estimated 40.7 square kilometres centred around the Weld Ranges.
- Sinosteel's project includes a number of granted mining leases, although it is apparent that Sinosteel is seeking additional mining leases.
- The native title party is aware of Sinosteel's plans and is currently in negotiations with Sinosteel concerning those pending mining leases.
- Oakajee Port and Rail (OPR) is examining the feasibility of the development of a railway to service mining companies in the Weld Range area, including Sinosteel, and including studies on Weld's Project area.

[225] I accept that the evidence establishes the facts asserted, with the following qualifications. First, it is not entirely accurate to say that the Sinosteel project all but surrounds Weld's proposed mining area at present. Sinosteel hold a number of exploration licences around Weld's proposed and granted Tenement area but Sinosteel's granted and pending mining leases are located on both sides of the Weld Range and Wilgie Mia Reserve, to the south of Weld's interests. One of Sinosteel's pending mining leases abuts the southern part of one of the Tenements (M51/544) and also abuts two of the granted Tenements (see map attached). Second, the NTP is currently in negotiations with Sinosteel (or was until the project was put on hold) in relation not just to its pending mining leases but also those

already granted and no agreement has yet been reached in relation to mining on any of the Sinosteel area (see above).

[226] The third qualification relates to the future of the Sinosteel project. On 23 June 2011, following receipt of the parties final written submissions on Wednesday 22 June 2011, there were media reports (NNTT 22-23) that Sinosteel had 'shelved its mine development indefinitely because of Oakajee's delayed construction' (*The West Australian*, 'Oakajee in doubt as Sinosteel pulls Mid West project', 23 June 2011 - NNTT 22A). *The West Australian* reported on its website that if Sinosteel's project does not go ahead, 'It strips the proponents of the Oakajee Port and Rail venture, Murchison Metals and Mitsubishi Corp, of arguably its most important customer and further adds to viability doubts hanging over the controversial venture.'

[227] Another article from *The Australian* newspaper website ('Sinosteel parks Weld Range project in major blow to Oakajee', 23 July 2011 – NNTT 22B) states:

'Sinosteel Midwest Corp confirmed to *The Australian* today that it had stopped all major work at its Weld Range project, laid off 43 workers and closed its office in the mid-west town of Geraldton. The move could jeopardise the troubled Oakajee project from going ahead in its present form.'

[228] The article reports Sinosteel's Chief Operating Officer Julian Mizera as saying 'We are certainly not closing the door on the Weld Range. However, we must make the right business decisions in order to protect our assets and ensure a realistic future for our organisation.'

[229] In the light of this information, the Tribunal has made its determination on the basis that the Sinosteel project and the construction of the OPR railway line are on hold but that there is a prospect that the proposal will be revived at some time in the future.

Summary of contentions on s 38 determination

[230] The NTP's primary contention is that there should be a determination under s 38(1)(a) of the Act that the grant of the Tenements must not be done. In the alternative, the NTP contends that, if there is a determination that the acts may be done, then it should be subject to the Government party's standard conditions referred to above at para [36] and Extra Conditions referred to above at para [37], as well as Additional Conditions or Alternative Additional Conditions, including a condition requiring the Government party to impose these conditions on the grant of the Tenements as well as being conditions of the determination.

[231] *NTP's Additional Conditions:* The NTP's proposed Additional Conditions deal with 'Low Impact Exploration' in similar terms to the NTP's Weld Range Heritage Agreement and Aboriginal Heritage Protocol (see above at para [200]).

[232] 'Ground Disturbing Activity' shall not be carried out until archaeological and ethnographic heritage surveys have been carried out in accordance with the processes set out in the Additional Conditions. Draft Additional Condition 1.4 says that Ground Disturbing Activity is not permitted without the consent of the NTP in any Avoidance Area, which means:

- All registered Aboriginal sites together with an exclusion area of 50 metres from the boundary of each such site.
- All areas identified by the NTP and certified by the qualified anthropologist conducting the heritage survey as being an Aboriginal site of cultural and religious significance, unless the ACMC determines that it is not an Aboriginal site.

The prohibition on Ground Disturbing Activity applies even if an authorization or consent pursuant to s 16 and s 18 of the AHA is given permitting the ground disturbing work.

[233] The proposed Additional Conditions say that mining activity can only be conducted if it complies with the Aboriginal Heritage Survey Procedure, which is in similar terms to the NTP's Weld Range Heritage Agreement and Aboriginal Heritage Protocol, including the engagement of monitors and provisions for ceremonies in relation to areas of Aboriginal cultural significance. With respect to Aboriginal sites that do not come within the definition of Avoidance Areas, the draft Additional Conditions provide for the grantee party to use its best endeavours to avoid disturbing any Aboriginal site. If application is made under s 16 or s 18 of the AHA, the grantee party must first provide a copy of the proposed application to the NTP. If an objection is received from the NTP the grantee party must attempt to negotiate in good faith with the NTP for at least four months in an attempt to reach an agreement to prevent or minimise any disturbance to any potential Aboriginal site. If no agreement is reached, the matter may be referred to the dispute resolution process provided for in the draft condition.

[234] Under the proposed Additional Conditions no notice of intention to mine shall be lodged with the Government party unless a copy of the proposed notice is given to the NTP with details of the mining proposal and including proposal for rehabilitation. If an objection

is received from the NTP in relation to environmental or heritage matters, the grantee party must attempt to negotiate in good faith with the NTP for at least 4 months from the date of the objection to try to reach an agreement to resolve the objection. If no agreement is reached, either party may refer the matter to be determined under the dispute resolution process provided for in the conditions.

[235] There are Additional Conditions proposed:

- To permit the NTP to continue to have access to exercise its native title rights and interests over the Tenement areas and to remove stone or ochre, provided that such access and exercise of rights does not interfere with the conduct of the mining activities and subject to the reasonable control of the grantee party for the purpose of safety.
- To restrict the dissemination of information as to the significance under Aboriginal law and custom of any particular Aboriginal site or precise location of it.
- For copyright and intellectual property rights in all reports produced on behalf of the NTP to be held by the NTP.

[236] Other proposed Additional Conditions cover:

- The grantee party conducting cultural awareness training for its employees, agents or contractors from a provider nominated by the NTP.
- The grantee party giving preference in employment and contracting work to people qualified to carry out the work.
- The establishment of a Liaison Committee, of not more than eight people chosen by the NTP, to meet once a quarter to discuss matters relevant to heritage protection, employment, training and the exercise of native title rights on the Tenements.

[237] NTP's Alternative Additional Conditions 19-20: If the Tribunal decides not to impose any of the Additional Conditions then the NTP seeks the following conditions in the alternative to Additional Condition 1.4:

• Requiring the grantee party to set aside an area around Quarry Stops 1 and 2 of not less than 800 metres by 500 metres, within the Tenement M51/546 or such other alternative quarry areas as may be agreed with the NTP as an Avoidance Area and not carry out any ground disturbing work within that area.

• The grantee party to ensure that the Wajarri Yamatji people at all times have a designated access route to and from the Quarry through any tenements held by the grantee party, which access route is to be at least one kilometre wide.

[238] The Alternative Additional Conditions also propose that:

- The grantee party ensure that WY people shall all times have a designated access route to and from Vivienne's Granite, Cattle Pool and Wilgie Mia through any tenements held by the grantee party (i.e. including the granted Tenements).
- The grantee party should not, except in cases of emergency, disturb the WY People when they are accessing and present at the quarry.
- The grantee party should negotiate in good faith with the NTP as to the location of the quarry area and the access routes.
- If no agreement is arrived at in the good faith negotiations, either party may seek to have the matter of the location of the quarry area and access routes, and any other matter in dispute, determined pursuant to the dispute resolution process.

[239] Under the proposed Alternative Additional Conditions no application is to be made under s 16 or s 18 of the AHA in relation to an Aboriginal site of cultural and religious significance, unless the grantee party has provided a copy of the application to the NTP, and, if an objection is received, attempted to negotiate in good faith with the NTP in an attempt to reach an agreement to prevent or minimise any disturbance to the site. If no agreement is reached, either party may refer the matter to be determined under the dispute resolution process as to whether the disturbance of the Aboriginal site should be permitted, and if so, under what terms. If the result of the dispute resolution process is that no disturbance to the site should be permitted, or should only be permitted on terms, then no application is to be made under s 16 or s 18 of the AHA in relation to the Aboriginal site that contradicts or which does not conform with the result of the dispute resolution process, except with the consent of the NTP. If an application is made under s 16 or s 18 of the AHA, the grantee party shall provide to the NTP copies of any decision, determination or correspondence from the Minister, Registrar or the DIA within three days of receipt of them.

[240] In light of my determination, it is not strictly necessary to consider the NTP's proposed conditions. However, for the record, I make the following brief comments. First, the conditions requiring further good faith negotiations and arbitration may well contravene the

principle established by the Federal Court that a Tribunal determination should finally resolve the issues between the parties (*Evans* at 213-214). As there is no agreement between the parties about further negotiations or determinations, as provided for in s 38(1A) and (1B) of the Act, a condition mandating further negotiations in some circumstance is not open to the Tribunal.

[241] Second, the Government and grantee parties submit that it is inappropriate and that it may be that the Tribunal has no power to require any conditions on the determination to be made as conditions of the grant of a mining lease itself. They say that this is not an appropriate function for the Government party through the Department of Mines and Petroleum, and may be beyond the power of the Minister under the Mining Act 1978 (WA) to impose. The conditions have the effect of the terms of a contract between the negotiation parties (s 41(1) NTA) and the enforcement of them would fall outside the proper function of the Government party in its administration and regulation of the *Mining Act* in that it would be called on to enforce a private agreement between the parties (GVP Conditions Response paras 14-18). It is not necessary to consider whether the Government party's suggested constraints apply to any of the NTP's proposed conditions, but I observe that the Tribunal has, in the past, made it a condition of a determination that the Government party must impose certain conditions on the grant of a mining lease (see for example Koara No. 2 conditions at pp 358-362) relating to access, compliance with the AHA, notice of a s 18 application to be given to the NTP and assignment of the mining lease were to be made conditions on the mining lease).

[242] Third, on the evidence that the quarry sites and mineral resource exist over the same area, I accept that the effect of both the NTP's Additional Condition 1.4 and Alternative Additional Condition 19 would be to prevent most of the proposed mining operation from proceeding. The Government party contends (GVP Conditions Response para 21) that such a condition would be beyond the scope of s 38(1)(c) of the Act, which is directed to allowing a future act to be done. Although not fully argued before me, I am of the view that a condition which allows no scope for the future act to be done would be problematic.

[243] Fourth, I accept that the condition requiring access to be given along a one kilometre corridor and maintaining an access route from Vivienne's Granite to Cattle Pool would also prevent the mining from going ahead.

[244] The grantee party (GP Conditions Response) is opposed to the NTP's conditions but agrees and that each future act may be done subject to the Government party's Extra Conditions set out at paragraph [37] above. Without prejudice to this position, Weld recognises the importance of Aboriginal heritage surveys over all the Tenements and confirms its willingness to engage in Tribunal conducted mediation with a view to agreeing a mutually satisfactory Aboriginal heritage regime with the NTP.

[245] The Government party contends (GVP Contentions 23 February 2011) that the Tribunal should determine that the act may be done without conditions. It now (GVP Condition Response) agrees to the imposition of the Extra Conditions which it says encapsulate many of the NTP's conditions and address their concerns.

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

[246] The Wajarri Yamatji native title claimant application (WAD6033/98, WC04/10) lists certain registered rights and interests into three categories of land: Area A, Area B and Area C. The extract from the Register of Native Title Claims states:

- "Area A' means land within the Application area and which comprises:
- areas of unallocated Crown land that have not been previously subject to any grant by the Crown;
- (ii) areas to which s. 47 of the Act applies;
- (iii) areas to which s. 47 A of the Act applies;
- (iv) areas to which s. 47 B of the Act applies; and
- (v) other areas to which the non-extinguishment principle, set out in s. 238 of the Act, applies and in relation to which there has not been any prior extinguishment of native title.

'Area B' means land and waters within the application area which is not within Area A and which comprises land and waters which are a "nature reserve" or "wildlife sanctuary" (as those terms are defined in the Wildlife Conservation Act 1950 (WA)) created before 31 October 1975.

'Area C' means land and waters within the Application area that are not included in Areas A or B above.'

Here, the Tenements are wholly overlapped by pastoral leasehold (Madoonga and Beebyn pastoral leases), so they cannot fall within Area A. The Tenements are not overlapped by any nature reserves or wildlife sanctuaries. Therefore, the Tenements fall within Area C.

[247] The following non-exclusive native title rights and interests have been registered in respect of Wajarri Yamatji's claimant application for Area C:

- '(9) A right to hunt in the area;
- (10) A right to fish in the area;
- (11) A right to take fauna;
- (12) A right to take traditional resources, other than minerals and petroleum used for sustenance from the area;
- (13) A right to be present on or within the area;
- (14) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
- (15) A right to invite and permit others to have access to and participate in or carry out activities in the area;
- (16) A right of access to the area;
- (17) A right to live within the area;
- (18) A right to erect shelters upon or within the area;
- (19) A right to camp upon or within the area;
- (20) A right to move about the area;
- (21) A right to engage in cultural activities within the area;
- (22) A right to conduct and participate in ceremonies and meetings within the area;
- (23) A right to visit, care for and maintain places of importance and protect them from physical harm;
- (24) A right to take flora (including timber);
- (25) A right to take soil;
- (26) A right to take sand;
- (27) A right to take stone and/or flint;
- (28) A right to take clay;
- (29) A right to take gravel;
- (30) A right to take ochre;
- (31) A right to take water;
- (32) A right to manufacture traditional items from the resources of the area;
- (33) A right to trade in the resources of the area;
- (34) A right to maintain, conserve and protect significant places and objects located within the area.'

[248] The Tribunal's task is to examine the effect of the proposed mining activities over the Tenement area on the enjoyment of the native title rights and interests of the NTP. For the purposes of the right to negotiate provisions of the Act, claimed registered native title rights and interests are treated as being on the same footing as determined registered native title rights and interests. A Tribunal determination is not based on an assumption that all the native title rights and interests exist and are exercised or enjoyed equally over the whole of the NTP's claim area just by virtue of their registration. Pursuant to s 39(1)(a)(i) of the Act, there must be evidence that 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).

[249] No issue was raised about the application of the non-extinguishment principle to the grant of the Tenements, such that any native title rights which are inconsistent with the grant will be suspended for the duration of the grant (s 24MD(3)(a) NTA).

[250] The grantee party (GP Final Submissions), concedes that the grant of the Tenements will have some impact on the exercise of native title rights and interests by the NTP but that any effect will be minimal because:

- There is 'little or no evidence' that the NTP enjoys the claimed rights and interests in the area of the Tenements.
- The Extra Conditions offered by the Government party will have some mitigating effect (para 8.4).

[251] The Government party contends (GVP Contentions) that any interference with the exercise of the NTP's rights could be mitigated by the Extra Conditions the Government party has offered to impose on each of the Tenements, in particular:

- Any right of the NTP to access or use the area of the Tenements is not to be restricted except where mining activity is occurring or for safety reasons.
- If the grantee party makes a s 18 application to the ACMC, it shall also give a copy of the application with all supporting documents (excluding sensitive commercial information) to the NTP.

[252] I agree with the grantee party in that, for the most part, the evidence given on this issue by the NTP is not specific to the Tenement area but relates more generally to the wider Weld Range area. The evidence and findings in the Tribunal's previous determinations deal with the carrying on of the NTP's community and social activities which are manifestations of their native title rights and interests in the various localities in and around the Weld Range. For instance, in *Walley* (at [44]-[45]) there is evidence and findings of regular hunting, camping, collecting bush tucker and teaching children about the country. The general evidence is not entirely irrelevant in that an inference can be drawn that if these activities occur in other parts of the Weld Range area they are likely also to take place to some extent on the Tenement area. Despite this, the NTP has had the opportunity to provide specific

evidence about the contemporary enjoyment of their native title rights and interests over the Tenement area and this must be the focus of the Tribunal's attention.

Rights to be present (13), to access the area (16), live in the area (17), erect shelters (18) and camp (19) and move about the area (20)

[253] The NTP contends (NTP Contentions para 10) that their right to be present on the Tenement area will be affected because their ability to access the area will be restricted. Mr Colin Hamlett in his affidavit says that he used to live on the Weld Range with his sons Carl and Brendan on and off when they were younger; they 'now come out to the Weld Range on holidays and as often as we can....' and that many Wajarri people regularly visit the Weld Range with their families for various purposes, including maintaining rock holes, camping out on weekends and holidays to teach children about the important places, collecting bush food, gathering ochre and hunting. He says that ochre is still gathered by Wajarri people for paintings and ceremonies but the evidence is clear that this is not an activity which occurs on the Tenement area. Access to the area to obtain stones for the purposes set out in paragraph 12 of his affidavit is said to be by the old people and there is no evidence that this is a contemporary activity. Mr Colin Hamlett's oral evidence is that he used to go to the Tenement area regularly but now he only goes there sometimes (TR p 8). He says that he and other Wajarri people go there to look for emu eggs and to check the quarries to make sure people have not been removing artefacts (TR p 8). Mr Colin Hamlett says that he has a camp at the eastern end of the Aboriginal Reserve near Wilgie Mia where he sometimes stays (TR p 75), but I am satisfied that the right to camp at that place will not be affected. Mr Brendan Hamlett gave evidence that he goes to the Weld Ranges a lot and that he brings his children with him and that he goes to the area of the Tenements for the purposes of showing respect for country and the old people, and to preserve and look after the area (TR p 9).

[254] The grantee party (GP Final Submissions at paras 8.7-8.8) says that Mr Colin Hamlett's evidence that he comes to the Tenement area to check that people have not been removing artefacts needs to be assessed in light of the fact that NTP witnesses have only recently become aware of the quarries on the Tenement area, the implausibility of Mr Hamlett being able to detect removal of an artefact and the lack of particularity as to the frequency of such visits. I accept that Mr Hamlett and others have not visited the Tenement area specifically for the purpose of looking at the quarry sites on the Tenements as, until recently, they were unaware of them. However, the evidence demonstrates the familiarity of the Hamlett family with other important areas in the vicinity, such Vivienne's Granite, and I

am satisfied that they have a concern about interference with them, including the taking of artefacts from them. I can accept that, from time to time, Mr Hamlett and other WY people frequent the general area for the purpose of checking on the disturbance of sites and that they will do this on the Tenement area now that the quarry sites have been located. I note that Mr Carl Hamlett is now employed by Sinosteel for this purpose (or was until its project was put on hold).

[255] There is no evidence that WY people live or erect shelters on the Tenement area. There is no evidence of regular camping at a specific place or generally in the Tenement area. The rights to be present, to access and move about the Tenement area and camp will be affected but these are not rights currently enjoyed on a frequent basis.

[256] The proposed chromium mining operations will occur over a period of some years and will eventually result in an open pit mine that will measure 3.2 kilometres by 700 metres. These operations, involving the use of mining equipment and the stockpiling and transport of ore, will undoubtedly have some effect on these rights, but the imposition of Extra Condition (1) would to some extent ameliorate it. The NTP contends (NTP Closing Submissions para 78) that a large pit will be left, even after rehabilitation, and that this will mean that the curtailment of access and the loss of the ability to exercise rights will be permanent. The exact depth of the pit from the first stage of the mine has not yet been determined and nor have the rehabilitation measures. Even though the mining will not be as disruptive as some large open cut mines, I am satisfied that, despite the legal effect of the non-extinguishment principle applying to the grant of the tenements (see s 24MD(3) NTA), there will be some permanent effect on the enjoyment of native title rights and interests.

[257] My finding in relation to these rights is that the effect on the WY current enjoyment on its own would not be given such weight as to justify a determination that the act may not be done.

The right to make decisions about use of the area by members of the Aboriginal society to which the native title claim group belong (14) and the right to invite and permit others to have access to and participate in or carry out activities in the area (15)

[258] I have dealt with these registered rights on the basis that the reference to 'others' in Right 15 is a reference to Aboriginal people and not to other people generally as any right to make decisions about the access of other people has been extinguished by the grant of the pastoral lease.

[259] There is not a great deal of evidence about the enjoyment of these rights. Mr Colin Hamlett says that he is recognised under Wajarri law as speaking for and protecting the sites and traditional stories of the Tenement area and that it is his responsibility to care for and maintain the sites (CH Aff para 4). However, there is no evidence of how this right is exercised or enjoyed in the contemporary setting in relation to WY or other Aboriginal people.

[260] The NTP says that the right to make decisions concerning the Tenement area will be curtailed because they will not be able to make decisions about Wajarri and other Aboriginal people coming to, passing through or exercising native title rights in the area and they will not be able to restrict or make decisions about access of uninitiated Wajarri people coming to the quarry area (NTP Closing Submissions para 82). There is evidence that, according to Wajarri Yamatji laws and customs, there are restrictions on who can be present at and use quarry areas, in that only initiated men are allowed to be present (TR pp 8, 64), but no evidence that these rights are currently exercised in relation to the Tenement area. The existence of the quarry sites now means that WY people may need to exercise these rights and that they will be to some extent affected by the grant. However, Extra Condition (1) would still enable the WY people access to parts of the Tenement area and to exercise its traditional decision making in relation to any sites, such as preventing uninitiated men from visiting areas that they are excluded from by traditional law and custom.

[261] My finding is that the effect of the grant on the enjoyment of these native title rights and interests is likely to be minimal, would to some extent be ameliorated by Extra Condition (1) and is not such as to support a finding that the future act must not be done.

A right to hunt (9), fish (10), take fauna (11), to take traditional resources, other than minerals and petroleum used for sustenance (12), take flora including timber (24), soil (25), sand (26), stone and or flint (27), clay (28), gravel (29), ochre (30) and water (31)

[262] The NTP contends that while mining operations are proceeding, the ability of the NTP to exercise these rights will at best be limited to those parts of the Tenements where access has not been restricted by the grantee party (NTP Contentions para 10). It is likely that, for safety reasons, activities such as hunting will not be permitted over an area wider than just where the mine is. The NTP also says that the gathering of plants and bush foods will be prevented where the land is cleared, even if access is permitted (NTP Closing Submissions para 79).

[263] I accept the NTP's contentions but they must be seen in the context of the current enjoyment of these rights which could be affected. There is no evidence of the contemporary enjoyment on the Tenement area of the rights to take soil, sand, clay, ochre or water or to fish.

[264] In relation to the exercise of rights associated with hunting, gathering and collecting material on the Tenement area there is evidence of collecting emu eggs (Colin Hamlett TR p 8); the *Waladarah* tree which has edible nuts and the *Gabawanna* tree which has big berries (CH affidavit para 13); the *Bibin* tree which produces juicy, edible flowers (TR p 12, CH Aff para 13); and the *Mulga* tree, which is used for making objects such as spears, boomerangs and shields (TR p 12). Mr Colin Hamlett says that he has observed that vehicles and heavy equipment frighten kangaroos and other wildlife away (TR p 78).

[265] There is a considerable amount of evidence about exercising these rights in the Weld Range area generally by hunting, taking stones and gathering seeds and other plants (TR pp 76-77, previous Tribunal determinations and the NHL Report) and I am satisfied that these rights are enjoyed from time to time over the Tenement area itself.

[266] The evidence provided in relation to the exercise of these rights of hunting, gathering and collecting material does not establish that the activities can only be done on the Tenement area. Indeed, the evidence given in these proceedings indicates that there are many other areas in the Weld Range where these activities can be and are carried out. While I am satisfied that the future act would have some impact on the ability of the NTP to enjoy these rights on the Tenement area, the impact is not such as to support a finding that the act should not be done.

[267] The NTP contends that the effect of cumulative mining means that it is not the case that hunting, gathering and camping can just as easily be carried out outside the area of the Tenements because the more mining in the area, the less area there will be to exercise these rights (NTP Closing Submissions para 81). This contention could, in different circumstances, be given weight particularly if the mining area being considered was the only area left where these rights are enjoyed. However, at this point, this is not the case in the Weld Range area.

A right to engage in cultural activities (21), including ceremonies and meetings, within the area (22)

[268] The NTP contends that activities such as camping and teaching will not be attractive or feasible near a mining area and that teaching will be impacted if the key areas of particular significance, such as the quarries, are damaged (NTP Closing Submissions para 79). The NTP says that the activities of the Wajarri people in the Tenement area cannot be viewed in isolation, given the interconnectedness between the activities and the Weld Range site complex area in forming a cultural landscape (NTP Closing Submissions para 84). They say that even where isolated activities may be possible, they will lose meaning if the cultural landscape is impacted by key areas or traditional pathways being disrupted or damaged (NTP Closing Submissions para 84).

[269] During the site visit, Wajarri witnesses gave evidence about bringing young people to the Weld Range and the area of the Tenements, the quarry sites in particular, in order to teach them about culture, history and the country (TR pp 77, 100 and 114). Mr Colin Hamlett said that young people are taught by bringing them out on country and talking to them about how their ancestors used to live, and comparing that to the conditions of today (TR p 77). He said that mining affects the ability to teach the young people because 'you can't show them where these things are, and you can't explain to them' (TR p 77).

[270] Colin and Brendan Hamlett gave evidence about ceremonial grounds used in the past located near Vivienne's Granite and at other places in the Weld Range, but no evidence was given to suggest that any ceremonies or meetings currently take place in the Weld Range area or within the Tenement area. Other cultural activities, including teaching young people and looking after country occur on the Tenements from time to time. I find that the grant of the Tenements will affect the capacity to enjoy this cultural activity to some extent but would be partly ameliorated by Extra Condition (1) and is not sufficient to support a finding that the act should not be done.

A right to manufacture traditional items (32) and trade in the resources of the area (34)

[271] No evidence has been provided to establish that these native title rights are exercised to any extent in the Tenement area.

Rights to visit, care for and maintain places of importance and protect them from physical harm (23) and the right to maintain, conserve and protect significant places and objects located within the area (34)

[272] These rights will be affected by the grant of the Tenements, given my findings that they are within an area of particular significance to the NTP and that there are quarries and other sites which will also be affected. The issue is further considered below under s 39(1)(a)(v).

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

[273] The NTP contends that they will be unable to carry out their culture and traditions within the Tenement area, which will affect their ability to carry out such traditions in surrounding areas of the Weld Range, due to the Tenements containing traditional pathways to a range of significant sites, including Wilgie Mia and Vivienne's Granite (NTP Contentions para 16). They say that the limited ability of the NTP to access the Tenements and these important pathways and sites will have a significant impact on the NTP's way of life, as it will impact their ability to pass on traditional knowledge and exercise their native title rights and interests (NTP Contentions para 17). The NTP contends that Dreaming tracks and songlines run along the pathway located on the Tenements (NTP Closing Submissions para 41).

[274] The Government party says that the destruction of part or all of the quarries on the Tenements could have an effect upon the way of life, culture and traditions of the NTP because they will not be able to be visited for teaching purposes, but that this must be considered in the context of evidence given of the large number of quarries in the vicinity (GVP Closing Submissions para 11).

[275] I have already found that the way of life, cultural and traditions will be affected to some extent by the restrictions on the capacity of the NTP to pass on traditional knowledge to young people in relation to the Tenement area. The issues of the pathways and associated dreaming tracks and song lines is dealt with below under s 39(1)(a)(v) NTA.

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

[276] The NTP contends that the future act would affect their ability to make decisions about use of the area of the Tenements, and hence impact upon their social and cultural structures (NTP Contentions para 18). I have already dealt with decision making and the effect on other aspects of WY people's culture and traditions. The NTP further contends that

the grant would adversely affect their economic structures by removing their right to manufacture and trade in the resources of the area and take flora, timber, soil, sand, stone, clay, gravel, ochre and water (NTP Contentions para 19). There is no evidence that these rights are currently enjoyed over the Tenement area and I find that the future act will not have any negative impact on this aspect of the NTP's economic structures.

[277] The Tribunal has held that any positive effect of a future act can be taken into account (*Waljen* at 170) and this issue has been dealt with under s 39(1)(c) NTA.

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

[278] I have already dealt with freedom of access above. As already mentioned, there is no evidence of the current practice of ceremonies being carried out in the Weld Range area. There is insufficient evidence to support a finding that the act should not be done because it will affect freedom of access and freedom to carry out rites and ceremonies.

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

[279] It is common ground that the question to be considered is whether there is an area or site of particular significance (being that which is of special or more than ordinary significance to that native title party) that will be affected by the future acts (*Cheinmora v Striker Resources NL & Ors; Dann v State of Western Australia and Others* [1996] FCA 1147; (1996) 142 ALR 21 at [34]-[35]). The Tribunal will have to make a value judgement about whether, from the NTP's point of view and according to their traditions, the area or site is special or different from other land in respect of which the NTP say they have native title rights and interests. This interpretation is consistent with the view that all of a native title holder's land is significant to the native title holder, but that persons may speak of areas or sites that are of 'particular significance' in accordance with their traditions (*Waljen* at 173-174).

[280] It is also common ground that consideration of this topic in the matter at hand requires an examination of the evidence relating to three issues being: first, the 'highway' or 'pathway' and associated Dreaming stories which pass through the Tenement areas; second, the quarries and artefact/scatters particularly the quarry located on M51/546 and probably extending into M51/543; and third, the significance of the Weld Range area (or pink box area) generally. The NTP contends that the evidence relating to these matters establishes that the Tenement area is an area or site of particular significance to the NTP in accordance with their traditions. The Government and grantee parties contest this contention. The grantee

party also says that on the evidence, a finding of this significance for the pink box area is not 'capable of being made' (GP NHL Submissions para 4.13).

[281] *Highways and dreaming stories:* The NTP contend that there is evidence of the existence of Dreaming tracks and story lines often associated with traditional trading routes for material such as ochre (NTP Closing Submissions para 41) which are specific to the Tenement area.

[282] The NTP says that the fact that people travelled between Wilgie Mia and the Vivienne's Granite area is illustrated by the following facts:

- The red ochre stencils found near Vivenne's Granite on the balancing rock and also the ochre grinding stone found near that area (NTP Closing Submissions para 42).
- The rock carving depicting the rockholes at Vivenne's Granite shows that the location of water sources determined the traditional pathways; and the pathways between these rockholes run through the Tenements (NTP Closing Submissions para 43).
- The extensive quarry located on M51/546 indicates extensive use of the area by Aboriginal people over a lengthy period of time: pathways took them through that area and that is why the area was used so much (NTP Closing Submissions para 44).

[283] At paragraph 10 of his affidavit, Colin Hamlett talks about the area of the Tenements being used as a 'kind of highway' between Wilgie Mia and Vivienne's Granite where the old people would hunt, gather stones and ochre and camp. He talked about the highway at the hearing in Cue (TR p 75), saying:

'The highway we was – talking about was when people came down to do traditional law business within the ranges, or people travel from there going out to do traditional law business. That was the highway we was talking about.'

[284] Ms Whitton also talks about this 'highway' at paragraphs 9 and 10 of her affidavit as an 'essential highway'. Mr Piotrowoski (para 6) says that the waterholes and visible rock art motifs at Vivienne's Granite support the existence of these traditional tracks between waterholes, particularly from Vivienne's Granite to Wilgie Mia. There is also evidence of a track from Vivienne's Granite to Cattle Pool which passes through the Tenement area.

[285] The grantee party contends that there is no evidence that the Tenement area is used by the NTP as a highway and that the evidence only refers to the highway being used in a past sense (GP Final Submissions para 9.4). The grantee party contends that while there may be

evidence of historical human activity within the Tenement area, there is no basis to conclude that the area was used as an *essential highway* (GP Final Submissions para 12.13). Ms Whitton, in cross examination during the hearing at Cue, said that she could not conclude that the claimed highway is the only pathway or the most likely pathway used in the pink box area (GP Final Submissions para 12.16, in reference to TR p 210). The grantee party says that there is nothing in the Napier Report which suggests the proposition that the Tenements were used as an essential highway (GP Final Submissions para 12.17). The Government party makes a similar submission in relation to the claimed highway (GP Final Submissions para 10).

[286] I generally prefer the submissions of the Government and grantee parties on this issue. The evidence in relation to the 'highway', particularly the notion of an essential highway between Wilgie Mia and Vivienne's Granite and the associated Dreaming tracks and songlines that run through the Tenements, is not particularly persuasive. It was established during the site visit that there are a number of pathways or highways that come from various parts of the country to and through the Weld Range (see TR p 98 onwards, Colin Hamlett). Mr Colin Hamlett said that there is a pathway used by the Badimia people coming from the south/south-west of the Weld Range and a pathway used by the Wiluna or Western Desert People coming from the east (TR p 99). Mr Colin Hamlett confirmed that these traditional pathways are not used by Aboriginal people anymore, as vehicles are now used for travel (TR p 100). Based on the oral evidence given by Mr Colin Hamlett during the site visit, the 'highway' through the Tenements is not unique. There are, in fact, numerous pathways coming from all directions to Wilgie Mia and the Weld Range.

[287] There is evidence of a number of Dreaming stories associated with Wilgie Mia, the Weld Range and its surrounding area, including the injured *marlu* story associated with the creation of Wilgie Mia. None of the NTP witnesses have specifically identified any of these stories with the Tenement area. There is also no evidence of contemporary trading occurring along any of the highways or that they are specifically associated with the Tenement area.

[288] There is evidence of substantial past human occupation of the Weld Range area and it would be surprising if the Tenement area was not used by Aboriginal people to travel to Wilgie Mia and between various rock holes. There are other rock holes in the pink box area and numerous other quarries but the evidence does not establish that there was an 'essential' or specific traditional highway through the Tenement area. Mr Colin Hamlett acknowledged (TR p 99) that there were pathways to Wilgie Mia from all directions, something which is

also well established by the evidence. The existence of these pathways and the associated Dreaming stories and trade routes provide support for the NHL Report (pink box) area being an area of particular significance, but are not on their own a sufficient basis for concluding that the Tenement area is a site or area of this kind.

[289] *Quarry sites:* The second issue is whether the traditional quarries are sites of particular significance. The evidence establishes that there are likely to be other quarry sites on the Tenement area, but the evidence concentrated on the quarry identified at Quarry Stops 1 and 2 (the Quarry) on Tenement M51/546 and which probably extends into M51/543. Whatever its archaeological significance, the issue before the Tribunal is whether the Quarry is a site of particular significance in accordance with the traditions of the NTP. The direct evidence from the initiated WY men (Colin, Carl and Brendan Hamlett) is that the Quarry site is significant to them, as are all of the numerous quarry sites throughout the Weld Range. They are significant because of the past association of their ancestors with them and are still used for teaching and passing on the traditions to younger generations. According to Colin and Carl Hamlett they are places that should only be accessed by initiated men (Colin Hamlett TR pp 8, 75, Carl Hamlett TR p 24). Mr Colin Hamlett (affidavit para 12) testifies to the quarry areas being 'the heart and soul of Aboriginal people before white people came' and their contemporary significance in being a means of passing on WY knowledge and culture.

[290] The Government and grantee parties submit that the Quarry on the Tenement area is not of special significance because of the large number of other quarry sites identified in the Weld Range area. They also say that because Mr Carl Hamlett identified the Airelles quarry as 'more significant than others', this suggests that the Quarry site was not of special significance. The issue is whether the Quarry site is of special or more than ordinary significance to the NTP in accordance with their traditions. In my view, this cannot be answered by just saying that there is a large number of quarries elsewhere in the vicinity or that there are grades of significance for different quarries.

[291] The Tribunal has noted in previous determinations that isolated quarries, artefacts or scatters may not necessarily be sites of particular significance to a NTP just because they are found on native title land. There must be evidence of whether they are special according to the traditions of a native title holders usually established by direct evidence from them. The NTP evidence establishes that the Quarry site is regarded as more important than other

areas of Wajarri Yamatji country and that it is important to them in a traditional way. I am satisfied that it is a site which falls within the scope of s 39(1)(a)(v) NTA.

[292] The evidence also establishes the likelihood of other quarry sites existing on the Tenements and the possibility of burial grounds. The Tribunal is aware, from its specialist knowledge, that burial grounds and human remains are places and objects of special significance to Aboriginal people and I infer that this would be the case for WY people. It is possible that the chromium resource mining will encounter quarry and burial sites on M51/546, M51/544 and M51/543 and that the mining of the nickel laterite resource will encounter them on these Tenements and M51/545. Although the evidence is not as clear cut as in relation to the Quarry site, I can give some weight to the fact that there is a reasonable likelihood that other sites of particular significance will be encountered and potentially interfered with on the Tenement area.

[293] Weld Range (pink box) area: The third issue is whether the pink box area is an area of particular significance to the NTP in accordance with their traditions. My finding on this topic is based on the primary evidence of Wajarri Yamatji people given by witnesses at the hearing, contained in the evidence and findings of the Tribunal's previous determinations and the factual information from WY people contained in the NHL Report. There can be no question that, from the perspective of the WY people themselves, the area falls into this category. It has been delineated by WY people as important and distinct from the rest of WY country for the purpose of both the NHL Application and the applicability of the special Weld Range Exploration Agreement. In my view, the WY view of the significance of the pink box area is more than amply supported by the evidence.

[294] Wilgie Mia cannot be viewed in isolation. It was a centre piece for traditional activity by the ancestors of the WY people and other Aboriginal people. It was a traditional centre of high cultural significance for the mining and trading of ochre with, in its near vicinity, important places for traditional ceremonies including initiation. The archaeological evidence establishes that the general Weld Range area was frequented by Aboriginal people. Not surprisingly, given the importance of Wilgie Mia, their occupation of the area was widespread and occurred over a significant period of time. The breakaways outside the Weld Range contain caves that were lived in, painted and used as places to prepare young men for initiation. There are Dreaming stories associated with the Weld Range area which emphasise its importance to the WY people. The continuing belief in spirit people in and around the Weld Range is testament to the significance of the area in accordance with their traditions.

[295] The fact that initiation ceremonies are no longer carried out in the Weld Range Area does not mean that the Weld Range area has totally lost its traditional significance for the NTP. I can infer that past mining and pastoral activity has diminished the WY people's freedom to use the Weld Range area as they once did, particularly for ceremonies that are of a sacred and secret nature. Despite this, Mr Colin Hamlett and his sons are initiated men and have demonstrated a continuing acknowledgement of the importance of this area to the culture and traditions of the WY people. The evidence from other WY people recorded in the previous determinations of the Tribunal and in the NHL report confirms this position.

[296] The Government party contends that there is no traditional basis for the delineation of the pink box area and that it is purely arbitrary. I cannot agree. There is a plethora of evidence of the traditional significance of the area which may even extend beyond it. For understandably practical reasons (i.e; for the purposes of putting governments and mining companies on notice of the special nature of the Weld Range area) they have, since 2005, identified and produced a map of the area using the rectangular pink box.

[297] The Government and grantee parties submit that the issue of Aboriginal sites can be dealt with under the provisions of the AHA. I accept that the grantee party has offered to carry out a heritage survey and is aware of its obligations under the AHA. The Tribunal has had regard to this legislation and the regulatory regime associated with it in determining whether there is likely to be interference with areas or sites of particular significance to a native title party in the context of the expedited procedure, and has often found that it is sufficient to make it unlikely (see for example Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd, NNTT WO04/89, [2007] NNTTA 15 (1 March 2007), Daniel O'Dea at [81]-[91]). The same is true of future act determinations (Waljen at 212; Australian Manganese at [54]). However, the Tribunal's position is that the effectiveness of the AHA must be considered taking into account the facts of the particular case. Its provisions do not contain a blanket protection for sites. To rely on the AHA in the current circumstances to deal with the issue of the effect of the grant on areas or sites of particular significance is inappropriate given the findings I have made. To do this would be an abrogation of the Tribunal's responsibility to properly consider the issues where the nature of the grantee party's mining operation is reasonably clear, as is the effect such operations will have on the area and sites of particular significance. The mining operations cannot take place in a way that will avoid the significant area or some of the specific sites within it.

[298] In summary, my finding is that the mining operations proposed for the Tenement area will affect part of an area of particular significance to the NTP in accordance with their traditions and the quarry sites within it which are also of particular significance for the purposes of s 39(1)(a)(v) NTA.

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

[299] Wajarri Yamatji attitude to mining: Ms Tan in her final oral submission said that the WY people are not opposed to mining as such and have entered into mining agreements in areas outside the Weld Range. I generally accept what the NTP says in its Closing Submissions (paras 5.5, 5.6 and 5.7):

'There has been past exploration and drilling in the area of the Tenements, although this has not been extensive and have not amounted to major destruction of sites, although they have had an adverse impact on the Weld Range complex area. All of these have been of concern to the Wajarri People, although much of this occurred prior to the time when Wajarri people had any legal ability to make objections...the NNTT should take into account the inability of the Wajarri People to prevent past drilling in the area...

Since the enactment of the NTA and the right to negotiate, the Wajarri People have entered into exploration and prospecting agreements, but these have been agreed on the basis that ultimately the Wajarri People have no right of veto and have therefore negotiated as much protection as they can within the circumstances. They have taken the view that it is better to reach agreements to protect the most important areas within the Weld Range complex area than risk unlimited mining being allowed on all of it...

The exploration agreements entered into have generally involved significant protection for areas of significance within the Weld Range complex area, covering avoidance of sites...and also any other areas of religious or cultural significance identified in surveys which had to be carried out prior to ground disturbing work beyond low impact activity. Applications for s 18 consents to damage or affect such avoidance areas are not permitted in this area without the consent of the Wajarri People. These provisions are set out in a special different heritage agreement applicable for the Weld Range complex area only, recognising the importance and significance of the area.'

[300] Evidence of Colin Hamlett on mining. Colin Hamlett would not like to see mining activities happen in the Weld Range area (TR p 77). He says that the WY claimants have agreed to exploration licences on conditions within the Weld Range area but have not agreed to the grant of mining leases. As explained above, this evidence was subsequently clarified to the effect that the NTP have agreed to the grant of one mining lease but not to actual mining.

[301] Mr Hamlet would not be happy to sign a survey agreement if there was a possibility of s 18 AHA application being made to destroy sites. He would consider signing agreements that protect sites and to consent to s 18 AHA disturbance with the consent of the WY people.

[302] Mr Colin Hamlett explained his general attitude to mining (TR pp 24, 25):

'COLIN HAMLETT: Yes, Carolyn, look, we've been – we – we've got to make it quite clear, you know, mining has to happen. That's – it's progress, you know, and it will eventually – it will eventually happen. We're not against entire – stopping the mining entirely; we're wanting respect, and to talk to us and that, and pay some respect to the traditional owners of this country, instead of going back to the 60s, 70s and 80s, where they just used to do anything they want with Aboriginal cultural stuff.

The things that the Europeans built here, like Sydney Harbour Bridge and all that sort of stuff, is more important than Aboriginal traditional stuff that's been here for centuries and centuries before white fellas came out here. And all we need is showing a little bit of respect for our traditional country.

MS TAN: Yes, but in terms of respect, then, can you – what about damaging this place? Is – it's not – is it enough to just show respect, or do you need to keep it - - -

COLIN HAMLETT: Well ---

MS TAN: --- keep it ---

COLIN HAMLETT: Well, we try to keep as much as possible. We know it's inevitable that the government will give the approval to mine the stuff, but we'd like negotiating with people to make sure we can preserve the most important bits that we feel are important to us. The really important things.'

[303] The grantee party says (GP Final Submissions para 13) that this statement of Mr Hamlett appears inconsistent with the consent determination made in WF10/35 and the various exploration agreements which have been entered into with the NTP. I cannot agree. These and other statements from Mr Hamlett express a wish that mining should not happen in the Weld Range but that if it does it should be after agreement which preserves as much as possible of WY's culture and heritage. The consent determination and exploration agreements were made on the basis that exploration could proceed subject to special conditions in the Weld Range and that mining would be the subject of further agreement.

[304] Exploration agreement and mining negotiations with Sinosteel: Colin Hamlett said he was opposed to the Sinosteel project (TR pp 86 and 95). The grantee party tendered an article from *The Australian* newspaper, dealing with Wajarri Yamatji mining negotiations with Sinosteel which includes a prominent photograph of Colin Hamlett and reports: (*The Australian*, 'Mine site will test China's iron will' Tuesday 4 January 2011, GP 141)

'Hamlett says that as the process at Weld Range moves from exploration into mining, he is confident agreement can be reached on preserving the most significant cultural sites. He is pragmatic enough to realise a mine will proceed, and that some sites will be destroyed, but is encouraged by the sensitivity his new Chinese partners have shown to his concerns. "They have something similar to our culture," Hamlett says. "When I talk to them about it, you know, they have their special places..." Hamlett's objective, he says, is "to save as much as possible of our history and our culture and heritage as much as I possibly can.""

[305] The article also reports on statements by Sinosteel's Chief Operating Officer Julian Mizera:

'Sinosteel chief operating officer Julian Mizera says the company expects to be able to sign a mining agreement with traditional owners this month.

"There are certainly some sites of very strong significance that not only we will not mine but we will actively preserve," Mizera says. "Wilgie Mia is a site of national and international significance. We are not only going to preserve it but put in place a lot of additional safeguards, including fencing, security and rangers."

Some areas, however, will inevitably be disturbed and artefacts relocated.

"We have agreed to a process that allows us to take identified sites, sit down and work out how to manage those sites," he says.

"Some caves we will not be able to relocate.

"They may be deemed significant enough to stop mining."

...

"We have got to strike the balance to preserve the things that are important and provide a compensation package for areas that are disturbed," he says.'

[306] In cross-examination by Mr Green on the article, Colin Hamlett said (TR p 106):

'MR GREEN: Notwithstanding all that, is it - is it correct to say that you're confident that you can reach agreement with Sinosteel?

COLIN HAMLETT: I'm not sure about – that was that comment I made, but we have to reach the agreement. We haven't reached any agreement.

MR GREEN: In this article, the CEO of Sinosteel is reported as saying that he expects:

... to be able to sign a mining agreement with the traditional owners this month -

which is January. So that – that hasn't happened.

COLIN HAMLETT: It hasn't, has it?

MR GREEN: Is it – do you think it's likely to happen?

COLIN HAMLETT: It's a possibility it'll happen.

MR GREEN: Do you hope that it happens?

COLIN HAMLETT: No, I don't.

MR GREEN: Okay. So you are – you possibly will just walk away from the negotiations?

COLIN HAMLETT: No, we won't. If we walk away from negotiations, Aboriginal people won't benefit out of it at all. So just rip up the Aboriginal country and no one benefits, apart from the mining company and the State and Federal governments.'

[307] On the issue of mining, even though the quarry area over the Tenements would be disturbed or destroyed, Mr Colin Hamlett had this to say (TR p 109):

'MR GREEN ...

The – the quarries sit on or very near to the resource that this company wants to mine.

COLIN HAMLETT: Yes.

MR GREEN: And you can see that the quarries are very close to most of the resource.

COLIN HAMLETT: Yes.

MR GREEN: Your position is that, because those quarries are there, they shouldn't be allowed to mine that resource.

COLIN HAMLETT: However, if - if that whole area was surveyed, and the decision would be made by the Wajarri and the Wajarri group on what happens there. With those

quarries – there'd be – more quarries than those if – when you start doing surveys. There would be more quarries than those, and then we could sit at the table and talk about it. But when you're not at the table talking about it, these things happen, what we're doing here today.

MR GREEN: So what – what you would say is there should be more surveys, and perhaps more quarries can be identified, and in that way Wajarri people could ensure that some quarries were preserved to show - - -

COLIN HAMLETT: But that's just what I'm saying, yes. The more important ones – we – we feel is more important than the others, but we don't know.'

(TR pp 115-116)

'DP SUMNER: Okay. What – what's your position if you get to a point where a mining company says, "Look, this is where the resource is, and this is where we have to mine, and it happens to be underneath the area of the quarries that you looked at yesterday. And, really, you can't do it without disturbing the quarries, because it's open cut mining'"? What's your attitude to that and that situation?

COLIN HAMLETT: Well, if they're going to destroy our sites, we need compensation for any damage to our sites. But this – if it's – I mean, I would take it as far as I possibly could through the court system if it were so important to me, or to Wajarri people.

DP SUMNER: So would you be prepared to negotiate about – about it?

COLIN HAMLETT: So we'd be prepared to negotiate.

DP SUMNER: Even though a lot of the quarry area would, of necessity, be disturbed by open cut mining?

COLIN HAMLETT: Yes. Because there could be other sites there as significant as that or more significant than that in that area, if it was surveyed and checked out.

DP SUMNER: So you'd – well, would you do – if you were negotiating, what would you do? You'd try to keep some – preserve some and – and perhaps let some others go? Is that what you would - - -

COLIN HAMLETT: That's what I'm saying. That what – that's what would happen, because we'd be – otherwise we'd be tied up in the court system for years and years.

DP SUMNER: So your – your position is that you'd prefer for there to be no mining in this area - - -

COLIN HAMLETT: That's right.

DP SUMNER: --- in these ranges.

COLIN HAMLETT: That's the preference.

DP SUMNER: Including by Sinosteel.

COLIN HAMLETT: Yes.

DP SUMNER: But that the reality is that mining happens, and if it is to happen, then it's – it should happen after discussions and agreement with the Wajarri People.

COLIN HAMLETT: Exactly.

DP SUMNER: And if there is such an agreement, you - you would be prepared to talk about places that could be disturbed and other places that shouldn't be disturbed.

COLIN HAMLETT: That's right.'

[308] *Findings in relation to WY attitude to mining:* The interests, proposals, opinions or wishes of the NTP in relation to the management use or control of the land which I have dealt with above establishes that the NTP is not opposed to mining, but would prefer it does not

occur in the Weld Range (pink box) area and has special requirements if it does. These requirements are reflected in the special heritage protection provisions which the NTP insists on in return for agreeing to exploration and that the NTP wishes to see reflected in any mining agreement. While the NTP is prepared to negotiate mining agreements, and was doing so with Sinosteel, it has not until this point entered into an agreement that permits mining over the pink box area. Mr Colin Hamlett's evidence is consistent with this position.

[309] The WY people's approach is similar to that of the Martu People described in *Martu/Holocene* at [211]:

'The Martu community along with many Aboriginal communities throughout Australia are in transition from a traditional society to one which accommodates the reality of living among a dominant culture that has little in common with their traditions. As part of this accommodation, the Martu are prepared to contemplate activity on their land which traditionally they would not have agreed to in return for benefits of an appropriate kind.'

In addition the WY want appropriate measures to protect their heritage in the Weld Range area.

[310] *Does the NTP have a veto*? The Tribunal accepts that the NTA does not give the NTP a veto over mining. The approach to this issue was summarised in *Martu/Holocene* at [161]-[162] citing also *Australian Manganese/Nyiyaparli* at 407-409, [55]-[57] and at 412-413, [71]-[72]. The Tribunal cannot make a determination that a future act must not be done solely because there is no agreement or a native title party is opposed to mining. The Tribunal is required to take into account evidence relating to all the factors in s 39 NTA. In a case such as this, where the mining operations will affect an area (the pink box area and the Tenement area within it) and sites (including the quarry sites and possibly burial sites) of particular significance to the NTP then the evidence, interests, proposals, opinions or wishes of the NTP can be given significant weight.

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

[311] Grantee party evidence and submissions: Mr Edwards says in his second affidavit that the chromium resource and the nickel resource have a combined in situ value (exclusive of mining and processing costs) of approximately US\$107 billion. Approximately 79.3 per cent of this value is located within the area of the Tenements. The chromium resource project has a net present value (after tax) of A\$681 million for the rail haulage option and A\$590 million for the road option. Weld commissioned ProMet Engineers Pty Limited to undertake a preliminary technical and economic evaluation of the alloy production process as the base

for a preliminary assessment of the capital and operating cost and economics of the chromium resource project. Mr Edwards says that the evaluation prepared by ProMet shows that the alloy production process is technically and economically viable based on proven iron and steel making process equipment and technology.

[312] Weld has also commissioned ProMet to undertake a Scoping Study (GP 143) for the mining of the chromium resource and the production of the iron/chromium/nickel alloy ingots. The Scoping Study concludes that the chromium resource project is highly viable under a number of development scenarios.

[313] The Scoping Study conducted by ProMet deals with certain parameters described as 'Stage 1' of the Project. A Weld Range Metals Press Release dated 30 August 2010 (GP 60) reports a number of findings of the Scoping Study in relation to Stage 1:

- An initial mine life of 25 years.
- Open pit mining and crushing of 600,000 tonnes of ore per annum containing chromium, iron and nickel.
- A construction workforce of around 1,000 contractors and permanent employment for 225 people for the Project. [NOTE: Mr Edwards gives evidence that the mining operations are likely to require an on-minesite workforce of 20 to 25 personnel (NE Aff no 3, GP 142, at para 26) see above.]
- Generating approximately A\$2 billion in taxes and royalties.
- Production rate of 310, 000 tonnes of refined stainless alloys per annum.
- Selling to stainless steel mills in Asia, Europe and USA.
- Capital costs of A\$590 million.
- Annual operating income of A\$407 million.
- Annual operating costs of A\$135 million.

[314] Most of the capital investment in Stage 1 relates to the establishment of the stainless steel refinery for export of refined stainless alloys and import of raw materials including chromite and nickel concentrates. The report states that: 'industry conditions are improving and that recovery is underway in the international stainless steel industry'; and 'Independent studies show that the demand for stainless steel is forecast to grow at an average of 7% per annum to 2015.'

[315] The Weld Range Metals Press Release of 30 August 2010 also reports the following statements:

'Weld Range Chief Executive Officer, Michael Naylor, said that the Company was very pleased with the key findings of the Scoping Study.

"The results find that Stage 1 of the Project is technically and financially robust."

"The two key factors in the positive results are the favourable characteristics of the Chromium resources and the attractive economics of the three stage pyro-metallurgical processing plant for the production of refined stainless alloys.

"The findings are based on more than \$10 million in project expenditures, which include approximately 60,000 metres of drilling within the mining tenements of Weld Range to date," he said.

"The project has a significant resource base which will underpin a long mine life - well beyond the first 25 years anticipated in Stage 1.

Mr Naylor said the project will position Weld Range as a strategic player in the supply of refined stainless alloys as feedstock to stainless steel mills for the manufacture of stainless steel products in Asia, Europe and the United States.

"By locating the stainless steel refinery in Western Australia, Weld Range retains the 'value adding' process. Rather than merely exporting bulk raw materials, Weld Range will export value added products in the form of refined stainless alloys containing chromium, nickel and iron," he said.

"The Scoping Study results give us the confidence to proceed directly with the Definitive Feasibility Study."

We expect to progress the DFS upon completion of funding by the Company towards a development decision by the First Quarter 2012.'

[316] There is no evidence to contradict Weld's assessment of the economics of the Project and I accept this evidence subject to the qualifications expressed below.

[317] In terms of the economic value of the Project for the State, at the hearing in Cue, Mr Edwards stated 'we're not selling the ore, as such; we're down – or we're processing the ore to produce a product, and that product is the thing that is on-sold.' He said (TR pp 284-285):

'So that's different from the direct shipping groups who mine it, put it on a truck, put in on a ship, and send it off. So we're bringing industry to the west and creating an industry which could basically generate other industries coming to Western Australia, basically adding on to what we're producing.'

- [318] The grantee party (GP Final Submissions para 14.1) submits that the following factors are matters of economic significance arising from the grant of the Tenements:
- Benefits to the local economy arising from the development of a local resource; engagement/employment of local communities; and expenditure within the local community.

- Benefits to the State arising from factors outlined above; payment of royalties in accordance with the *Mining Act*; and establishment of a downstream processing plant.
- Benefits to the nation arising from the earning of foreign capital from the sale of the mining product; and contribution to the national tax base.

[319] The Government party submits that: 'To establish a downstream processing plant in Western Australia's northwest would be a very significant development for the Western Australian mining industry and the economy in general' (GVP Closing Submissions para 95). They say that the Tribunal should conclude that the Project is likely to be of significant economic and other significance to the local, State and national economies and should place significant weight on this factor. Benefits include royalties and export income; and benefit to the local economy in and around the greater Geraldton area (GVP Contentions para 66).

[320] In general, I accept the Government and grantee parties' submissions and accept that the Project, including the proposal to value add by processing in Australia, has potential to provide economic benefits to Australia and Western Australia, and given considerable weight to it. The NTP has queried this significance on several grounds: the Scoping Study forecasts are outdated and incorrect, particularly the net profit based on the current exchange rate; further drilling is necessary; a definitive feasibility study is still needed; there is no definite evidence about the financing of the Project and it is too early to predict the return to the State or nation. It may also be that uncertainty over the Sinosteel Project and the OPR railway has affected Weld's plans. There is some uncertainty as to whether the Oakajee Port Project will proceed. There is a difference of A\$91 million in the net present value of the Project if Weld is forced to use road haulage instead of rail. However, I am satisfied that the Project does not depend on the infrastructure from these projects as there is still a viable option to transport the ore by road and other options for the location of the processing plant.

[321] There is no doubt that further work needs to be done to finalise the Project and it cannot be said at this stage that the Project will definitely proceed. It is more accurate to describe the Project as of potential economic benefit at this stage. Nevertheless, the evidence establishes that there are reasonable prospects for a successful Project and I have not discounted the weight to be given to its economic significance to any great extent because a final decision on it has yet to be made.

[322] Paragraph 39(1)(c) NTA also talks of the economic significance of the act to the area in which the land or waters concerned are located and to Aboriginal people (and Torres Strait Islanders) who live in the area. The land concerned is the Tenement area, which means that the broader economic consideration applicable to the Project is not strictly relevant. I accept that there will be some economic benefit to the locality of Cue but it is uncertain how significant this will be. The mining operation is not a large project and will employ some 20-25 people on site. There was no evidence dealing with whether this would be local employment or fly in fly out. Nevertheless, some weight can be given to this local effect, even though it may be relatively small.

[323] Any potential benefit to local Aboriginal people is another matter, including any positive effect on the NTP's economic structures. The grantee party has not, at any stage, offered to provide WY people with employment opportunities during negotiations or in the draft agreement (GP 99). At the hearing in Cue, Mr Edwards said that he saw no problem with implementing a policy to provide WY people with jobs, but that he has no involvement with the employment aspect of Weld (TR p 272).

[324] I find that the future act is not likely to have any positive impact on the economic structures of the NTP or to be of any economic significance to them or the local Aboriginal people. Despite Mr Edwards' views on this issue, there is no evidence that the Weld Board has shown any interest in considering whether its Project will benefit local Aboriginal people. There has been a consistent policy from Weld throughout the negotiations and the inquiry to oppose any conditions which would have encouraged WY employment or contracting opportunities. It can hardly be said that the NTP's proposals were onerous as they do not impose any absolute obligation for WY people to be employed. Therefore, I have not given any weight to the possibility that the local Aboriginal community (including the NTP) will benefit from these mining operations.

Section 39(1)(e) – Public Interest

[325] The Tribunal accepts that there is a public interest in the continuing development of the mining industry in Western Australia and Australia (*Waljen* at 215-216; *Evans* at 214-215) and that this Project has the potential to enhance it. There is also a public interest in ensuring that places of importance to Aboriginal people are preserved (*Martu/Holocene* at [182]).

[326] For the reasons already given in relation to s 39(1)(c) NTA, I find that there is a public interest in the Project proceeding but that the weight to be given to this needs to be balanced against the public interest considerations in mining not proceeding in areas of special significance to Aboriginal people without their agreement.

[327] Weld's attitude to negotiations and benefits offered: The NTP's submissions on this issue were raised in relation to the development of the NTP's economic structure, the public interest and any other relevant issue. The NTP contends (NTP Closing Submissions para 92) that there is likely to be a major adverse impact on WY people's ability to develop economic structures if the future act is allowed to proceed. This is said to come about because, if the Tribunal makes a determination in favour of Weld in the knowledge that no benefits will flow to the WY people, then this will be a disincentive for other grantees to offer reasonable agreements. In other words, the Tribunal should not reward companies that do not offer benefits to WY People, the NTP says.

[328] The NTP says (Closing Submissions para 124) that it is a relevant consideration that there was no substantive attempt by Weld to negotiate an agreement with the WY people and no response was made by Weld to the NTP's proposed WY Mining Agreement of 8 February 2011. The NTP summarises its position on this issue:

- '125. Even if there is a public interest in mining, there is a greater public interest in ensuring mining takes place in circumstances where there are negotiated agreements with the native title party. If the Tenements are not granted, this does not mean that another company may not seek to mine in the area and that party would be well advised to negotiate a proper agreement with the Wajarri People. If mining is allowed in the Weld Ranges complex area, it should be limited to companies that act in a fair and reasonable manner towards the Wajarri People.
- 126. The NNTT should consider the impact that allowing a grant of Tenements at all or without stringent conditions will have on the ability of Wajarri People to continue to negotiate agreements with other companies which provide for strong protections. As set out above, to allow the Grantee Party to have Tenements without any protections for the Wajarri People is to reward parties who will not show respect to the Wajarri people nor enter into reasonable agreements and drastically lower the standards applicable, and given companies little incentive to try to engage in best practice.'

[329] Mr Green says that the above considerations are irrelevant and it would constitute an error of law for them to be taken into account in the way contended for by the NTP. I agree with Mr Green. Once a Government or grantee party has fulfilled its obligation to negotiate in good faith, that party may continue negotiations after a s 35 application is made but there is no obligation on them to do so. Having fulfilled its obligation to negotiate in good faith, Weld was under no obligation to respond to the NTP's Mining Agreement or engage in

negotiations about it. The provisions of the Act (s 31(1)(b)) as currently interpreted are clear. There is no requirement for the negotiations to have reached a particular stage or for the parties to negotiate about substantive issues relating to the effect of the future act on native title rights and interests (*FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; (2009) 175 FCR 141; good faith decision at [29]-[35])). Once a Government or grantee party has fulfilled its obligations to negotiate in good faith, it is entitled to seek a determination from the Tribunal and there is no requirement for negotiations to continue. I am aware that some negotiation/mediation occurred after the good faith decision but the fact that these (and the good faith negotiations) were not satisfactory to the NTP is not, in itself, relevant.

[330] In assessing whether good faith negotiations have occurred, the Federal Court has said there is no obligation on the Tribunal to consider whether offers made are reasonable, although it may do so if it assists in deciding the issue (*Walley v Western Australia and Others* [1999] FCA 3; (1999) 87 FCR 565; (1999) 168 ALR 359 para 15). If it is not necessary for the Tribunal to engage in an assessment of the beneficial nature of any proposal for the purpose of determining whether there has been negotiation in good faith, it is difficult to see how it is relevant to a substantive determination. While there may be some special circumstances where the behaviour of a grantee party is a relevant factor (*Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna*, NNTT WF10/10, [2011] NNTTA 53 (24 March 2011), Hon C J Sumner), simply failing to offer an agreement which the NTP considers to be adequate is not one of them once the grantee party has fulfilled its obligation to negotiate in good faith. The potentially negative impact on other grantees behaviour is likewise not relevant.

[331] The differences of view between the NTP and Weld about an agreement are only relevant to s 39(1)(b) NTA in so far as the NTP's view reflects the interests, proposals, opinions or wishes of the NTP in relation to the use and management of the Tenement area and the relative weight to be given to them. There will be cases such as *Martu/Holocene* and this one where considerable weight will be given to this factor where the evidence of the effect of a proposal on the s 39(1)(a) NTA factors will be substantial.

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

[332] I accept that it is appropriate to have regard to the previous expenditure of A\$10 million on prospecting/exploration on the Tenement area. While it appears most of this was incurred by Weld's predecessor companies, it is legitimate to give some weight to it as it no doubt all contributed to the current assessment of the mineral profile of the area.

[333] The Government party submits that a determination that the act must not be done will affect other mining proposals in the area, including the large Sinosteel Project. Apart from the fact that it is now uncertain whether the Sinosteel Project will proceed, I do not consider that great weight should be given to this factor. The consideration of the various criteria in s 39 NTA is very fact specific. It could be that another project will be of much greater economic significance or that another grantee's policies relating to the protection of Aboriginal interests referred to in s 39 NTA will be different and a native title party's interests, proposals, opinions or wishes may be different. Each case will turn on its own facts as assessed against the s 39 NTA criteria.

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

[334] The existing non-native title rights and use of the land by other than the NTP are the pastoral leases and Weld's prospecting licences. I have taken them into account. The pastoral lease has partially extinguished native title and it is likely that past pastoral activity has affected, to some extent, the enjoyment of the NTP's native title rights and interests. The prospecting licences have not extinguished native title and there is no evidence that the activity carried out pursuant to them has affected the enjoyment of native title rights and interests. The existence of the prospecting licences is a relevant factor but they were granted prior to the right to negotiate provisions of the Act coming into effect and it is acknowledged by all parties that the grant of the Tenements constitutes separate future acts involving substantially different considerations.

[335] The granted Tenements are not strictly existing non-native title interests 'in relation to the land or waters concerned' but are related to the Tenement area in forming part of the overall mining operations. The evidence in this case has concentrated on Stage 1 and it is the Tenements, not the granted Tenements, which are of principal relevance. I can have regard to the granted Tenements but the weight to be given to them is lessened by the fact that the current proposal does not involve the granted Tenements to any great extent. If the bulk of the mining were to occur on already granted Tenements then different considerations could apply.

Conclusion

[336] As with *Martu/Holocene*, the weighing up of the various often conflicting factors found in s 39 NTA in exercising the Tribunal's power under s 38 NTA has not been an easy task. However, on balance, I have concluded that a determination that the act must not be

done is justified. The principal factors in the weighing up exercise are the potential economic significance of the grant of the Tenements and the Project generally, and the NTP's interests, proposals, opinions and wishes in relation to the management, use and control of the land, which are that mining should not be permitted on an area of special significance to them without their agreement, including (particularly) agreement relating to the protection of the heritage of the WY people.

[337] The importance of the Weld Range area to the NTP should not be understated. They have put in place means to try to ensure protection of it as far as possible, as explained by Mr Colin Hamlett. They have not, to this point, agreed to mining over any of it but are prepared to negotiate about acceptable agreements with grantee parties.

[338] There is no doubt that the Weld Range area is highly prospective for, in particular, iron ore mining. The large number of granted and pending mineral tenements are testament to that fact. There will be substantial disturbance to the landscape, including the Weld Range itself, from the Sinosteel project if it proceeds. The Atlas mining proposal will also occur on the NHL area in the heart of the Weld Range.

[339] At the outset, the evidence seemed to suggest that the WY people had agreed to some mining in the pink box area but closer examination demonstrates that they have not yet done so. They have agreed to exploration on terms which include that mining will not proceed without a subsequent mining agreement. Negotiations with Sinosteel were at an advanced stage but no agreement had yet been reached. The WY people have adopted this approach because of the special importance the Weld Range area holds for them.

[340] If this matter was confined to the effect of the mining operations on the NTP interests referred to in s 39(1)(a) NTA considered apart from s 39(1)(a)(v) NTA, then the potential economic significance of the Project would have taken precedence.

[341] Mr Green has argued (TR p 357) that this case is to be distinguished from *Martu/Holocene*. While the essential conflict is the same between an area or site of particular significance and the economic significance of the future act, there are distinguishing features. In *Martu/Holocene* I gave weight to the fact that it was already the subject of a determination of exclusive native title. In this case the WY people have not yet had their native title claim determined and, if it is it determined in their favour, it will not be of an exclusive nature. However, while a positive determination of exclusive native title is a relevant factor, it cannot be decisive in the sense that there can never be a determination under s 38 NTA that an act

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must not be done unless there is a determination recognising the existence of native title. The

Act contemplates a s 38 NTA future act determination being made at the claimant stage and,

in this case, I have been confronted with an impressive range of evidence about the

significance of the Weld Range area including the Tenement area to the NTP in accordance

with their traditions which I am obliged to give appropriate weight to.

[342] In *Holocene*, there were also factors which could be said to weigh against the NTP, in

that the Martu had reached an agreement with the grantee party on commercial terms which

is not the case here. Factual comparisons with other determinations will not always be

helpful because the facts will rarely be exactly the same in relation to all the factors which the

Tribunal must weigh up.

[343] My conclusion is that the interests, proposals, opinions or wishes of the NTP in

relation to the use of the Tenement area should be given greater weight than the potential

economic benefit or public interest in the Project proceeding. The Weld Range area

(including the Tenement area) is of such significance to the NTP in accordance with their

traditions that mining on it should only be permitted with their agreement. This is not to

incorporate a general right of veto over mining projects into the NTA but is a conclusion

arrived at in the special circumstances of this case.

Determination

[344] The determination of the Tribunal pursuant to s 38 NTA is that the acts, namely the

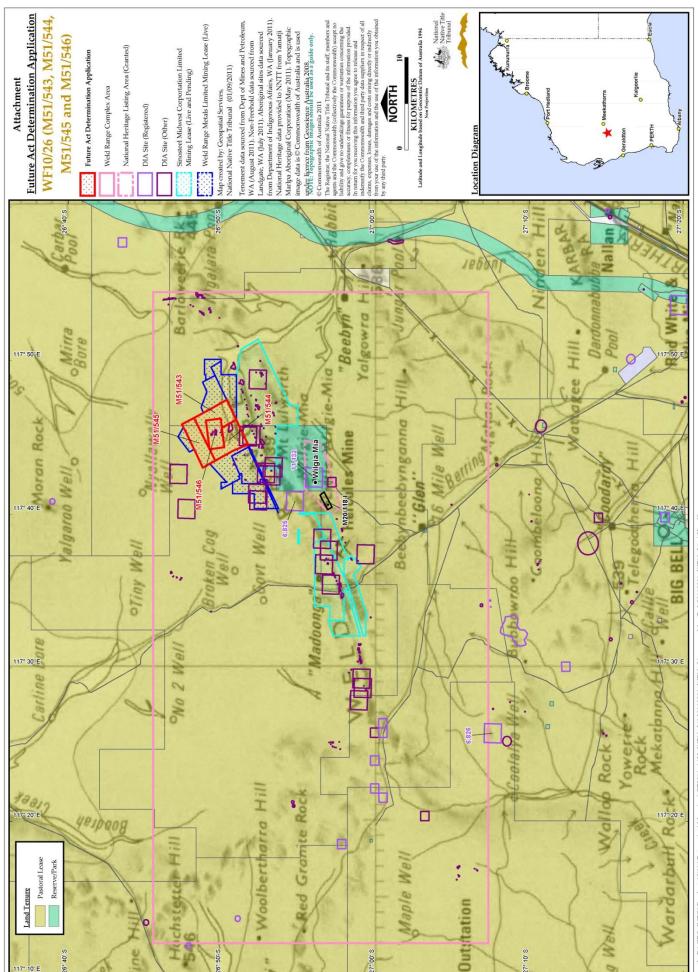
grant of mining leases M51/543, M51/544, M51/545 and M51/546 to Weld Range Metals

Limited, must not be done.

Hon C J Sumner Deputy President

21 September 2011

(Map attached below at p 125)



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