

**NATIONAL NATIVE TITLE TRIBUNAL**

***FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014)**

**Application Nos: WF2013/0015-WF2013/0016**

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

- and -

**IN THE MATTER of an inquiry into future act determination applications**

**FMG Pilbara Pty Ltd (grantee party)**

- and -

**Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guinness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin and Masie Ingie on behalf of Yindjibarndi #1 (WC2003/003) (native title party)**

- and -

**The State of Western Australia (Government party)**

**FUTURE ACT DETERMINATION**

**Tribunal:** Member Helen Shurven

**Place:** Perth

**Date of decision:** 31 July 2014

**Hearing date:** 25 March 2014

**Grantee party representatives:** Mr Kenneth Green, Green Legal Pty Ltd  
Ms Nerolie Nikolic, Fortescue Metals Group Ltd

**Native title party representative:** Mr George Irving, Yindjibarndi Aboriginal Corporation RNTBC

**Government party representatives:** Ms Rosanna Hill, State Solicitor's Office  
Mr David Crabtree, Department of Mines and Petroleum  
Mr Jason Diss, Department of Mines and Petroleum  
Mr Dennis Jacobs, Department of Mines and Petroleum

**Catchwords:** Native title – future acts – no agreement with native title party – application for determination for the grant of mining leases – s 39 criteria considered – whether the future acts must not be done – whether the future acts may be done – whether the future acts can be done subject to conditions – determination that the acts may be done subject to conditions

**Legislation:** *Native Title Act 1993* (Cth), ss 3, 23F, 26, 28, 29, 30, 31, 35, 36, 36A, 38, 39, 41, 66B, 76, 77, 109, 150, 151, 238  
*Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth)  
*Aboriginal Heritage Act 1972* (WA)  
*Acts Interpretation Act 1901* (Cth), s 36  
*Environment Protection and Biodiversity Conservation Act 1999* (Cth)  
*Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA)  
*Environmental Protection Act 1986* (WA)  
*Mining Act 1978* (WA), ss 82, 84, 85  
*Mining Regulations 1981* (WA)  
*Rights in Water and Irrigation Act 1914* (WA)  
*Wildlife Conservation Act 1950* (WA)

**Cases:** *Australian Manganese Pty Ltd v State of Western Australia and Others* (2008) 218 FLR 387; [\[2008\] NNTTA 38](#) ('*Australian Manganese v Stock*')  
*Australian Manganese Pty Ltd/Western Australia/David Stock and Ors on behalf of the Nyiyaparli People* [\[2010\] NNTTA 101](#) ('*Australian Manganese v Stock 2*')  
*Cheinmora v Striker Resources NL & Ors; Dann v State of Western Australia and Others* [\[1996\] FCA 1147](#); [\(1996\) 142 ALR 21](#) ('*Cheinmora v Striker Resources NL*')  
*Evans v Western Australia* (1997) 77 FCR 193 ('*Evans v Western Australia*')  
*FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [\[2009\] NNTTA 91](#) ('*FMG Pilbara v Cheedy*')  
*FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [\[2011\] NNTTA 107](#) ('*FMG Pilbara v Yindjibarndi 1*')  
*FMG Pilbara Pty Ltd/NC (Deceased) and Others on behalf of the Yindjibarndi People/Western Australia* [\[2012\] NNTTA 142](#) ('*FMG Pilbara v Yindjibarndi 2*')  
*FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of Yindjibarndi People/Western Australia* [\[2012\] NNTTA 11](#) ('*FMG Pilbara v Yindjibarndi 3*')

*FMG Pilbara Pty Ltd/Wintari Guruma Aboriginal Corporation/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [\[2009\] NNTTA 99](#) ('*FMG Pilbara v Wintari*')

*Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia,* [\[2011\] NNTTA 80](#) ('*Magnesium Resources v Slater*')

*Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People* [\[1998\] NNTTA 2](#) ('*Minister for Lands v Strickland*')

*Minister for Mines (WA) v Evans and Others* (1998) 163 FLR 274; [\[1998\] NNTTA 5](#) ('*Minister for Mines v Evans*')

*Re Koara People* (1996) 132 FLR 73; [\[1996\] NNTTA 31](#) ('*Re Koara*')

*Silver v Northern Territory* (2002) 169 FLR 1; [\[2002\] NNTTA 18](#) ('*Silver v Northern Territory*')

*Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji,* [\[2011\] NNTTA 172](#); (2011) 258 FLR 9 ('*Weld Range v Simpson*')

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

*Western Australia v Thomas* (1999) 164 FLR 120; [\[1999\] NNTTA 99](#) ('*Western Australia v Thomas 2*')

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

*WMC Resources Ltd/Western Australia/Richard Evans on behalf of the Koara people* [\[1999\] NNTTA 372](#) ('*WMC Resources v Koara*')

*Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another* [\[2014\] NNTTA 8](#) ('*Yindjibarndi Aboriginal Corporation v FMG Pilbara*')

## REASONS FOR DECISION

### Background

- [1] This decision has been made in the context of a vast amount of material consisting of many thousands of pages from the grantee party and native title party, inclusive of sworn affidavits, signed statements, reports, photographs, maps and other materials, as well as documentation from the Government party. The leases which are the subject of the inquiry form part of the larger project of the Solomon Iron Ore Mine in northwest Western Australia, as outlined in more detail throughout this decision. The careful assessment of these materials, in the context of the requirements of the *Native Title Act 1993* (Cth) ('the Act'), has taken time, and the decision that the acts can be done with conditions has been weighed in the context of relevant criteria under the Act. This is detailed further throughout this decision. Overall, I have been guided by the main objects of the Act relevant to this matter, being 'to provide for the recognition and protection of native title' (s 3(a)), and 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings' (s 3(b)).
- [2] The Government party, through the Department of Mines and Petroleum ('DMP'), gave notice under s 29 of the Act of its intention to grant the tenements as mining leases 47/1475 ('the first proposed lease') and 47/1473 ('the second proposed lease') to FMG Pilbara Pty Ltd ('the grantee party'). The notice for the first proposed lease specified the notification day as 11 July 2012, and the notice for the second proposed lease specified the notification day as 19 September 2012 (see s 29(5) of the Act).
- [3] Each notice provides that any person who, four months after the notification day, is a registered native title claimant in relation to any of the land or waters that will be affected by the future act, has a procedural right to negotiate in relation to the future act (see ss 30(1)(a) and 31 of the Act). The notification period ended on 11 November 2012 for the first proposed lease, and 19 January 2013 for the second proposed lease (the four month date for each lease was moved to the next working day of 12 November 2012 and 21 January 2013 respectively, due to s 36(2) of the *Acts Interpretation Act 1901* (Cth)). At the end of each notification period, the Yindjibarndi #1 claim (WC2003/003) wholly overlapped each proposed lease. As there were no other claims or determinations overlapping the proposed leases on those dates, Yindjibarndi #1 ('the native title party') are the only native title party for the purpose of this determination (see s 29(2)(b)(i) and s 30(1) of the Act). The native title

party are represented by the Yindjibarndi Aboriginal Corporation ('YAC'). My consideration of the effect of the acts on factors relevant to the native title party is inclusive of consideration of the wider claim group which the native title party represents. I shall have regard to any evidence submitted by those who can speak for the relevant area of Yindjibarndi country.

- [4] According to the s 29 notices, the grant of each proposed lease would authorise the grantee party to mine for minerals for a term of 21 years from the date of grant, with the right of renewal for 21 years. The notices also specify the size of the first proposed lease to be approximately 8.1 square kilometres (809.76 hectares) and the size of the second proposed lease to be approximately 4.85 square kilometres (485.13 hectares). A portion of the first proposed lease (approximately 2.85 square kilometres) is to be excised on grant, as outlined in detail at [13] and [26]-[28] of this decision. To avoid doubt and in consideration of the evidence presented, the Tribunal will impose a condition on the grant of the first proposed lease that this area is to be excised. The proposed leases are located in the Ashburton Shire, approximately 65 and 66 kilometres north of Tom Price respectively.
- [5] The proposed leases are future acts covered by s 26(1)(c)(i) of the Act and so, unless there is compliance with s 28 of the Act, the future acts will be invalid to the extent that they affect native title. In this case, s 28(1)(g) of the Act is the relevant requirement, that is, invalidity of the future acts can be avoided if 'a determination is made under section 36A or 38 that the act may be done, or may be done subject to conditions being complied with'.

### **The section 35 future act determination application**

- [6] Following the notification of the proposed leases, the Government party commenced negotiations with parties by letter dated 7 November 2012. Parties exchanged correspondence and attended mediation on 10 October 2013 convened by President Raelene Webb QC of the National Native Title Tribunal ('the Tribunal'). Neither negotiation between parties or mediation assistance led to an agreement of the kind specified in s 31(1)(b) of the Act.
- [7] On 11 October 2013, the grantee party applied for the Tribunal to make a determination under s 38 of the Act. The negotiation parties had not been able to reach agreement of the kind mentioned in s 31(1)(b) and at least six months had passed since the notification day specified in each s 29 notice (see s 35 of the Act). On 15 October 2013, President Webb appointed me

for the purpose of making the determination in respect of the proposed leases. I considered the conditions outlined in s 76 of the Act and subsequently accepted the determination applications, pursuant to s 77 of the Act, on 18 October 2013.

- [8] On 29 October 2013, parties were provided with a map prepared by the Tribunal's Geospatial Services showing the proposed leases, the claim boundary, topography, Aboriginal communities and Aboriginal sites recorded with the Department of Indigenous Affairs ('DIA', now Department of Aboriginal Affairs, 'DAA'). At the preliminary conference held on 1 November 2013, the grantee party representative, Mr Green, raised that the map did not clearly distinguish whether the DAA sites on the map were 'registered' sites or 'other heritage places'. This relates to the DAA's administrative assessment as to whether a site is categorised as a 'registered' site or as an 'other heritage place' (the latter further categorises the sites as 'stored data', 'insufficient information' or 'lodged'). In response, the Tribunal's Geospatial Services prepared two new maps clarifying the category of each of the DAA sites in relation to the proposed leases. The first map ('NNTT Map 1 – leases with distant view') showed the DAA sites marked according to their specific status (that is, a registered site or other heritage place). The second map ('NNTT Map 2 – leases with close view') showed a closer view of the proposed leases and the status of DAA sites (with the Site ID of the DAA sites clearly marked). These two maps replaced the earlier version and were distributed to parties on 11 November 2013. Parties were informed the two maps would form part of the decision-making process; comments were invited for consideration and no comments were received.

### **The inquiry**

- [9] If the native title party alleged that either the Government or grantee party's conduct had not been in good faith, the Tribunal would have to consider contentions and evidence on that issue. The Tribunal would then only have power to determine the substantive issue under s 39 of the Act if satisfied that the relevant party had negotiated in good faith. At the preliminary conference for the inquiry held on 1 November 2013, the native title party indicated it did not intend to submit that the grantee party or Government party had not negotiated in good faith (see ss 31(1)(b) and 36(2) of the Act).

- [10] During the preliminary conference, I asked parties whether they saw benefit in participating in a s 150 conference to try and resolve any matter relevant to the inquiry. Parties were agreeable to this endeavour. Accordingly, President Raelene Webb QC directed the holding of a s 150 conference and appointed herself as the Member for the purposes of that conference process. She conducted a conference on 20 November 2013 and terminated the process on that day as parties were unable to reach any agreement.
- [11] Immediately following the preliminary conference, I made directions in relation to the inquiry, requiring parties to submit contentions and evidence in relation to the criteria outlined in s 39 of the Act. These directions required, among other things, native title party compliance by 7 February 2014. This is noted in view of the amendment requests made by the native title party, as outlined below (at [15]). Due to the size and volume of documentation provided, the initial compliance from parties is listed in detail in Attachments A, B and C to this decision. For convenience, a summary is provided at [12]-[16] immediately below.
- [12] In compliance with the 1 November 2013 directions:
- (a) on 12 December 2013 (earlier than its compliance date of 10 January 2014), the grantee party provided its statement of contentions, together with Annexure materials 1-45 ('GP Doc' 1-45), as listed at Attachment A; and
  - (b) on 10 January 2014, the Government party submitted its statement of contentions, together with Annexure materials 1-21, as outlined at Attachment B.
- [13] On 21 January 2014, the grantee party's representative, Mr Green, provided additional material to the Tribunal and other parties, as he wished to clarify that, after it submitted its contentions, the grantee party had received confirmation from DMP that its application to reduce the area of the first proposed lease had been processed successfully. The additional material consisted of:
- (a) a letter from DMP to the grantee party dated 24 December 2013 confirming that, as of 24 December 2013, the tenement application for the first proposed lease no longer encroached upon an area known as Satellite Springs (and detailing that the public tenograph screens would not show the updated reduced area until grant). Accompanying

this letter was a tengraph map of the updated area. This became Annexure 46 to the grantee party materials; and

- (b) an email from DMP to Mr Green dated 21 January 2014 attaching an updated Tengraph Quick Appraisal generated on 21 January 2014, showing the area of the first proposed lease had changed from 809.76 to 525.27 hectares (approximately 5.25 square kilometres). This became Annexure 47.

[14] This additional material was provided to the Tribunal after the grantee party compliance date of 10 January 2014. No party objected to these materials, and I decided that this additional material could be accepted as it related to a vital aspect of the inquiry and clarified the submissions already provided by the Government party and grantee party. However, as the additional material needed to be considered by the native title party, and to allow the Government party an opportunity to amend its contentions in view of the updated area of the first proposed lease, I issued amended directions on 22 January 2014, extending the remaining compliance dates. On 28 January 2014, the Government party provided by email a copy of the DMP letter and map (as described in [13(a)] above), stating that ‘the Government party seeks to rely’ on that letter and map ‘in respect of the proposed tenement area of M47/1475’. Accordingly, its contentions submitted on 10 January 2014 were read in conjunction with the confirmation that the tenement would not overlap Satellite Springs on grant of the first proposed lease.

[15] Directions were amended again on 26 February 2014 and 7 March 2014 following requests from the native title party. A witness statement (‘NTP Witness Statement’) was received from the native title party on 7 March 2014 but the native title party’s contentions (‘NTP Contentions’), and an affidavit, were received on 12 March 2014. Parties were given the opportunity to make submissions on the late receipt of the contentions and affidavit and no submissions were received. Having considered the timing and nature of the contentions and affidavit, I accepted them on the basis that it would cause undue prejudice not to in the circumstances.

[16] The material received from the native title party on 12 March 2014 consisted of a statement of contentions, together with the Annexure materials 1-20 as outlined in Attachment C.



[17] On 12 March 2014, I issued amended directions to alter the date for the listing hearing to take into account a request from the native title party for an on country hearing (as detailed further at [18] below).

### **On country hearing request**

[18] On 6 March 2014, the native title party made a request for an on country hearing. A listing hearing was held on 25 March 2014 in relation to that request. It is not necessary to outline the request, or the Tribunal process in considering the request, as this is detailed in my decision not to grant the request, as extracted below. The on country hearing decision was sent to parties on 28 March 2014. Further directions were issued in relation to parties' provision of evidence, as outlined below.

#### **Request for on country hearing**

##### *The Tribunal processes*

Since *WA v Thomas* (1996) 133 FLR 124, the factors the Tribunal will take into account in an inquiry matter have been very clearly outlined. Parties have a central role to play in the conduct of right to negotiate inquiries. Parties have various procedural rights, including a reasonable opportunity to present their case (as per s 142 of the Act). These rights are guided by directions, issued by the Tribunal, which assist the Tribunal in conducting the inquiry and all parties in presenting their contentions and evidence in a timely and efficient manner. Directions are one of the ways the Tribunal fulfils its statutory mandate of s 109(1). In addition, the Tribunal is not required to make out a party's case for it where that party chooses not to produce evidence. The Tribunal must take into account a native title party's cultural and customary concerns (s 109(2)), but not so as to unduly prejudice any party to the proceedings. The Tribunal must also make the decision as soon as practicable (s 36).

##### *Background to the request*

The present inquiry commenced by the grantee party lodging the future act determination application on 11 October 2013. At the preliminary conference on 1 November 2013, the native title party advised it did not take issue with good faith, and directions were set down for the substantive inquiry. Taking into account the upcoming vacation period in December, and to provide all parties with sufficient time to gather their evidence, the Government and grantee party compliance dates were set at 10 January 2014, and the native title party for 7 February 2014. The grantee party and Government party complied (with the grantee party lodging their documents on 12 December 2013). The native title party then had these documents to consider and take instructions on from early December and early January respectively. In addition, a s 150 conference with another Member was undertaken on 20 November 2014.

On 21 January 2014, the grantee party provided a short further statement in relation to some tenure developments which would apply to this matter. As such, the native title party compliance dates were extended to enable them to consider this point, along with other party's substantive contentions and evidence. Their compliance date then became 28 February 2014.

On 24 February 2014, the native title party emailed the Tribunal and parties to say they did wish to file 'evidence and contentions' but required an extension due to a suicide in the community. The extension was not opposed by other parties and it was granted, such that their compliance date became 4 March 2014. It was not until 6 March 2014 that the native title party representative wrote to the Tribunal, having missed the compliance date due to a health issue, and further advising that 'I should also advise that, following discussion in Roebourne last week, the native title party instructed me to request a hearing on country in this matter'. On 7 March, the native title

party representative sent a further email, with an attached witness statement signed by 28 'Yindjibarndi persons' - I note that 2 of these signatories appear to be persons on the register of native title claims for the claim group.

Due to the health issue of the native title party representative, a further extension was granted to 10 March 2014, and submissions (in the form of contentions) and evidence (in the form of an affidavit from Anthropologist Mr Davies and the re-submitted statement signed by 28 persons) were not received until 12 March 2014. No objection was received from other parties to these later submissions, and they were accepted by the Tribunal.

*Whether to hold an oral hearing*

The Tribunal must hold hearings 'if it appears to the Tribunal that the issues for determination cannot be adequately determined in the absence of the parties' (s 151 of the Act - emphasis added). The native title party have provided a great deal of information which runs to well over 1000 pages (several lever arch files), some of which relates to areas outside of the tenements under this inquiry process. That information also includes the sworn affidavit of Mr Davies, anthropologist (mentioned above), showing areas said to be within the proposed licence.

Mr Davies' affidavit details certain sites he has visited and received information in relation to, and how the registered rights and interest of the native title party are exercised and enjoyed. These are issues which the Tribunal must turn its mind to in making the determination in this matter (as per s 38 and s 39 of the Act).

The statement signed by 28 persons includes the following (at paragraph 3):

'this statement describes the kind of evidence we wish to give to the tribunal on our country, Yindjibarndi country, where these tenements will be located....the evidence we wish to give to the Tribunal needs to come from...our collective knowledge and our collective beliefs...we believe the best way to give that evidence is as a group on our country where we can demonstrate to the Tribunal the significance of what we will lose if these Tenements are granted...'

The question of an oral hearing was canvassed with parties at a hearing on 25 March 2014. Broadly speaking, the native title party representative indicated his clients had lost confidence in the system, and sought to give evidence on country. The grantee party representative raised the issue of prejudice to his client in relation to further delays in the matter due to this late request, and the grantee and Government party representatives both raised the issue of resources in taking parties and the Tribunal to an on country hearing.

As outlined under 'The Tribunal processes' above, resources are an important issue for the Tribunal. Nevertheless, that consideration will not over-ride the need for an on country or an oral hearing should there be a demonstrated need for such. In the present matter, the native title party has been on notice of this matter for some 5 months - the 6 month statutory timeframe for the decision to be made will be upon us in approximately 2 weeks. The on country request was made very late in the process. While the timing of the request in itself is not fatal to such a request, the Tribunal takes it into account as one of the factors to balance in making the decision.

In this matter, taking into account the balancing of all factors as outlined above, the Tribunal's view is that a clear case had not been made out that there are issues to be determined which cannot be *adequately* determined in the absence of parties in person or on country.

Bearing in mind the balance of prejudice to the grantee party in lengthening this inquiry process, and that the native title party held out hope that an on country hearing would be granted and that evidence could be produced in a collective manner, rather than from a single individual, so have not provided any evidence in support of Mr Davies affidavit, Member Shurven issues the following additional directions in this inquiry matter:

**Direction 1** - the native title party has liberty to provide the Tribunal and parties, in affidavit, statement, DVD or audio recording, from an individual or collectively, further evidence in relation

to s 39, and in relation to any conditions they seek to be imposed in relation to this matter, by close of business on **Monday 14 April 2014**.

**Direction 2** - the Government party and grantee party has liberty to provide the Tribunal and parties further contentions or evidence by way of reply, to the native title party's contentions and evidence filed 12 March 2014 and any further material submitted as per direction 1, by **Monday 5 May 2014**.

As a guide, in relation to Direction 1, the Tribunal will consider accepting material from an individual which is supported by a group of identified persons, or evidence given collectively, whether by affidavit, statement, DVD or audio media. The Tribunal is not bound by rules of evidence (as per s 109(3)) and takes a pragmatic approach to materials submitted.

[19] In compliance with direction 1 made on 28 March 2014, the native title party provided to the Tribunal and parties additional evidence consisting of:

- (a) a statement of evidence by members of the native title party ('NTP Joint Statement') dated 14 April 2014, signed by 19 Yindjibarndi persons;
- (b) a map entitled 'DIA Registration with tenements' showing the proposed leases and a red marking around an area, with various points of interest marked by star symbols; and
- (c) twenty electronic files (MapInfo and shape files) containing data to accompany the NTP Joint Statement. The data from the MapInfo and shape files is said to show the *Ganyjingarringunha Ngurra* site complex (an area the native title party indicated they unsuccessfully attempted to have registered with the DAA). It also showed 'additional sites of significance in the Tenements that are identified in the affidavit of our anthropologist Philip Davies, filed in this inquiry' (at paragraph 13 of the NTP Joint Statement).

[20] On 15 April 2014, the native title party sent to the Tribunal and other parties:

- (a) another copy of the map referred to in [19(b)] above with the name of the PDF file re-titled as 'NTP Doc 21 - *Ganyjingarringunha Nurra*'. I have confirmed that the map itself is the same as the map provided the previous day (and note also various spellings of this area which include *Ganyjingarringunha Ngurra*); and
- (b) the affidavit of Mr Ned Cheedy, sworn 7 April 2010, which was referred to at paragraph 8 of the NTP Joint Statement, marked as NTP Doc 22.

[21] As there were some potential access problems with the shape files, the Tribunal's Geospatial Services compiled the data from the files into a single PDF map and associated Excel spreadsheets. Parties were provided with a copy of these Geospatial Services products on 23 April 2014, and the Tribunal sought verification from the native title party that the Geospatial products represented the files submitted. No party took issue with this process or with the data produced by the Tribunal Geospatial Services. On 15 May 2014, a staff member from YAC wrote to the Tribunal to confirm that the Tribunal's Geospatial products are an accurate representation of the files submitted. Later that day, the Tribunal advised parties that the Geospatial product would form part of the decision-making process. For ease of reference, I shall refer to the Geospatial product as 'NNTT Map 3 – NTP Data'.

[22] On 8 May 2014, the grantee party noted it had not complied with the directions date of 5 May 2014 for its reply, due to an administrative error, and requested an extension to 19 May 2014. The other parties were given the opportunity to respond to the request. No responses were received and, noting the nature of the request and prior extensions granted to the native title party and no dissent from other parties, I granted the request. On 19 May 2014, the grantee party submitted a reply ('GP Reply') together with the following:

(a) Affidavit of Mr Christopher Ian Leonard Oppenheim, employed by Fortescue Metals Group Ltd as a Specialist Hydro-Geologist, affirmed 19 May 2014. The affidavit was accompanied by the following:

(i) Annexure CILO1 – Map showing Satellite Springs, prepared by Fortescue Metals Group Limited and entitled 'Solomon Mine Satellite Spring, FMG's Current and Pending Mining Leases and Sub Catchment Area';

(ii) Annexure CILO2 – Diagram 'Figure 1 Satellite Springs Hydrological Setting', prepared at Mr Oppenheim's instruction; and

(iii) Annexure CILO3 – Diagram 'Figure 2 Satellite Springs Hydrological Setting', prepared at Mr Oppenheim's instruction.

(b) Affidavit of Mr Ken Sandy, an initiated Yindjibarndi man and a member of Wirlu-Murra Yindjibarndi Aboriginal Corporation ('WMYAC'), affirmed 16 May 2014. The following accompanied the affidavit:

- (i) Annexure KS1 – Affidavit of Ken Sandy affirmed 28 February 2011; and
  - (ii) Annexure KS2 – Map provided by Mr Michael Gallagher showing the proposed lease and ‘new mining leases and old mining leases’ (at paragraph 6 of Mr Sandy’s affidavit).
- (c) Affidavit of Mr Luke Patrick May, an anthropologist employed by Terra Rosa Cultural Resource Management Pty Ltd, affirmed 19 May 2014. The following accompanied the affidavit:
- (i) Annexure LMP1 – Assessment by Alpha Archaeology Pty Ltd entitled ‘4.2.55 YIN11-062 (Rock Shelter, Artefact Scatter, Stone Arrangement)’; and
  - (ii) Annexure LMP2 – Assessment by Alpha Archaeology Pty Ltd entitled ‘4.2.53 YIN11-058 (Rock Shelter, Grind Stone)’.

[23] The Government party did not submit a reply.

[24] After considering the material submitted by parties, I decided it would be beneficial to be able to view the Tribunal’s Geospatial Services maps already circulated to parties (see ‘NNTT Map 2 – leases with close view’ referred to at [8] and ‘NNTT Map 3 – NTP Data’ referred to at [21] above) in terms of the reduced area for the first proposed lease. That is, taking into account the excising of Satellite Springs. Consequently, on 16 June 2014, using the map prepared by DMP (GP Doc 46) showing the reduced area as of 24 December 2013, parties were sent an additional version of both ‘NNTT Map 2 – leases with close view’ and ‘NNTT Map 3 – NTP Data’, showing the reduced area superimposed onto each of those original products. Parties were invited to comment on the additional maps. No comments were received in relation to the superimposed version of ‘NNTT Map 3 – NTP Data’ (the superimposed version shall be referred to as ‘NNTT Map 4 – NTP Data (reduced area)’). In relation to the updated version of ‘NNTT Map 2 – leases with close view’, following a comment from Mr Green regarding the labelling of native title claims, a final superimposed version of the ‘NNTT Map 2 – leases with close view’ was sent to all parties on 24 June 2014 (to be referred to as ‘NNTT Map 5 – leases with close view (reduced area)’). It was confirmed that each of these superimposed maps would also form part of the decision-making process in this inquiry, subject to consideration of any comments received by 30 June 2014.

[25] No further comments were received from parties. Subsequently, in making my decision I have taken into consideration the following five maps involving assistance from the Tribunal's Geospatial Services as described thus far in the decision:

- (a) 'NNTT Map 1 – leases with distant view'
- (b) 'NNTT Map 2 – leases with close view'
- (c) 'NNTT Map 3 – NTP Data'
- (d) 'NNTT Map 4 – NTP Data (reduced area)'
- (e) 'NNTT Map 5 – leases with close view (reduced area)'

### **Size of the first proposed lease**

[26] At the time of lodging the future act determination application on 11 October 2013, the size of the first proposed lease reflected the tenement application received by DMP on 26 March 2012 (approximately 810 hectares). The future act determination application foreshadowed that the grantee party intended to apply to alter the size of the tenement application in order to avoid the Aboriginal site 'Satellite Springs'. On 22 November 2013, Ms Denice Johns of Fortescue Metals Group Limited wrote to DMP notifying them of this intention, based on the understanding that Satellite Springs ethnographic site should be avoided due to its significance to the Yindjibarndi People (see GP Doc 39).

[27] On 21 January 2014, the grantee party provided additional information to the Tribunal and other parties (see [13] above) confirming the tenement application had been amended as at 24 December 2013 so the area reduced to 525 hectares (or 5.25 square kilometres), would no longer encroach upon Satellite Springs, and the tenement screens would show the updated reduced area, upon grant. The specific coordinates for this area had been exchanged between the grantee and Government parties, but not provided to the Tribunal. On 15 July 2014, the Tribunal sent an email to parties referring to DMP's letter to the grantee party dated 24 December 2013 (GP Doc 46). The Tribunal's email requested the provision of the coordinates for the reduced area to be granted, being those coordinates mentioned in DMP's letter as follows: 'the Department is now showing M47/1475 in Tenement screens based on the coordinates supplied by you [the grantee party] and reflected on the attached Status Plan'. In response, on 18 July 2014, the Government party supplied to the Tribunal and parties a document showing 'the revised coordinates of the boundaries of M47/1475'. The document consisted of a diagram of the revised tenement area and a page of corresponding coordinates and other data

(ID numbers, Geographic Coordinates, Grid Coordinates, Azimuths and distances). The diagram and associated coordinates/other data are at this decision as Attachment G.

[28] As described above, I accepted the grantee party's additional material and the subsequent material from the Government party relating to the size of the lease. The native title party did not raise any argument in relation to the issue of this area being excised on grant. Subsequently, for the purposes of my consideration of the s 39 criteria, the first proposed lease shall be taken as the amended and reduced area, exclusive of Satellite Springs, as per the confirmation from DMP on 18 July 2014 (see Attachment G and [197] below).

### **Project information and proposed mining activity**

[29] No previous mining appears to have been conducted on either of the proposed leases. Upon grant, the proposed leases would be subject to open pit mining, and form part of the grantee party's Solomon Project (also referred to as Solomon Hub or the Project), which comprises the Firetail mine and Kings mine. Mining for ore deposits at Firetail mine commenced in late 2012 and mining at Kings mine commenced in March 2014. According to information provided by the grantee and Government parties, Fortescue Metals Group Limited and its subsidiaries is collectively Australia's third largest iron ore producer (see, for example, the Department of State Development's Iron Ore Profile published in 2012 at GP Doc 9).

[30] As an aside, it is noted that much of the material provided by the grantee party refers to Fortescue Metals Group Limited, as opposed to the grantee party, FMG Pilbara Pty Ltd. President Webb QC dealt with this issue in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [32]-[35]), and concluded that 'the conduct and actions of the grantee party's controlling entity, Fortescue Metals Group Limited, and of its other wholly owned subsidiaries, are relevant to the Tribunal's consideration in this matter.' I accept and adopt that reasoning (at [35]) for the purposes of this decision.

[31] The grantee party's *Mining Act* Statement (as attached to GP Doc 13 and see s 74(1)(a) of the *Mining Act*) suggests that the lease areas hold 'strategic iron ore resources to the overall project,' as well as 'land required for infrastructure' (at page 4). According to the Mineralization Report, this infrastructure is likely to be major in nature, including haul roads, communication towers and similar facilities (at page 4). This appears to apply equally to both leases, although the Mining Statement is not as clear about the infrastructure to be placed in

the first proposed lease. Mining operations were intended to commence ‘within four years’ (as at December 2010). Ore will be extracted ‘by conventional drill and blast methods’ (at page 7).

- [32] As noted in the grantee party Mining Act Statement, the intended mining methods and dewatering requirements for both leases is as follows:

#### 5.2 Mining Methods

Mining at Solomon will be carried out using open pit mining methods. The ore body is predominantly a flat tabular body and will be mined by conventional shovel and truck mining methods, which are used throughout the Pilbara. In-pit and overland conveying systems are likely to complement the trucking transport system in order to increase mining efficiency. Detailed geotechnical and hydro geological investigations are being conducted with respect to the ore, internal waste and the overburden throughout the mining areas.

#### 5.6 Dewatering requirements

It is anticipated that because a fair portion of this mineralisation is below cover that there will be a reasonable level of dewatering required to mine the ore by open cut methods. An assessment of dewatering requirements will be undertaken and dewatering strategies considered meeting demand for “best possible” mining conditions and provision of a local water supply.

- [33] The Project’s capital expenditure, as at December 2013, exceeded \$5.9 billion. Solomon Railway opened in 2012; it stretches 129 kilometres and links the Solomon Project to Fortescue’s mainline, to Herb Elliot Port in Port Hedland. The grantee party supplied an aerial photograph of the Solomon Project to the Tribunal and all parties, showing already granted mining leases and mining activities near the proposed leases (Document 44). That map showed the first proposed lease was at the northern end of areas where mining activities were being undertaken in the Kings section of the Solomon Project. The second proposed lease was adjacent to the first proposed lease, and also to the northern end of areas where mining activities are being undertaken in the Firetail section of the Solomon Project. Prior to the excision of Satellite Springs, both proposed leases shared a common north/south boundary. Following the excision, the boundary of the first proposed lease was shifted some 500 metres or so to the west of the second proposed lease, so the leases share no common boundary with each other, but both do share common east/west boundaries with the already granted tenements to the south. The grantee party also provided information of its wider developments in the Pilbara, including the 620 kilometre railway track and the construction of the aforementioned Herb Elliot Port.



[34] The grantee party refers to the restrictions on the acts, by way of the proposed endorsements and conditions to be imposed by the Government party (as outlined at [50]-[51]), and the operation of the *Mining Act*. The Government party noted the rights conferred under s 85 of the *Mining Act* are subject to the covenants and conditions in s 82 of the *Mining Act*, and the conditions and endorsements which can be imposed under s 84 of the *Mining Act*.

[35] The native title party draws attention to, among other things, that ‘there will be a reasonable level of dewatering required to mine the ore by open cut methods’ (paragraph 5.2 NTP Contentions, referring to the grantee party’s mining statement (GP Doc 13)).

[36] Mining and dewatering activities are dealt with in more detail later in this determination.

### **Overview of underlying tenure and usage**

#### *First proposed lease – M47/1475*

[37] The Tengraph Quick Appraisal provided by the Government party indicates:

- (a) the underlying tenure comprises unallocated Crown land;
- (b) the proposed lease area is subject to three current tenements as follows:
  - (i) exploration licence 47/1319, overlapping by 3.8 per cent;
  - (ii) exploration licence 47/1334, overlapping by 96.2 per cent; and
  - (iii) miscellaneous licence 47/362, overlapping by 0.1 per cent;
- (c) the proposed lease area was previously the subject of various dead/expired tenements, as follows:
  - (i) miscellaneous licence 47/355 (withdrawn May 2011, which overlapped by 0.1 per cent);
  - (ii) temporary reserve 70/2703 (cancelled 11 October 1966, which overlapped by 100 per cent);
  - (iii) temporary reserve 70/6662 (cancelled 15 December 1979, which overlapped by 62.4 per cent);
  - (iv) temporary reserve 70/1807 (expired 28 September 1961, which overlapped by 24.4 per cent);
  - (v) exploration licence 47/228 (surrendered 25 June 1986, which overlapped by 32.9 per cent);

- (vi) exploration licence 47/806 (surrendered 17 May 1999, which overlapped by 0.5 per cent);
- (vii) miscellaneous licence 47/396 (surrendered on 4 April 2012, which overlapped by 26.7 per cent); and
- (viii) mining lease 47/1304 (withdrawn on 19 September 2008, which overlapped by less than 0.1 per cent).

*Second proposed lease – M47/1473*

[38] The Government party provided the Tengraph Quick Appraisal, indicating:

- (a) the underlying tenure is unallocated Crown land;
- (b) the proposed lease area is subject to the following other current tenements:
  - (i) exploration licence 47/1334, overlapping by 5.8 per cent;
  - (ii) exploration licence 47/1447, overlapping by 94.2 per cent; and
  - (iii) miscellaneous licence 47/362, overlapping by 38.5 per cent;
- (c) the proposed lease area was previously the subject of various dead/expired tenements, as follows:
  - (i) miscellaneous licence 47/355 (withdrawn May 2011, which overlapped by 38.4 per cent);
  - (ii) temporary reserve 70/2703 (cancelled 11 October 1966, which overlapped by 100 per cent); and
  - (iii) temporary reserve 70/6662 (cancelled 15 December 1979, which overlapped by 100 per cent).

[39] The Government party contend that given the prior existence of underlying tenure, including TR70/2703 which entitled the holder to a right of occupancy, a claim for exclusive possession cannot be sustained over the area of the proposed leases. The native title party have not disputed this, and based on the available evidence, while any exclusive rights and interests would be likely to have been extinguished in such areas, non-exclusive rights and interests may still exist.

## Overview of relevant cultural heritage material

[40] The Government party submitted evidence that heritage surveys have been carried out within portions of each proposed lease. Search results provided by the Government party from DAA's Aboriginal Heritage Inquiry System (Documents 21 and 22), show heritage surveys as follows:

- (a) Six heritage surveys were recorded within the first proposed lease, with relevant details as follows:
  - (i) Archaeological survey 5666 with start date 28 July 2013. The proponent was Fortescue Metals Group Limited and the consultants were Eureka Heritage and also Veritas Archaeology & History. 'Aboriginal people' were consulted, though the record does not provide any identifying information;
  - (ii) Ethnographic survey 5692 with start date 11 February 2013. The proponent was Fortescue Metals Group Limited and the consultant was Terra Rosa Cultural Resource Management Pty Ltd. 'Aboriginal people' were consulted and the summary of the related report (ID 27888) provides more detail as follows: 'Report on a Heritage Assessment of Heritage Place YIN10-095 within the Fortescue Metals Group Solomon Mining and Infrastructure Phase 13 Section 18 Application area, conducted by the Yindjibarndi [sic] Traditional Owners and Terra Rosa Cultural Resource Management Pty Ltd for Wirlu-Murra Tableland Heritage Pty Ltd on behalf of WMYAC and the Yindjibarndi traditional owners and prepared for Fortescue Metals Group Ltd';
  - (iii) Ethnographic survey 5370, with start date 27 June 2011. The proponent was Fortescue Metals Group Limited and the consultant was Brad Goode & Associates Consulting Anthropologists and Archaeologists. 'Aboriginal People' were consulted, though the record does not provide any identifying information;
  - (iv) Archaeological survey 5661, with start date 9 May 2011. The proponent was Fortescue Metals Group Limited and the consultant was Alpha Archaeology Pty Ltd. 'Aboriginal People' were consulted, though the record does not provide any identifying information;

- (v) Archaeological and ethnographical survey 4387, with start date 1 July 2008. The proponent was Fortescue Metals Group Limited and the consultant was Western Heritage Research Pty Ltd. ‘Aboriginal People’ were not consulted; and
  - (vi) Archaeological and ethnographical survey 1454, with start date 1 August 1996. The proponent and consultant was Hamersley Iron Pty Ltd and the survey was conducted in relation to a proposed exploration drilling program in respect of two exploration licences. ‘Aboriginal People’ were consulted though the record does not provide any identifying information.
- (b) Four heritage surveys were recorded within the second proposed lease, with relevant details as follows:
- (i) Archaeological survey 5666, with start date 28 July 2013. It is the same survey as described above in relation to the first proposed lease;
  - (ii) Ethnographic survey 5692, with start date 11 February 2013. It is the same survey as described above in relation to the first proposed lease;
  - (iii) Ethnographic survey 5370, with start date 27 June 2011. It is the same survey as above for the first proposed lease; and
  - (iv) Archaeological survey 5661, with start date 9 May 2011. It is the same survey as above for the first proposed lease.

[41] These surveys recorded with DAA are not necessarily an exhaustive representation of all heritage surveys that have been conducted. The native title party has not specifically addressed the surveys which have been done over the proposed leases, apart from in broad terms as outlined later in this decision.

[42] The grantee party, as part of its evidence in this matter, provided a copy of the native title party’s s 31(1)(a) statement (as GP Doc 15), which the native title party provided to DMP at the outset of negotiations. I refer to that statement in this decision, as it contains information from the native title party which is relevant to this matter, even though the native title party itself did not provide the document. They raised no objection when the grantee party did so. In that statement, the native title party has submitted viewpoints in relation to particular heritage surveys that the grantee party carried out with the involvement of WMYAC (see pages 5-6 of the NTP’s s 31(1)(a) statement). For example, they state that heritage surveys

have not been undertaken with the native title party, the Yindjibarndi People who, in accordance with traditional law and custom, have the relevant authority to speak for the areas of the proposed leases. The native title party say that WMYAC is not authorised by YAC or the Yindjibarndi #1 Applicant to undertake heritage surveys or provide advice in relation to heritage or the registered native title rights and interests of the Yindjibarndi #1 Applicant.

[43] Details about heritage surveys conducted by the grantee party are set out in a letter from Mr Green on behalf of Fortescue Metals Group Limited to YAC (copying in Mr Crabtree from DMP) dated 12 March 2013 (GP Doc 13). Relevant portions are as follows:

**Aboriginal heritage surveys**

1.8 I am pleased to advise that portions of the Mining Tenements have been the subject of Aboriginal heritage surveys. In this regard, please find the following maps enclosed:

(1) map entitled *M47/1473 & M47/1475 Archaeological Survey Status as of 2<sup>nd</sup> November 2012*) *Solomon* which shows the portion of the Mining Tenements which has been the subject of archaeological survey (“**Archaeological Survey Map**”); and

(2) map entitled *M47/1473 & M47/1475 Ethnographic Survey Status as of 2<sup>nd</sup> November 2012*) *Solomon* which shows the portion of the Mining Tenements which has been the subject of ethnographic survey (“**Ethnographic Survey Map**”).

1.9 Analysis of the above maps shows that of the:

(1) 482.83 Ha area of M47/1473:

- (a) 67.12 Ha has been the subject of archaeological survey; and
- (b) 482.83 Ha has been the subject of ethnographic survey; and

(2) 777.43 Ha area of M47/1475:

- (a) 352.99 Ha has been the subject of archaeological survey; and
- (b) 777.24 Ha has been the subject of ethnographic survey

1.10 As is apparent from the Archaeological Survey Map and the Ethnographic Survey Map, the Aboriginal heritage surveys undertaken have identified that the northern portion of M47/1475 encroaches upon an ethnographic Aboriginal site.

1.11 Following discussions with Wirlu-Murra Yindjibarndi Aboriginal Corporation, FMG has agreed to adjust the northern portion of M47/1475 such that it no longer encroaches upon that Aboriginal site. FMG is currently investigating how the adjustment can best be made.

1.12 As you are aware from previous matters, FMG recognises its obligations under the *Aboriginal Heritage Act 1972 (WA)*.

**Policies or Relevant Information**

1.13 I am pleased to enclose a copy of FMG’s:

- (1) Procedure for Ground Disturbance Permits; and
- (2) Cultural Heritage Management Plan for Projects in the Pilbara region of WA.

[44] It is clear that heritage surveys are a contentious issue from examining the submissions made for this inquiry. The native title party’s 31(1)(a) statement, together with the contentions of the native title party, demonstrate the native title party’s views as communicated to the grantee party’s parent company (Fortescue Metals Group Limited) on taking part in heritage

surveys involving WMYAC and related organisations. In a letter from YAC to Fortescue Metals Group Limited Board of Directors dated 27 May 2013, the YAC representative stated 'please ensure all notices of future acts in the Yindjibarndi #1 claim area, including notices of Heritage Surveys, Heritage Work Instructions and s 18 applications are forwarded in the first instance to YAC's Future Act Unit.' The letter goes on as follows:

please also be advised that YAC will not be taking up any invitations issued by FMG to be involved in heritage surveys which are being undertaken by the Wirlu-Murra Tableland Heritage Service, who YAC understands to be FMG's preferred heritage manager. In the absence of a heritage protection agreement between YAC and FMG, YAC reiterates that it will not be participating in the heritage surveys or providing heritage information to FMG.

Attached to the letter were the following (with relevant aspects summarised):

- (a) A Federal Court notice of change in name, contact details or address for service of agent which states 'by resolutions made on 26 March 2013 and passed by the members of the Applicant jointly', Yindjibarndi Aboriginal Corporation RNTBC ('Registered Native Title Body Corporate') has been appointed to act as agent on behalf of the Applicant for Yindjibarndi #1.
- (b) A letter from all persons comprising the Applicant (as per the newly appointed Applicant) to the Chairman and Directors of Fortescue Metals Group Limited dated 26 March 2013. This letter referred to orders made on 15 February 2013 under s 66B of the Act by the Honourable Justice McKerracher replacing the Applicant for the Yindjibarndi #1 claim so the replacement Applicant comprised Thomas Jacob, Stanley Warrie, Allum Cheedy, Kevin Guinness, Angus Mack, Michael Woodley, Joyce Hubert, Pansy Sambo, Jean Norman, Esther Pat, Judith Coppin and Masie Ingie on behalf of the Yindjibarndi People. These are the currently listed Applicants for the native title party involved in this inquiry. The letter explains that on 26 March 2013, the newly authorised Applicant met and passed many resolutions, inclusive of a resolution to appoint YAC as agent of the Applicant 'in respect of all other matters that touch upon or relate to the land and waters the subject of the Yindjibarndi #1 Application including ... all matters, issues or things arising under the State or Federal Aboriginal heritage protection Acts', effective from 15 February 2013 (page 2 of the letter, found at NTP Doc 4). Later in the letter, the persons comprising the Applicant go on to inform FMG that:

...none of (i) Wirlu-Murra Yindjibarndi Aboriginal Corporation (ii) Wirlu-Murra Tableland Heritage Pty Ltd; or (iii) any person or entity engaged with either of those companies – is authorized or otherwise has been or is appointed or approved by us to represent the Yindjibarndi native title claim group in relation to any action taken or proposed to be taken on

or over any of the land or waters within the area claimed in the Yindjibarndi #1 determination application, including any action sought to be taken under the Aboriginal Heritage Act 1972 (WA) or the Mining Act 1978 (WA).

Further, we wish to inform you that in relation to aboriginal heritage and cultural heritage work to be undertaken over any land or waters within the area claimed in the Yindjibarndi #1 determination application over which any company in your Group has an interest none of - (i) Wirilu-Murra Yindjibarndi Aboriginal Corporation (ii) Wirilu-Murra Tableland Heritage Pty Ltd; (iii) the directors or members of the Wirilu-Murra Yindjibarndi Aboriginal Corporation or Wirilu-Murra Tableland Heritage Pty Ltd; nor (iii) any person or entity engaged with either of those companies – is authorized to speak for, or on behalf of, us or the Yindjibarndi native title claim group as a whole. Moreover, we do not consider any of those entities or persons has or holds the requisite traditional and customary knowledge, authority and experience to properly carry out such aboriginal heritage work or provide accurate information that will properly protect and preserve the traditional laws and customs of the Yindjibarndi People and their traditional sites, cultural materials and practices in a manner that is in the best interests of the whole of the Yindjibarndi native title claim group.

The letter requires for all future correspondence in relation to activities or proposed activities on the land be sent to YAC RNTBC.

- [45] The issue then for the native title party is that, in their view, the WMYAC does not hold the ‘requisite traditional and customary knowledge...’ to undertake heritage work in relation to the native title party claim area. The native title party perspective on this issue must be considered within the framework of native title and cultural heritage, which operate under separate legislation and separate jurisdictions. There simply are no legislative requirements as to who participates in cultural heritage surveys, or who is a party to heritage agreements.
- [46] Legislation does not outline the appropriate persons who may or may not be consulted for cultural heritage surveys. For example, the AHA does not provide a legislative requirement for who is to participate in heritage surveys or enter into heritage agreements. The conduct of heritage survey's and the entering into heritage agreements has evolved as part of corporate due diligence in ensuring compliance with the provisions of the AHA, assisting in the application for consent under s 18 of that Act, and as part of the building of relationships with the relevant traditional owners, rather than being a product of statute. There is, therefore, no specific requirement as to who should conduct such surveys.
- [47] A heritage survey may be relevant where a land owner, inclusive of a mining tenement holder, wishes to use the land for a purpose which, unless the Minister gives consent under s 18 AHA, would result in a breach of s 17 of the AHA (which sets out circumstances when an

offence is or is not committed in relation to an Aboriginal site). Section 18(2) of the AHA provides:

Where the owner of any land gives to the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land, the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as to whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which and the conditions upon which his consent should be given.

- [48] The relevance of a heritage survey to the s 18 AHA process is further demonstrated by the contents of the s 18 notice which proponents must complete. A number of these forms (from previous s 18 applications) have been provided as attachments to the native title party contentions (see for example Attachments 5A-5G). The form requires a description on how sites and places were identified, and also asks for a list of all places on the land that are the subject of the s 18 notice that have already been entered on the DAA register, or are reasonably believed to be Aboriginal sites (see page 5 of the Form). It also asks for details of all parties consulted and informed of the s 18 notice or provided a copy of the s 18 notice (see pages 6-7 of the Form).
- [49] While statute can regulate the conduct of parties in some instances, the difficulties with the s 18 process are highlighted in this matter. Nevertheless, the key to building relationships between a grantee party and the relevant traditional owners also lies in the behaviour of those parties towards each other, and the actions which result from those behaviours. Only the relevant parties can judge for themselves the appropriate behaviours toward each other to facilitate the smooth running of complex mining operations for many years to come.

### **Conditions of grant**

- [50] Under the *Mining Act*, the holder of a mining lease can exercise the rights set out in s 85, subject to the lessee covenants and various conditions set out in s 82. It is also possible for the Minister to impose further conditions under s 84 relating to the 'prevention or reduction of injury to land'. Endorsements can also be placed on the leases - these differ from conditions in that the licensee will not be liable to forfeit of the lease if endorsements are breached. For the first proposed lease, M47/1475, the Government party has indicated it intends to impose the conditions set out in the draft tenement endorsement and conditions extract, as follows:



## **ENDORSEMENTS**

1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

### **In respect to Water Resource Management Areas (WRMA) the following endorsements apply:**

3. The Lessee [sic] attention is drawn to the provisions of the:
  - Waterways Conservation Act, 1976
  - Rights in Water and Irrigation Act, 1914
  - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
  - Country Areas Water Supply Act, 1947
  - Water Agencies (Powers) Act 1984
  - Water Resources Legislation Amendment Act 2007
4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water's relevant Water Quality Protection Notes and Guidelines for mining and mineral processing

### **In respect to Artesian (confined) Aquifers and Wells the following endorsements apply:**

6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for the activities has been issued by the DoW.

### **In respect to Waterways the following endorsements apply:**

7. Advice shall be sought from the DOW if proposing any mining/activity in respect to mining operations within a defined waterway and within a lateral distance of:
  - 50 metres from the outer-most water dependent vegetation of any perennial waterway, and
  - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.
8. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimise erosion and sedimentation of receiving catchments and adjacent areas.

### **In respect to Proclaimed Ground Water Areas the following endorsement applies:**

9. The abstraction of surface water from any watercourse is prohibited unless a current licence to take surface water has been issued by the DoW.
10. All activities to be undertaken with minimal disturbance to riparian vegetation.
11. No mining/activities in respect to mining operations being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence to take surface water or permit to obstruct or interfere with beds or banks issued by the DoW.
12. Advice shall be sought from the DoW and the relevant service provider if proposing mining/activities in respect to mining operations being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

### **In respect to Proclaimed Ground Water Areas the following endorsement applies:**

13. The abstraction of groundwater is prohibited unless a current licence to construct/alter a well and a licence to take groundwater has been issued by the DOW.

## **CONDITIONS**

1. Survey.
2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
3. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines

and Petroleum (DMP). Backfilling and 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 operations and separately stockpiled for replacement after backfilling and/or completion of operations.
6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DMP for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.

[51] For the second proposed lease, M47/1473, the draft tenement endorsement and conditions extract reads as follows:

**ENDORSEMENTS**

1. The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2. The Lessee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.

**In respect to Water Resource Management Areas (WRMA) the following endorsements apply:**

3. The Lessee [*sic*] attention is drawn to the provisions of the:
  - Waterways Conservation Act, 1976
  - Rights in Water and Irrigation Act, 1914
  - Metropolitan Water Supply, Sewerage and Drainage Act, 1909
  - Country Areas Water Supply Act, 1947
  - Water Agencies (Powers) Act 1984
  - Water Resources Legislation Amendment Act 2007
4. The rights of ingress to and egress from the mining tenement being at all reasonable times preserved to officers of Department of Water (DoW) for inspection and investigation purposes.
5. The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water's relevant Water Quality Protection Notes and Guidelines for mining and mineral processing

**In respect to Artesian (confined) Aquifers and Wells the following endorsements apply:**

6. The abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for the activities has been issued by the DoW.

**In respect to Waterways the following endorsements apply:**

7. Advice shall be sought from the DOW if proposing any mining/activity in respect to mining operations within a defined waterway and within a lateral distance of:
  - 50 metres from the outer-most water dependent vegetation of any perennial waterway, and
  - 30 metres from the outer-most water dependent vegetation of any seasonal waterway.
8. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimise erosion and sedimentation of receiving catchments and adjacent areas.

**In respect to Proclaimed Ground Water Areas the following endorsement applies:**

9. The abstraction of surface water from any watercourse is prohibited unless a current licence to take surface water has been issued by the DoW.
10. All activities to be undertaken with minimal disturbance to riparian vegetation.

11. No mining/activities in respect to mining operations being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence to take surface water or permit to obstruct or interfere with beds of [sic] banks issued by the DoW.
12. Advice shall be sought from the DoW and the relevant service provider if proposing mining/activities in respect to mining operations being carried out in an existing or designated future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.
13. Measures such as effective drainage controls, sediment traps and stormwater retention facilities being implemented to minimise erosion and sedimentation of receiving catchments and adjacent areas.

**In respect to Proclaimed Ground Water Areas the following endorsement applies:**

14. The abstraction of groundwater is prohibited unless a current licence to construct/alter a well and a licence to take groundwater has been issued by the DOW.

**CONDITIONS**

1. Survey.
2. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.
3. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and 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 operations and separately stockpiled for replacement after backfilling and/or completion of operations.
6. The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DMP for his assessment and written approval prior to commencing any developmental or productive mining or construction activity.
7. The rights of ingress to and egress from Miscellaneous Licence 47/362 being at all times preserved to the licensee and no interference with the purpose or installations connected to the licence.

[52] Other conditions which I find to be of relevance in this matter are a set of conditions the Government party has raised in various matters before the Tribunal, commonly referred to as 'Extra Conditions'. They have not been raised by the Government party in this inquiry, though I do consider Extra Conditions 1-3, and appropriate amendments to those conditions in this matter, for reasons outlined later in this decision.

[53] Those Extra Conditions are as follows:

1. Any right of the native title party (as defined in Sections 29 and 30 of the *Native Title Act 1993*) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.

2. If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice, together with copies of all documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial and cultural data), on the native title party.

3. Where, 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 lease the assignee shall be bound by these conditions

## Legal Principles

[54] The Tribunal must determine whether the act must not be done, or that the act may be done, or that the act may be done subject to conditions (see s 38 of the Act). Section 38(2) prohibits the Tribunal from imposing a profit-sharing condition with its decision. The Tribunal must assess the evidence provided by each party in terms of the criteria in s 39 of the Act, which reads as follows:

### 39 Criteria for making arbitral body determinations

(1) In making its determination, the arbitral body must take into account the following:

(a) the effect of the act on:

(i) the enjoyment by the native title parties of their registered native title rights and interests; and

(ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(e) any public interest in the doing of the act;

(f) any other matter that the arbitral body considers relevant.

*Existing non-native title interests etc.*

(2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:

(a) existing non-native title rights and interests in relation to the land or waters concerned; and

(b) existing use of the land or waters concerned by persons other than the native title parties.

*Laws protecting sites of significance etc. not affected*

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

*Agreements to be given effect*

(4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:

(a) must take that agreement into account; and

(b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[55] The Tribunal must weigh the various s 39 criteria, and the Act does not require greater weight to be given to some criteria over others. It is a discretionary exercise in assessing the criteria, and the outcome of the assessment will depend on the evidence provided in relation to each criterion (see *Western Desert Lands v Holocene* at [37]). In addition, for example, in *Western Australia v Thomas*, the Tribunal explained (at 165-166):

We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of the evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.

The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.

The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.

[56] Section 36(1) of the Act requires the Tribunal to take all reasonable steps to make a determination as soon as practicable (subject to s 37 of the Act). Section 109(3) of the Act outlines the Tribunal is not bound by technicalities, legal forms or rules of evidence. Although there is no burden of proof incumbent on any of the parties during a future act determination inquiry, the Tribunal relies on the evidence provided in relation to the criteria (see *Western Australia v Thomas* at 157-158). Ultimately, a common sense approach to

evidence is required and the determination will be based on logically probative evidence and application of the law (see *Western Australia v Thomas* at 162-163).

## Summary of Contentions

- [57] The grantee party and the Government party are each seeking a determination that the future act may be done (without conditions) (at paragraph 60 Government party contentions and paragraph 19.1 GP contentions). The grantee party also specifically states the imposition of a condition requiring the grantee party to secure a specified amount of money by bank guarantee (see s41(3) of the Act) is not an appropriate course of action, and provides reasons for this view.
- [58] The native title party is seeking a determination that the future act may be done subject to three conditions (at paragraph 17 NTP Joint Statement). Those conditions, which are described fully under ‘Conditions on the Acts’ below, are expressed somewhat ambiguously. Due to their expression, including a form of commentary with them, I have summarised the native title party conditions in the following terms:
1. The grantee party is not to interfere with or change *Ganyjingarringunha Ngurra* without the prior consent of the native title party (this area is explained in more detail at [111] of this decision);
  2. Protection is to be given to sites of particular significance (referring to site numbers provided by the native title party and captured in ‘NNTT Map 3 – NTP Data’)
    - i. M47/1475: 14-19, 27, 29, 30, 45, 48;
    - ii. M47/1473: 8, 13, 19, 25, 32, 34, 35, 46, 64; and
  3. The grantee party enters into a Regional Standard Heritage Agreement (‘RSHA’) with the native title party and undertakes certain ethnographic and archaeological surveys.
- [59] The grantee party has submitted reply material opposing the imposition of each of those conditions. Further details are set out under the section ‘Conditions on the Acts’ later in this decision.
- [60] The grantee party raises a number of arguments about the weight to be given to the NTP Joint Statement (at 3.1-3.7 of GP Reply). However, I accept the joint statement as being evidence

of the native title party interests in this matter, and give it similar weight to sworn evidence, as it is said to be from a number of members of the native title party, including three of the named Applicants for this claim, who all have signed that they agree with the information contained in the document.

## **Section 39 Criteria**

[61] The grantee party initial evidence and materials focus on the native title party's s 31(1)(a) statement and its perceived shortcomings, as the grantee party sees it, in relation to the s 39 criteria. However, the native title party did provide a substantial amount of evidence subsequent to the grantee party's initial evidence. In the grantee party reply, the contentions and evidence focus on addressing the three conditions suggested by the native title party (as summarised at [58] earlier in this decision), and the sites which the native title party said were significant or of particular significance. As such, section 39 criteria were not explicitly referred to in the grantee party reply.

[62] The native title party materials did not explicitly address each of the s 39 criteria individually. The Government party did address s 39 criteria sub-section by sub-section, but did so prior to the provision of the native title party further materials, and no further contentions were received from the Government party. Accordingly, the analysis of the s 39 criteria below places materials and evidence under the relevant sub-section where it best fits, unless a party has explicitly referred to it in relation to a particular limb of s 39. The comments made relating to each of the s 39 criteria relate to both proposed leases, unless otherwise stated.

### **Section 39(1)(a)(i) enjoyment of registered native title rights and interests and s 39(2) existing use of land or water by persons other than the native title parties**

[63] The Tribunal's task is to consider the effect of the act on the enjoyment of registered native title rights and interests, being those on the Tribunal's Register of Native Title Claims for this native title party (see s 30(3)(b) of the Act and *WMC Resources v Koara*). For the purposes of this inquiry, persons affected include all of the persons in the native title claim group for Yindjibarndi #1. The registered native title rights and interests for the native title party in this

matter are set out at Attachment D to this determination. When assessing any enjoyment of those registered rights and interests, the Tribunal is concerned with the effect of the act on members of the Yindjibarndi claim group, being those persons that the native title party represents. For example, in *Western Desert Lands v Holocene* (at [64]), the Tribunal noted that:

The Tribunal's task is to examine the effect of the proposed mining activities over the area of the proposed lease on the enjoyment of the native title rights and interests of the native title party. Although by definition the native title party is WDLAC, it is *self-evident that the Tribunal is concerned with the effect of the act on the Martu native title holders* (emphasis added).

- [64] The register extract for the native title party's claim relevant to this matter (WC2003/003) sets out three areas where native title rights and interests have been claimed: Area A (a claim for exclusive possession); Area B (where a claim for exclusive possession cannot be sustained); and Area C (where a claim to exclusive possession cannot be sustained over land and waters which are nature reserves or wildlife sanctuaries, as defined in the *Wildlife Conservation Act 1950* (WA) created before 31 October 1975). The register extract states that the native title claim group: does not claim native title rights and interests that are extinguished by operation of law; and does not claim possession occupation, use and enjoyment of an area to the exclusion of all others where that area is covered by a previous non exclusive possession act (see s 23F of the Act).
- [65] 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 native title party'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 in relation to the other matters in s 39(1)(a) (see *Western Australia v Thomas* (at 166-167) and *WMC Resources v Koara* (at 339-341)).

#### *Enjoyment of registered native title rights and interests*

- [66] The native title party contentions refer to the 2008 Connection Report prepared for the native title determination application. It records statements in relation to *Ganyjingarrimunu* (Kangeenarina Creek, which is also referred to as Kanjeenarina Creek - note also various



spellings of the Creek in both English and traditional language). This is an area which, according to Tribunal mapping, is within the original area of the first proposed lease, and adjacent to or flowing across into the second proposed lease (as outlined at [136]). The native title party states this area supports the exercise of rights of use, access, enjoyment, hunting, fishing and camping. For example, in the Connection Report, Mr Woodley (a person who is one of the persons of the named Applicants on the Register of Native Title Claims) stated, ‘the Yindjibarndi used to fish and hunt and gather food’, and Mr Tucker (a person whose views were included in the Connection Report), described Yindjibarndi People going there on holiday to go camping and sing corroborees. More generally, the native title party asserts that the Connection Report and previous Tribunal determinations (for example, *FMG Pilbara v Cheedy* and *FMG Pilbara v Wintawari*) indicate the existence of the native title rights and interests to access, occupy, use and enjoy the area and its resources. I note these two decisions involved evidence of nearby tenement M47/1413, but not the area relating to the two proposed leases in this determination.

[67] Given that the Connection Report is now some 6 years old, and was created for a purpose other than this inquiry, I afford it less weight than the more current statements or affidavit evidence which has been provided by the native title party. I also note that while it refers to places of death and burial (at pages 16 and 29), culturally sensitive sites (at page 28), and other areas, this Report focuses on the claim area as a whole, rather than the specific area of these proposed leases. The NTP Joint Statement outlines particular rights and interests (which I note are drawn from the lists for Areas A to C on the register extract, except that the register extract does not provide a right to take fauna in respect of Area C). The NTP Joint Statement reads:

the registered native title rights and interests, which we continue to enjoy in the Land include the right, as against the rest of the world, to possess, occupy, use and enjoy the Land, as well as:

- a. the right to reside, live and camp on the Land;
- b. the right to engage in cultural activities and to conduct ceremonies within the Land;
- c. the right to teach our children about the physical and significant attributes within the Land, which are significant to us in accordance with our laws and customs;
- d. the right to take, use and enjoy the resources of the Land including ochre, flora, fauna and water for social, cultural, religious, spiritual, ceremonial and ritual purposes, and for food and other purposes;

- e. the right in relation to any activity on the Land to maintain, conserve and protect significant places and objects located within the Land, by preventing, by all lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object.

The NTP Witness Statement outlines similar rights and interests, in a slightly different form (at paragraph 2).

*Effect on enjoyment of native title rights and interests*

[68] After setting out those rights and interests, the native title party submits ‘we believe the grant of the Tenements and the activities permitted by them will have a serious effect on the enjoyment of these registered native title rights and interests...’ (at paragraph 10). One of the reasons provided is that ‘many of us still enjoy the continuing right under our traditional law to exclusively possess, occupy, use and enjoy the Land and the surrounding area’. The native title party further clarify ‘this right is held and enjoyed only by Yindjibarndi People’ (at paragraph 11). The native title party also explains ‘our legal representative has informed us that the Grantee Party intends to mine the areas covered by the Tenements, using ‘open cut mining methods’ to remove ‘flat lying despoils of iron ore, which are one to two kilometres in width and up to 50 metres in thickness’ (at paragraph 14 NTP Joint Statement). This appears to be consistent with statements made by the grantee party in their contentions and evidence. The native title party goes on to say that, in relation to certain features of the land, unless protected, ‘we will no longer be able to teach our children about the physical and significant attributes within the Land’ (at paragraph 14 NTP Joint Statement). While the effect on enjoyment is explained in broad terms, in that the rights are enjoyed, there is little detail on how those rights are actually enjoyed, or how they are enjoyed specifically within these proposed leases.

[69] In its s 31(1)(a) statement of 24 May 2013, the native title party states that all of the registered native title rights and interests will be affected by the grant of the mining leases, though does not explain how. The native title party states the rights to occupy, use and enjoy the area are demonstrated by the existence of various sites of significance to Yindjibarndi People within the area of the proposed leases, namely: *Wundu* (watercourses); *Jinbi* (springs); *Yinda* (rock holes); *Yamararra* (caves and rock-shelters); *Thalu* (increase sites and healing sites); *Yarna* (ochre quarries); *Wurrungarli* (hunting hides); *Gumbha* (human forms in natural features); *Thungari* (burial sites); *Marningarli* (rock art); *Budbungarli* (artefacts) and scarred trees (at page 5 of s 31(1)(a) statement). The grantee party states that little information about these

sites, specific to the proposed leases, has been provided in the s 31(1)(a) statement. However, this argument was made prior to the native title party evidence being provided in this matter. I note, under s 39(1)(a)(v), there is considerable detail about various sites claimed to be of ‘particular significance’, but that alone does not establish that there is present occupation, use and enjoyment of the area. I deal with this further.

[70] The native title party describes the grantee party’s rights under s 85 of the *Mining Act* as inclusive of the right to exclusively occupy, use and enjoy the land for mining purposes and the right to take and divert water from any natural spring, lake, pool or stream, situate in or flowing from such land. The native title party also refer to the grantee party’s intended method of mining and dewatering requirements in particular, as detailed in the grantee party’s Mining Act Statement (see s 74(1)(a) of the *Mining Act*) for each proposed lease (as outlined at [31]-[32] above and see also GP Doc 13 at Attachment A).

#### *Existing use of land or water*

[71] In contending that the proposed grants will have little effect on the registered native title rights and interests, the grantee party raises the existing impact of miscellaneous licence L7/362 overlapping 38.5 per cent of the second proposed lease. The terms of the miscellaneous licence are such that it can be used for various purposes including: pipeline; power line; road; taking water; communication facility; aerodrome; power generation; transmission facility; storage or transportation; or facility for minerals or mineral concentrate. There is no evidence in relation to what the licence is actually being used for.

[72] The grantee party also notes it has taken steps to exclude Satellite Springs from the tenement application of the first proposed lease, which it believes should accommodate the native title party’s concerns raised in the s 31(1)(a) statement.

[73] The Government party contends that the proposed grant is unlikely to cause any greater effect than the interference already in place by way of the temporary reserve which overlapped both leases by 100 per cent, and the current licences as follows:

- E47/1319 and E47/1334 which encroach upon the first proposed lease by 3.8 per cent and 96.2 per cent respectively;
- E47/1334 and E47/1447 encroaching 5.8 per cent and 94.2 per cent respectively for the second proposed lease; and

- miscellaneous licence L47/362 which encroaches upon the second proposed lease by 38.5 per cent and the first proposed lease by 0.1 per cent.

[74] However, here the Government party are comparing exploration and miscellaneous licences with the current proposed leases which are mining tenements. While this may still be relevant if these existing activities have limited the exercise or enjoyment of native title rights and interests, there does not appear to be any specific evidence of what has previously occurred on the proposed leases, apart from in the broadest terms, or of the current exploration activity or the miscellaneous licence uses. By their very nature, mining activities which are allowed under the grant of mining leases will be more intensive than exploration licences, and mining has not occurred on either of the proposed leases to date. The grantee party itself has indicated it will conduct open pit mining over the proposed leases (as outlined in detail earlier in this decision).

[75] The Government party asserts that the effect of grant would be minimised due to operation of:

- (a) the *Mining Act*;
- (b) *Mining Regulations 1981* (WA);
- (c) the draft tenement endorsements and conditions to be imposed on the proposed leases;
- (d) other State legislation (including the *Environmental Protection Act 1986* (WA), *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), *Aboriginal Heritage Act 1972* (WA), *Wildlife Conservation Act 1950* (WA), *Rights in Water and Irrigation Act 1914* (WA)); and
- (e) relevant Federal legislation (including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); and the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth)).

*Consideration of s 39(1)(a)(i) and s 39(2)*

[76] Evidence indicates that there is underlying tenure on the area of the proposed leases such that the native title party has not possessed, occupied, used or enjoyed the land as against the rest of the world. The native title party has provided some broad evidence and information about the claim area, and less information specifically in relation to the areas of the proposed leases. For example, there is little or no evidence that the Yindjibarndi people live or erect shelters,

regularly camp, teach the children, use or enjoy resources from the land, in relation to these proposed leases. There is limited information that ceremonies are conducted on the land, and the evidence provided suggests that when this occurs, ochre is taken from the land to assist in those cultural activities (as outlined for example under s 39(1)(a)(v) later in this decision). However, it is not apparent that such is limited only to these proposed leases, and there is evidence that such occurs across the claim area. There is little or no evidence that other resources are taken from these particular leases for Yindjibarndi purposes.

[77] There is evidence that the native title party work to conserve and protect significant places and objects located within the proposed leases, as well as across the claim area as a whole. As such, their right to do so will be affected by the activities of the grantee party, and as outlined in the evidence provided, this is considered to be an important right by the native title party. The grantee party's letter dated 11 September 2013 to the native title party (GP Doc 22, in response to the native title party s 31(1)(a) statement) indicates the grantee party would be agreeable to the native title party accessing the land without restriction, except in relation to those parts which are used to explore or mine, or for related security or safety purposes.

[78] The mining leases do not confer exclusive possession on the grantee party (see the discussion of s 85 of the *Mining Act* above), though the nature of activities and safety requirements necessary for open pit mining may well restrict the native title party's ability to access areas. As was described in *Western Desert Lands v Holocene* (at [97]-[98]), the effect of the grant on access can be reduced by conditions which operate to preserve the right of access.

[79] The operations of an open pit mine, which can occur over 21 years (with a 21 year extension available), as well as the infrastructure to be created to facilitate the open pit mining, will undoubtedly have an effect on the native title party rights to conserve and protect their significant places. As such, I believe the imposition of the 'Extra Condition One' is warranted in this matter, and will somewhat mitigate those effects. Rehabilitation of the area following mining, as required by the draft conditions to be imposed on the grants by the Government party, should ensure that the loss of the ability to access the area will not be permanent.

[80] The effect on the enjoyment of the native title party rights and interest on its own does not give rise to a decision that the acts must not be done.

**Section 39(1)(a)(ii) – way of life, culture and traditions of the native title party**

*Way of life, culture and traditions of the native title party and any effect*

- [81] The native title party contends that the Yindjibarndi People are actively exhibiting their culture and traditions within the proposed leases. For example, in the NTP Witness Statement, the 28 Yindjibarndi signatories state ‘over the past 8 years a large number of us have been out on the country where these tenements will be located. Most of these visits have been field trips to identify and record sites and areas of significance to us under our law and customs’ (at paragraph 4). I accept this statement as reflecting the view of the native title party.
- [82] The native title party’s section 31(1)(a) statement asserts that the grant of the proposed leases will interfere with the exercise of the native title rights and interests which they are obliged to exercise in accordance with their traditional laws, customs and religious beliefs for their ‘in order to guarantee their ongoing survival’. Again, the weight of the s 31(1)(a) statement must be considered, and arguably this reflects the interests, wishes and proposals of the native title party, which while adding to the matrix of evidence, does not hold the same weight as affidavit evidence or the signed statements provided by the native title party specifically for this inquiry. The native title party refers to the spiritual and religious relationship existing between the Yindjibarndi people and country, with the welfare of the people being connected to the welfare of Yindjibarndi country. It is described as ‘a religious domain for which they are held accountable to supernatural beings’ (at pages 3-4). The native title party asserts that failure to carry out religious observances, being the registered native title rights and interests, is a breach of Yindjibarndi Law, which in turn causes Yindjibarndi People to suffer through sickness or the diminishing of spiritual or physical resources. It states the ‘grant of the Mining Leases in a way which does not accord with *Ninyadt* [the sacred principle of reciprocity] impacts upon the way of life, culture, traditions and religion of the Yindjibarndi People’ and that there are many sites of particular significance at risk of damage, and such damage would impact on the way of life, culture and traditions of the native title party (at page 4). The native title party states that *Ninyadt* ‘is a two way street and our preference is to have mutually beneficial agreements in place with mining companies operating in our country, such as the agreement we negotiated with [another large mining company]’ (at paragraph 16).
- [83] In Mr Davies’ affidavit, he describes witnessing ‘Yindjibarndi people performing traditional ceremonies after collecting ochre and bark, which they used in those ceremonies’ during an

ethnographic field trip to the area known as *Ganyjingarringunha Ngurra* which took place on 8-9 December 2012 (see paragraphs 4-5). The various maps provided in this inquiry indicate that this area comprises unallocated Crown land within the Solomon Fire Tail area. The 'NNTT Map 3 – NTP Data' also indicates the existence of sites within *Ganyjingarringunha Ngurra* and within the proposed leases that are regarded by members of the claim group as being 'of significance' and of 'particular significance'. Mr Davies describes witnessing 'Michael Woodley demonstrating how to ritually 'work' the *Manggurla Thalu*, a men's fertility site' on the first proposed lease during another ethnographic field trip on 18 May 2013, and he was informed it is necessary to be painted in ochre from a nearby ochre site prior to commencing the ritual (at page 16 of Mr Davies' affidavit).

- [84] The Government party and grantee party, prior to viewing the native title party's contentions, submitted that in the absence of sufficient evidence, there would be little or no effect on the way of life, culture and traditions of the native title party. The Government party did not submit any material in reply and the grantee party's reply material is not directed to s 39(1)(a)(ii).

#### *Consideration*

- [85] I have already found, in the consideration of s 39(1)(a)(i) and s 39(2), that the traditions of the native title party will to some extent be affected by the restrictions on access to the proposed leases. This is also dealt with somewhat in the evidence outlined relating to s 39(1)(a)(iv), as are the activities said to be performed on the proposed leases. However, the effect on the way of life, culture and traditions is such that on its own does not give rise to a decision that the acts must not be done. The imposition of the Extra Condition One may mitigate against such effects. The issue of ceremony is further considered and detailed at s 39(1)(a)(iv).

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

##### *Evidence provided*

- [86] As the Government party and grantee party provided contentions prior to the native title party materials, they both submit they are unaware of the social, cultural and economic structures of the native title party.

[87] The grantee party anticipates the grant would have a beneficial effect on any social, cultural or economic structures due to training and business development opportunities and regional infrastructure development expected to occur. The grantee party refers to their previous endeavours benefiting Aboriginal people, including:

- (a) a media release dated 23 November 2012 that Jindari Aboriginal Enterprise joined the grantee party as a contractor in relation to Chichester mining operations, which involved employment opportunities for Aboriginal people;
- (b) a media release dated 21 February 2013 which details a five year joint venture between Eastern Guruma and WMYAC to work as contractors for the grantee party at Solomon;
- (c) a media release dated 7 March 2013 describing traditional owner group Martu Idja Banjima expanding its business offerings and establishing their own traffic management business which undertook work on the Fortescue Hamersley Line;
- (d) a media release dated 11 June 2013 describing eleven Aboriginal People's plans to work for the Fortescue Metal Group Limited's Christmas Creek Mine after they completed specific training at the company's Vocational Training and Employment Centre;
- (e) segments on Corporate Social Responsibility from the grantee party's 2013 Annual Report;
- (f) statistics from Fortescue Metal Group Limited's Investor Site Tour Presentation; and
- (g) evidence provided from an earlier determination of the Tribunal, in which it was found in the circumstances of that case that grant of the mining lease would have some beneficial effect on the social, economic and cultural structures (at [39] – [40] of *FMG Pilbara v Yindjibarndi 2*).

[88] The native title party did not submit any contentions or evidence specifically in relation to this sub-section, nor is it addressed in the s 31(1)(a) statement of 24 May 2013.

#### *Consideration*

[89] In considering this criterion, and in the absence of evidence from the native title party specifically on this point, I find that the future acts will not be likely to have any negative impact on the native title party's social, cultural or economic structures. I do note, in relation to evidence of awarding contracts or economic benefits to Aboriginal people, that there is



nothing specifically provided by way of information or evidence in relation to economic benefits for this particular native title party, through their representatives, YAC.

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

#### *Access and carrying out rites and ceremonies*

[90] There are various accounts of the native title party accessing the area of the proposed leases, including a description within the NTP Witness Statement of going on country ‘over the past 8 years’ to identify and record sites and areas of significance, and Mr Davies’ accounts of visiting the area of the proposed leases in December 2012, May 2013 and January 2014 with various named Yindjibarndi People to camp and document sites and areas of significance. Also, in the NTP Joint Statement, it is outlined that ‘many of us still enjoy the continuing right under our traditional law to exclusively possess, occupy, use and enjoy the Land and surrounding area’. While the specifics are provided in relation to the various site visits to record this information, no specifics are provided of the right to use and enjoy that land in any of the Statements. In the Connection Report, there is some information regarding the use and enjoyment of Kangeenarina Creek (as described earlier in this decision and at [136]).

[91] Mr Davies’ affidavit provides evidence that ceremonies are carried out within the proposed leases, describing how he witnessed traditional ceremonies involving the use of ochre and bark (at paragraph 5). In Annexure B to his affidavit, he describes how he witnessed Mr Michael Woodley ‘ritually working the *Manggurla Thalu*’ (see [83]). Information about ceremonial sites is also recorded in the DAA Heritage Information Submission Form, although that is focussed more on the broader area of *Ganyjingarringunha Ngurra* (part of which includes the area of the proposed leases) rather than expressly focussed on the proposed leases.

[92] In the s 31(1)(a) statement of 24 May 2013, the native title party sets out various reasons for its viewpoint that the grant of the proposed leases would affect its freedom of access and freedom to carry out rites and ceremonies. They include:

- (a) prior unsuccessful attempts to access Yindjibarndi country where the grantee party holds a mining lease;

- (b) the nature of the permitted mining activities is regarded as impinging upon their prescribed freedom (at page 5);
- (c) the native title party being unaware of any evidence demonstrating the grantee party would not prevent the native title party from accessing the proposed leases (at page 5); and
- (d) the notion of the grantee party being at liberty to make applications under s 18 of the AHA 'to damage or destroy Yindjibarndi sites; and prevent Yindjibarndi People from exercising their registered native title right to maintain and conserve and protect significance places and objects located within the area'. The native title party asserts the grantee party damaged sites in Yindjibarndi country without Ministerial consent (at page 5).

[93] The grantee party's affidavit evidence responds to some of the native title party's assertions of ceremonies taking place within the tenements. For example, at paragraph 36 of his affidavit, Mr Sandy asserts his viewpoint that initiated Yindjibarndi men do not collect resources from site 30 (within the first proposed lease) for initiation ceremonies, that ochre has not been collected by him and other Yindjibarndi men who attended the field trips (in relation to sites 8, 13, 25 and 32 within the second proposed lease), and that no ceremonial preparations of the kind described in Mr Woodley's affidavit dated 4 February 2011 take place at Woodbrook (in relation to site 30 within the first proposed lease). However, Mr Woodley's affidavit was not lead by the native title party in relation to this inquiry. In relation to various sites, Mr Sandy asserts that he and the other Yindjibarndi men involved in the field trip agreed, without visiting sites 8, 13, 25 or 32, that ochre would not be collected from specific sites where the native title party asserts ochre is used for ritualised ceremonial proposes, due to their viewpoint it would be too hard to get to the sites (that is, sites 8, 25, 32 within the second proposed lease and 18, 19 and 30 within the first proposed lease). However, this statement was made without visiting sites 8, 13, 25 or 32 in the second proposed lease. This is dealt with further at s 39(1)(a)(v), but for the purposes of s 39(1)(a)(iv) I accept that different Yindjibarndi people will have different understandings and knowledge of rites and ceremonies as carried out by that group, as the claim area is a large one in terms of its geographical coverage (some 2,778 square kilometres), and in terms of the number of people who belong to the group.

[94] In relation to the circumstances of accessing previously granted tenements, the native title party states their survey team was ‘followed by a light plane and then a helicopter and were hand-delivered a letter from Green Legal, threatening legal action if they entered the M47/1413 lease area’ when the survey team attempted to gain access by travelling north of that lease (at paragraph 6.4 NTP contentions). While some commentary has been provided by people who were present at that series of events, including a letter from archaeologist Dr Graham Knuckey, ‘the hand delivered letter’ from Green Legal was not provided in evidence, and the grantee party has not responded to these allegations. It is difficult therefore, to say definitively what happened during this interaction. Clearly though, the native title party considered they had a right to access the area, and the grantee party considered the native title party did not have a right to access the area. Again, clear lines of communications between parties, particularly on issues as important as access to areas, where issues of safety may be paramount, are crucial to create a positive, ongoing relationship between a grantee party and a native title party.

*Effect of grant on freedom of access and freedom to carry out rites and ceremonies*

[95] The native title party raises concerns about the effect of the grants on their access to the land (at paragraph 12 of the NTP Joint Statement), as follows (key aspects in bold):

We are informed by our legal representative that, under the Mining Act, the grant of the Tenements will confer on the Grantee Party the right to “exclusively occupy, use and enjoy the Land for mining purposes”. Obviously, if these Tenements are granted, we will not, for the life of the Tenements, be able to enjoy, as we and our ancestors have always enjoyed, our exclusive right to possess, occupy, use and enjoy the Land. **Instead, our access to and enjoyment of the Land and its resources will be subject to FMG’s ‘Solomon Project’, as it is when some of us tried to visit an area of the previously granted mining lease, M47/1413, in December 2012, to identify sites of cultural significance and record the songs stories and ceremonies associated with those sites as a cultural record for our children.**

[96] Detail of the denial of access to M47/1413 in December 2012 is provided in the native title party’s contentions as outlined at [94]. By way of context, prior to this incident, the Tribunal handed down a determination on 13 August 2009 that mining lease 47/1413 (which is south of and shares a common boundary with the second proposed lease) could be granted subject to specific conditions, one of which was that ‘[a]ny right of the native title party (as defined in Sections 29 and 30 of the *Native Title Act 1993*) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities’ (see *FMG Pilbara v Cheedy* at [32] and [91]). Although these circumstances relate

to a different tenement, I find the information provided by the native title party relevant to the native title party's reasons for concern about access. The grantee party has not provided any information, evidence or comment in relation to the native title party evidence in this regard.

[97] The Government party, having submitted their contentions prior to the native title party's evidence, contend that the grant will not adversely affect freedom of access and freedom to carry out rites, ceremonies or other activities of cultural significance. The Government party contends that the grant would not have an adverse effect due to the impact of prior tenements (as outlined for example at [37]-[39] above). However, there is some evidence of ceremony being carried out in the area of the proposed leases, and I accept that evidence from the native title party.

### *Consideration*

[98] The grantee party evidence does not address the allegation of prevention of access (at [94] above). This is a serious allegation made by the native title party, with nothing to challenge the allegation from the grantee party. As such, I accept that even if the grantee party may not have intended to prevent such access, or may have had a lawful reason for preventing such access, then this may not have been adequately communicated to the native title party. As such, any future communications between parties in relation to the present leases would need to be carefully constructed to ensure misunderstandings or confusion did not occur, for the benefit of the conduct of grantee party activities, and the native title party rights and interests, particularly, for example, the freedom to access the area of the proposed leases and the freedom to carry out rites and ceremonies.

[99] Because of the information provided in this matter, it is a difficult criterion to assess. However, there is sufficient evidence of ceremony activity in the area of the proposed leases to suggest that some ceremonies will be linked to specific areas of the proposed leases, such as the fertility ceremony in the second proposed lease and the *Gurdiwirndanha Wurndu* in the first proposed lease and its creation links.

[100] I accept that the native title party freedom of access and freedom to carry out rites and ceremonies will be curtailed on the area of the proposed leases for the life of the mine, which could be up to 42 years. As such, I believe the imposition of the 'Extra Condition Three' on

both proposed leases is warranted in this matter, and will somewhat mitigate those effects. This is discussed further under the ‘Conditions on the Act’ section later in this determination.

[101] Having considered the evidence, I am satisfied that the effect on the freedom of access and freedom to carry out rites and ceremonies on its own does not give rise to a decision that the acts must not be done.

### **Section 39(1)(a)(v) – effect on areas or sites of particular significance**

[102] The native title party is of the view that the grantee party’s intended activities, in conjunction with ‘past behaviour towards the Native Title Party in respect of adjacent mining leases’ (at paragraph 6.1 NTP Contentions) will more likely than not restrict the continued use and enjoyment of the native title party’s registered native title rights and interests, noting that the rights of the grantee party would prevail over the rights of the native title party for the term of the lease under the non-extinguishment principle in s 238 of the Act. The term for each proposed lease is 21 years with a further possible 21 years. The native title party refers to the grantee party’s conduct in respect of an adjacent mining lease, M47/1413, when it is alleged a survey team was denied access in November 2011 to carry out a two week heritage survey (as outlined earlier in this determination).

### Dewatering

[103] After noting the rights under s 85 of the *Mining Act* and the grantee party’s expected dewatering activities, the native title party states it is worried about the effect on Bangkangarra (Satellite Springs) (at paragraph 13 of the NTP Joint Statement). I note that, as outlined earlier in this decision, Satellite Springs shall be excluded from the first proposed lease and that excluded area is also adjacent to the first and second proposed lease. Relevantly, the grantee party has submitted affidavit evidence of Mr Oppenheim, a Specialist Hydro-Geologist employed by Fortescue Metals Group Limited, who attested to considering the hydrogeology and the likelihood of impact to Satellite Springs.

- [104] Mr Oppenheim states that ‘any dewatering by Fortescue is unlikely to affect Satellite Springs’ (paragraph 12) because the site is located in an elevated sub-catchment which is independent of any other surface water catchment and any other ground water system. He also notes any effect is unlikely as the grantee party ‘does not intend undertaking mining operations’ within that sub-catchment and the environmental approvals obtained by the grantee party do not authorise any impact upon the site (see paragraphs 12 and 23). He states Satellite Springs is ‘essentially isolated from any other water flow’ due to being enclosed by hills comprised of banded iron rock formation. Mr Oppenheim attests that water can flow from Satellite Springs into Kangeenarina Creek, but not the other way around due to Satellite Springs being approximately 20 metres higher; he provides a diagram showing drainage catchments in the Solomon area, paths of surface water flows, and the Satellite Springs Sub-Catchment in support of this.
- [105] After having set out reasons why any effect is unlikely, Mr Oppenheim goes on to say ‘in the unlikely event that any mining operation did impact Satellite Spring’, remedial action could be taken by way of the grantee party implementing a sub-surface reinjection system or a surface supplementation system, both of which he states are or have been successfully implemented at Solomon Mine (paragraphs 24-25).

Evidence in relation to sites of ‘particular significance’

- [106] The native title party refers to Mr Davies’ description of three ethnographic field trips he carried out with particular Yindjibarndi People on 8-9 December 2012, 17-18 May 2013 and 31 January-1 February 2014 to record important sites within the areas of the proposed leases. As a result of these trips, Mr Davies states Yindjibarndi informants told him of 14 sites of particular significance within the first proposed lease (comprising a portion of a wider group of 41 sites of significance rather than particular significance identified by Mr Davies), and nine sites of particular significance within the second proposed lease (from a wider group of 57 sites identified by Mr Davies). The full list of sites identified by Mr Davies was provided with his affidavit. Within that full list, sites and areas regarded as of particular significance are marked and described. A summary of these sites and areas is provided in the table at Attachments E and F of this decision.
- [107] I note that, within the first proposed lease, Mr Davies’ affidavit has 11 sites marked as being of particular significance, even though he mentioned 14. As the 11 sites are the ones which

have been described and referred to in subsequent evidence, my attention is focussed on the 11 rather than the 14. Mr Davies' evidence was supported by the NTP Witness Statement (at paragraph 4) and in the NTP Joint Statement (which supports the native title party's contentions, by multiple references to Mr Davies' evidence) (at paragraph 3).

The first field trip

[108] In relation to the field trip over 8-9 December 2012, for which he was accompanied by 14 Yindjibarndi people, seven Yindjibarndi children and five archaeologists, Mr Davies states (at paragraph 5):

We camped overnight at a beautiful waterfall and spring called "*Bangkangarra*" (known in English as 'Satellite Springs')...According to my informants, *Bangkangarra* is a site of particular ethnographic significance that is fed by *Ganyjingarringunga Wurndu* and they are very worried that dewatering in any nearby mine might cause serious damage to the site.

[109] On 21 January 2014, the grantee party provided the Tribunal and other parties with confirmation that Satellite Springs no longer falls within the area of either proposed lease (see [13] above). The reduction of the area of the first proposed lease also means some of the sites of 'particular significance' provided in Mr Davies evidence will no longer fall within the grant area of the first proposed lease. I note the shape files and Map Info files submitted by the native title party incorporated into 'NNTT Map 3 – NTP Data' circulated on 23 April 2014, plotted significant sites in relation to the two proposed leases. To account for the excision of the first proposed lease, the Tribunal's Geospatial Services produced an updated version showing the native title party's depiction of significant sites, in view of the reduced area for the first proposed lease. As a result, I can see that sites 14, 15, 16, 17 and 48 (sites the native title party asserted to be of particular significance within the first proposed lease) fall outside of the reduced area for the first proposed lease.

The second field trip

[110] On the field trip that occurred on 17-18 May 2013, for which Mr Davies was accompanied by Mr Michael Woodley, Mr Thomas Jacobs, Mr Hayden Woodley and Mr John Woodley, Mr Davies states he intended to document any sites or areas of particular significance in the areas affected by the proposed leases, but was unable to complete the exercise due to time constraints. During this trip, he recorded GPS coordinates of 17 sites within the first proposed lease, 35 within the second proposed lease and 54 sites just outside the proposed leases.

[111] Mr Davies explains that those recorded sites (106 in total), in addition to 45 previously recorded sites, were submitted to DAA, through a Heritage Information Submission Form, on 7 June 2013, for registration of the *Ganyjingarringunha Ngurra* area as a cumulative ‘site complex’, rather than applying for individual sites (see also [91] of this decision). Mr Woodley, a senior Yindjibarndi man, was the informant who lodged the form. The form identified the location of 152 sites, and provided detailed information on the significance of those sites. The site complex approach was taken due to the heritage value of the area as a ‘unified religious and cultural precinct’ and the ‘volume and density of sites, and their cultural inter-connectedness’ making registration as stand-alone sites ‘impossible’ (page 4 of the Submission Form). Further, page 4 of the Submission Form provides:

*Ganyjingarringunha Ngurra* is a place of importance and special significance because it is a unique religious and cultural precinct, of unparalleled beauty, which contains a multitude of interconnected sites that are sacred to Yindjibarndi people who continue to live under our customary law.

DAA indicated to the native title party that they needed to apply for each of the 152 sites individually rather than as a site complex. The native title party has submitted the Heritage Submission Form in evidence for this inquiry and at paragraph 18 of the NTP Joint Statement, it states the signatories to the statement ‘fully support and adopt what was said there’.

### *The third field trip*

[112] Mr Davies describes another ethnographic field trip on 31 January 2014 to 1 February 2014, for which he was accompanied by Yindjibarndi men Mr Angus Mack and Mr Curtis Lockyer. During this trip he recorded GPS coordinates of 24 sites and six areas of significance within the first proposed lease and 22 sites and nine areas of significance within the second proposed lease.

[113] Mr Davies describes the sites regarded by ‘my Yindjibarndi informants’ as of ‘particular significance’ to comprise ochre sites, rock shelters with walled niches, natural features which hold religious significance in the forms of songs and narratives and scarred trees, from which bark has been removed to make implements (see paragraph 8 of Mr Davies’ affidavit).



Other evidence in relation to sites

- [114] As mentioned earlier in this decision, Mr Davies' affidavit contains a list (most sites accompanied by a photograph and description) of all of the sites regarded as being significant or particularly significant within the area of the proposed leases, based on the information gathered during these three ethnographic field trips.
- [115] The grantee party provided a reply on 19 May 2014 which addressed the sites claimed to be of particular significance. In the reply, the grantee party raised a number of technical issues related to wording and formalities which I have considered. One notable issue is the grantee party highlighting (at paragraph 3.5-3.6 of the reply) that not all of the signatories to the NTP Joint Statement are members of the Applicant for the native title determination application. I note two of the 19 signatories are members of the registered claimant, however, in my view this does not negate the relevance of the collective evidence as it is stated the signatories comprise members of the Applicant *and* members of the Yindjibarndi People (at paragraph 1 of the NTP Joint Statement).
- [116] I also note one item of the grantee party's affidavit evidence is submitted by an initiated Yindjibarndi man, Mr Sandy, who is not listed on the Register of Native Title Claims as part of the Applicant for the native title determination application. I confirm that both the NTP Joint Statement and Mr Sandy's affidavit will be taken into account as evidence from those who speak for Yindjibarndi country. The grantee party contends less weight should be given to Mr Davies' anthropological evidence because he is employed by Yindjibarndi Aboriginal Corporation and has 'shown a lack of reasoning' - that 'lack of reasoning' is said to be based on the absence of an explanation for why he holds the view that the stones within site 29 in the first proposed lease have been 'placed' (in a barrier form) rather than, for example, having fallen. The grantee party states '[t]he lack of reasoning and lack of reference to alternate explanations for the existence and placement of the stones is surprising and must detract from the weight the Tribunal must give his affidavit...his failure to provide any reasoning for conclusions suggests he hasn't brought his learning to bear on the subject matter' (see paragraph 6.72 grantee party reply). I address that argument under consideration of that specific site.

[117] In relation to Mr Davies' employment by the native title party, I note, for example, that Mr Oppenheim is employed by the grantee party. My view is that such concerns raised (apparently regarding the veracity of evidence of an employee) do not detract from the evidence itself and are, in this matter, unsupported by firm issues of fact regarding any concerns about the contents of the evidence. Similarly, in relation to issues of difference between the affidavit evidence of Mr Sandy, and that of Mr Davies (and the native title party statement evidence), essentially, Mr Sandy says he is *not aware* of certain activities being conducted on the relevant areas (for example, ochre collection and use) and Mr Davies and the native title party statements say they *are aware* of such activities. On the basis that Mr Davies has actually observed members of the native title party conducting such activities in the relevant areas (the native title party have tendered signed statements confirming this), I accept the evidence that such activities have occurred on the proposed leases. The evidence of Mr Sandy can co-exist with native title party evidence as Mr Sandy merely appears to be unaware of the activities attested to by Mr Davies (which is supported in the signed group statements from the native title party). This does not in itself mean the activities have not occurred.

[118] The grantee party affidavits of Mr Ken Sandy and Mr Luke May (an anthropologist employed by Terra Rosa Cultural Resource Management Pty Ltd) describe visiting sites within the proposed leases on 1 April 2014, though by slightly differing accounts. Mr May deposes he visited 11 sites on 1 April 2014 with Ms Anne Golden (archaeologist with Terra Rosa Cultural Resource Management Pty Ltd), Mr Cameron Lloyd (an FMG employee), five traditional owners (Mr Ken Sandy, Mr Jimmy Horace, Mr Rodney Adams, Mr Glen Toby and Mr Dillon Locker) and traditional owner Captain Wilson (described as a Lawman who is not a Yindjibarndi person). Mr Sandy, on the other hand, states he visited 16 sites, rather than 11, with the attendees listed above, other than Mr Cameron Lloyd who is not mentioned. As such, it is a little unclear who visited which sites on which occasions.

[119] I have considered all contentions and evidence regarding sites regarded as 'of particular significance' and have set out relevant aspects from the native title party contentions, Mr Davies' affidavit, the NTP Joint Statement and NTP Witness Statement, the grantee party reply and the affidavits of Mr May and Mr Sandy in two tables below (Attachments E and F to this decision). Based on that material, my comments in relation to each site alleged to be of particular significance are set out in the following paragraphs. In relation to the 'NNTT Map

3 – NTP Data’ this showed sites 14, 15, 16, 17 and 48 to fall within the original area for M47/1475, but the updated ‘NNTT Map 4 – NTP Data (reduced area)’ and ‘NNTT Map 5 – leases with close view (reduced area)’ confirm they do not fall within the reduced area for M47/1475.

*First proposed lease: Sites stated to be of ‘particular significance’*

[120] **Sites 14-17 – scar trees and a *jinbi* (spring/permanent water)**

As noted at [119], these sites do not fall within the area to be granted.

[121] **Sites 18 and 19 – rock shelters/ochre sources**

The grantee party asserts that the evidence provided by the native title party is too broad to conclude that either of these sites is of particular significance. What is compelling for my decision-making is that there is evidence from the native title party that there are many such sites on the proposed leases, as well as within the claim area itself. This is also reinforced in comments made by the native title party in the Heritage Information Submission Form. There is no evidence to suggest these sites are more important or special to the native title party than other similar sites.

[122] **Site 27 – stone arrangement/grinding stone**

On the evidence before me, I accept that this is a stone arrangement indicating use by ancestors of the native title party which is important to the native title party. As is stated by the native title party, this is an accessible site which the native title party visited on its site visit programme, and so I can conclude it could be easily disturbed. Grantee party evidence indicates this site was subject to an archaeological report in 2011 and an opinion was formed that this was a site of traditional cultural use, and was a site for the purposes of the AHA but that disturbance was acceptable 'to the relevant Yindjinbarndi Traditional Owners' (set out at paragraph 17 of Mr May’s affidavit). As such the issue of whether disturbance was acceptable appears to be conflicted. At a site visit by the grantee party in 2014, neither a flake nor the grinding stone could be identified in the site. Since the archaeological report in 2011, there has been a change of members of the persons comprising the Applicant, as noted on the Register of Native Title Claims and the representatives of this Applicant suggest the site is of particular significance and should not be disturbed. Notwithstanding some disturbance may

have already occurred, I accept that even without the current identification of the flake and the grinding stone, it is likely that for Yindjibarndi people this would be a site of particular significance.

[123] **Site 29 – Walled niche**

The native title party Heritage Information Submission Form suggests there are many such sites on the proposed leases, as well as within the claim area itself. The native title party evidence states the ‘wall’ of stones in this niche have been ‘placed’, whereas the grantee party evidence states the stones are ‘likely’ to be roof-fall. The native title party states the cave may hold artefacts or remains from ancestors, but nothing definitive has been put forward. It appears no one from the native title party or grantee party went into the cave on their respective field trips or if they did, this was not reported. On the basis of the limited and conflicting evidence, I accept this may be a site of significance, but cannot say it is a site of particular significance to the native title party.

[124] **Site 30 - Cave/rockshelter, ochre source, artefact scatter, Gandi (sacred stones).**

The evidence in relation to this site is very broad and it appears there are many such sites in the proposed leases and across the claim area, particularly in relation to *Gandi*. For example, the native tile party Heritage Information Submission Form states (on page 7) that:

*Gandi* (sacred stones) are found in the beds and banks of the eastern and western branches of the watercourse we call *Ganyjingarringunha Wundu* (aka ‘*Kangeenarina Creek*’), which runs through the centre of *Ganyjingarringunha Ngurra*. We believe *Gandi* were created by the Marrga and put in the beds and banks of these two branches of the creek for us to collect and use in initiation ceremonies for the boys who come from *Garliwinyji Ngurra*, in which *Ganyjingarringunha Wundu* is situated. Yindjibarndi people who continue to live subject to *Birdarra* Law believe *Gandi* are sacred objects that should be preserved.

As such, I could not say this site is a site of particular significance. I do note that grantee party evidence indicates the site was subject of an archaeological report in 2011, and that the archaeologist formed the view that the site is an Aboriginal site for the purposes of the AHA, but that disturbance was acceptable to ‘the relevant Yindjibarndi Traditional Owners’ (at paragraph 17 of Mr May’s affidavit). Since 2011, there has been a change of persons comprising the Applicant, as noted on the Register of Native Title Claims, and as such the issue of whether disturbance was acceptable to Yindjibarndi People appears to be conflicted.

In relation to all of the ochre sites in this proposed lease (stated to be sites 18, 19, 22 and 30), the NTP Joint Statement outlines they 'are of particular significance because they are needed by the *Ngurrara* who comes from *Garliwinyji Ngurra* so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (at paragraph 22). However, as outlined for each of these sites, limited information has been provided in relation to those associated ceremonies and rituals. As such, I could not say Site 30 was a site of particular significance.

[125] **Site 45 - *Gurdiwirndanha Wurndu*.**

Mr Davies refers to *Gurdiwirndanha Wurndu* as an 'area' and a site. For the purposes of this determination, I refer to it as a site. Mr Davies provides this site's location and provides photographs and dimensions for the site. As such, it is sufficiently identified for the purposes of this determination. He also provides information about its links to creation times which is supported by the NTP Joint Statement where they say 'it was created by the actions of a Marrga' (at paragraph 27). I note the grantee party documentation and evidence is limited on this site. Given the information and evidence provided by the native title party, I accept it is a site of particular significance for the purposes of this limb of the Act.

[126] **Site 48 - *Ganyjingarringunha Wurndu (Kanjeenarina Creek)***

After considering the position of this site in line with the reduced area on grant, and NNTT Mapping, it appears that the Creek flows in a north/south direction through the first proposed lease, at the area the DMP intends to excise. The grantee party also contends it is outside this proposed lease. As such, I have not considered the significance of this site for the purposes of the grant of the first proposed lease. However, see paragraph [136] of this decision for more information on this site in relation to the second proposed lease.

*Second proposed lease: Sites stated to be of 'particular significance'*

[127] For the second proposed lease, relevant aspects of Mr Davies' affidavit and the NTP Joint Statement, together with related reply material from the grantee party, are summarised in Attachment F below. My findings, based on all the material submitted, are outlined in the following paragraphs.

[128] **Site 8 – Group of four *Yamarrara* (caves) with ochre**

These caves are within the grant area. The grantee party affidavit evidence from Mr Sandy indicates they did not visit the site. Mr Davies specifically refers to 'site 8' and the ochre here. The Heritage Information Submission Form refers to four local ochre quarries, which appear to have the same co-ordinates as noted by Mr Davies in this matter for site 8. While they are noted to have sacred, ritual and ceremonial significance, it is not specified how these sites are more special or of particular significance in relation to other ochre sites within the proposed leases, or in relation to the claim area as a whole. As such, I could not conclude that this is a site of particular significance.

[129] **Site 13 – Group of two caves with ochre**

These caves are relatively near Kangeenarina Creek, and the grantee party deponents had not visited the site. However, Mr Davies' comments are very broad and he does not specifically refer to the significance of this area but rather to *Ngurra* and their importance overall. Also, he doesn't specifically link this area with the Creek, merely saying it is nearby so likely to be an important area. Overall, there is insufficient evidence for me to conclude that this is a site of particular significance.

[130] **Site 19 – Cave ochre source**

This site is within the grant area, however, the evidence provided by the native title party is too general for me to conclude that it is a site of particular significance.

[131] **Site 25 - Rock shelter/cave with ochre**

While this site is within the grant area, the evidence is very broad and not tied to ceremonies on or near the area or within this proposed lease. The evidence is too general for me to conclude that this is a site of particular significance.

[132] **Site 32 – Rock shelter/cave with ochre**

This site is within the grant area and the evidence specifically relates to this site which is said to be an ochre site for performing ceremonies ‘in the area’.

In relation to all of the ochre sites in this proposed lease (8, 13, 19, 25 and 32), the NTP Joint Statement states they 'are of particular significance because they are needed by the *Ngurrara* who comes from *Garliwinyji Ngurra* so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (at paragraph 22). However, as outlined for each of these sites, limited information has been provided in relation to those associated ceremonies and rituals; I cannot conclude that it is a site of particular significance.

[133] **Site 34 – *Manggurla Thalu***

The native title party Heritage Information Submission Form states (at page 14) that:

There is a Manggurla Thalu (baby Increase site) in the escarpment that overlooks the banks of Ganyjingarringunha Wundu; however, unlike the Manggurla Thalu at Malarni, in Millstream, the religious ritual for this Thalu may be conducted only by Yindjibarndi lawmen who are Ngurrara for Garliwinyji. The ritual ensures that the child's spirit will come from Garliwinyji Ngurra.

The grantee party affidavit evidence states that their deponents' grandfathers had not told them about this area. However, my view is that this does not mean other Yindjibarndi people have not been told about it. I accept the evidence of Mr Davies that the area is a men's fertility site, and that it is linked to ceremonies using local ochre and sometimes a specific kind of bark. The NTP Joint Statement (at paragraph 23) notes that this is a 'men's business site that is particularly significant under our Law because it is a fertility site. In order to work this site it is necessary to get painted up in ochre from a local source'. I note that this site is only several hundred metres from the ochre sites 8, 13, 19, 25 and 32 and while I have not found these sites themselves to be of particular significance, I conclude their proximity to site

34 with its association with ceremony and ochre, lead site 34 to be a site of particular significance.

[134] **Site 35 – Yamararra (cave) with potential engraving**

Mr Davies has attested to what he was told from specific Yindjibarndi people in relation to an engraving in this cave sighted in 2013. However, the difficulty is that those specific people did not provide evidence themselves. Mr Davies states he was unable to see the engraving, but the NTP Joint Statement does say (at paragraph 24) that the engraving ‘can only be seen when the sun is at a certain angle’. The grantee party deponents state they could not see any engraving when they visited the site in early 2014. As such, there are two conflicting views on whether the engraving exists. It is difficult to reconcile those differences - it may be that the angle of the sun was not an appropriate one by which to view such an engraving when visited in 2014, or that such an engraving had undergone some level of weathering between the native title party visit in 2013 and the grantee visit in 2014. While it is still no doubt an area of significance, I could not say it is a site of particular significance for the purposes of s 39.

[135] **Site 46 - Wundu (watercourse/spring) in a gorge**

I accept this site is either within, or very near to, the second proposed lease’s northern boundary. The grantee party contends it is six metres approximately to the north of the boundary. However, this is so near that it could be affected by activity on the proposed lease. I accept that there are at least pools of water in the area of this site, based on the native title party evidence. The photo provided is of a gorge type feature, but no water is apparent in the photo as it is a long distance perspective. The grantee party deponents dispute that this is an area of particular significance, but they did not visit the site, and as such I am not sure how they ascertained there were pools but no spring in the area. This may be from past knowledge, but this is not stated. The NTP Witness Statement (at paragraph 25) outlines in some detail as to why this site is of particular significance, including that the gorge contains many caves ‘which contain either the physical remains of our deceased ancestors or their sacred gear, which they used in our Law ceremonies and which remain highly dangerous’. Bearing this in mind, in addition to its association with Kangeenarina Creek, which is not disputed by the



grantee party, I accept that whether or not there is a spring, this area is of particular significance to the native title party.

[136] **Site 64 - *Ganyjingarringunha Wurndu* (Kanjeenarina Creek)**

Mr Davies refers to *Ganyjingarringunha Wurndu*. It is also known as Kangeenarina Creek. 'NNTT Map 3 – NTP Data' and 'NNTT Map 4 – NTP Data (reduced area)' shows the Creek running approximately 50-100 metres inside the second proposed lease. Tribunal mapping indicates that the centreline of the Creek flows through the first proposed lease, very near to the border of the second proposed lease. Mapping provided by parties (for example, the grantee party Solomon Mine Overview map, and the native title party *Ganyjingarringunha Nurra* map) suggests that the width and impact of the Creek may be more extensive than the mere centreline, as shown in the NTP Data maps (as noted earlier in this paragraph). The Creek appears, visually, to be very near to, or slightly across the westerly border of the second proposed lease. This is also suggested by 'NNTT Map 4 – NTP Data (reduced area)'. No party took issue with either of these maps. As the area where the Creek flows through in the first proposed lease has been excised, I did not need to consider its significance in that area, although I acknowledge it is adjacent to the westerly border of the second proposed lease and very near the Satellite Springs area which has been excised. Given that the Creek appears to run for at least several kilometres, it is not unlikely that it could become wider than its mere centreline, and vary in width from time to time taking it at least up to, if not over, the border of the second proposed lease, as apparent on party and NNTT maps. The grantee party have provided evidence in relation to the Creek, mainly focussing on the issue of hydrological disturbance to the Creek, which they say will be limited. In *Silver v Northern Territory*, the Tribunal held that sites or areas of particular significance not located within the proposed tenement area can be impacted upon by the grant of the proposed tenement. This is a qualified consideration, in that there must be a clear nexus between that which may be interfered with and the proposed activities of the grantee party (at [35]).

The native title party have provided much detail on the cultural and heritage significance of the Creek. I note that the WMYAC also raised the mythological and cultural significance of the Creek, and its close proximity to Satellite Springs, as well as the possibility of exclusion zones being applied to the Creek (see for example the grantee party s 18 notice for Phase 9 of

the Project, dated 18 June 2012, at page 685 onwards (NTP Doc 10)). The grantee party plans to use the proposed lease for open pit mining, and as such, the use of the area will likely be intensive in the sense that the lease will have a range of activities conducted on it and, according to grantee party mapping, these will be on or near the westerly border of this proposed lease. Given the Creek flows either through the second proposed lease, or is adjacent to the westerly border of the second proposed lease and so has sufficient nexus with that lease, as well as the evidence provided by the native title party about the significance of the Creek to them, I accept this is an area of particular significance to the native title party and that it may be affected by the activities of the grantee party as it is so close to, or may on occasions be within, the second proposed lease.

*Other comments*

[137] Apart from the specific sites described above, the native title party states ‘we are also very worried about other sites that are known to exist in the Land but which have not yet been identified because we did not have sufficient resources to fully survey the Land prior to this inquiry’ (at paragraph 14 of the NTP Joint Statement).

[138] In the grantee party’s contentions, reference is made to its knowledge of only one site (Satellite Springs) identified through a heritage survey. As specified, Satellite Springs is now excluded from the first proposed lease. I do note, however, the native title party’s views on heritage surveys, as described at [44] above.

[139] The Government party notes there are no registered DAA sites within the proposed leases, however, this is not determinative of whether or not a site is of particular significance, and particular significance is to be found on the evidence provided specifically during the inquiry.

[140] In relation to the numerous sites listed in the s 31(1)(a) statement (as outlined in the section above dealing with s 39(1)(a)(i)), the grantee party, before it obtained the native title party evidence in this matter, drew attention to the fact that their exact location within the proposed leases was not provided, despite requests from the grantee party on 11 September 2013 and 11 October 2013 for the provision of those details. Accordingly, it stated it was unaware of the recorded or non-recorded sites mentioned in the s 31(1)(a) statement. The evidence provided by the native title party for this inquiry, submitted after those comments of the grantee party, is detailed and specific and does provide information on locality. The grantee

party's contentions and evidence in reply to the native title party's evidence is summarised in Attachments E and F below.

Effect of grant on any sites of particular significance

[141] The native title party refers to their understanding that open pit mining methods will be used to remove flat lying iron ore 1-2 kilometres in width and up to 50 metres in thickness. The native title party states 'this means that, unless protected, certain surface features of the land, such as those identified in the evidence of Philip Davies as being of particular significance to us under our traditions, will be destroyed' (at paragraph 14). The native title party notes it is of particular concern due to 'the amount of development that has already occurred in *Ganyjingarringunha Ngurra*' (at paragraph 14), perhaps referring to the tenements which form part of the Solomon iron ore mining project to the south of those being considered in this matter.

[142] The grantee party contends (at paragraph 12.8) that interference with any areas or sites of particular significance is unlikely due to the grantee party's:

- (a) cognisance of its obligations under the AHA. Mr Weaver's affidavit (at paragraph 10) refers to a policy under Fortescue Metals Group Limited's Ground Disturbance Permit Procedure (a copy of which is provided at annexure TJW11) which requires that 'FMG personnel and contractors must not disturb any area unless a Ground Disturbance Permit has been issued for that area. The issue of a Ground Disturbance Permit is dependent on a range of matters being satisfied', one of which is Aboriginal heritage. I do note, however, that heritage in relation to this document appears to relate to internal reviews by the grantee party heritage personnel, rather than any consultation with traditional owners as such. Mr Weaver's affidavit (at paragraph 11) describes the grantee party having adopted Guidelines for the Management of Aboriginal Cultural Heritage for its project areas, which require compliance from all FMG personnel and contractors (Guidelines provided at annexure TJW12). I note these Guidelines suggest (at page 4) that Cultural Heritage Management Plans (which include information on sensitive sites) will be developed 'in consultation with the respective Native Title Groups'. As noted earlier, the native title party, as represented by YAC, have been invited to participate in heritage processes but

have declined to do so to date due to their lack of confidence with the grantee party heritage provider, WMYAC;

- (b) adoption of processes and procedures to avoid interference with Aboriginal sites. In Mr Weaver's affidavit, he describes Fortescue Metals Group Limited's Heritage Department maintaining a geographic information system which records registered sites, Aboriginal sites identified by FMG not yet registered, and relevant heritage zones 'to ensure that FMG's Heritage Obligations are satisfied' (at paragraph 15);
- (c) endorsement of the principles set out in DMP's Guidelines for Consultation with Indigenous People by Mineral Explorers (published in 2004 by the Tenure and Native Title Branch) (see paragraph 16 of Mr Weaver's affidavit). I note these were updated as at April 2014 by DMP, and that they relate to exploration, rather than mining. For example, the document states (at page 1) '[t]he guidelines are for exploration activities. They are not intended to cover feasibility or development stages of resource projects. In later stages of development, much greater attention should be given to questions of social impact, employment, community participation, compensation and the effects of associated infrastructure'; and
- (d) policy not to undertake ground disturbing activity without a heritage survey having already taken place. Mr Weaver refers to parts of the Ground Disturbance Permit Procedure and Guidelines for the Management of Aboriginal Cultural Heritage at paragraph 17 of his affidavit as follows:
  - (1) the following extract from page 3 of the GDP Procedure:
    - "A GDP must be applied for in the following circumstances:
    - if ground disturbance or vegetation clearing is proposed
    - if the activity on or purpose of the parcel of land in question is being altered e.g. from a lay down area to workshop"
  - (2) the following extract from paragraph 4.1 of the Heritage Guidelines:
    - Heritage surveys are triggered by:
    - project operations, expansion and development requirements; or
    - applications for a Ground Disturbance Permit (see Part 5.5 of this document).

[143] In relation to any impact to Satellite Springs, the affidavit evidence of Mr Oppenheim addresses dewatering, the isolation of the site from other water flows, and the elevation of the site preventing water flow from Kanjeenarina Creek (as raised at [104] above). That evidence doesn't address impact to other areas of water on or near the proposed leases, such as the Creek itself apart from in broad terms referring to environmental and water approvals processes.

- [144] In addition to the operation of the AHA, the Government party contends an adverse effect is unlikely due to heritage surveys having been conducted and that Endorsement One applies (drawing the grantee party's attention to the AHA and associated regulations). However, I note this is an endorsement, rather than a condition and so the licensee is not liable to forfeit the licence if the endorsement is breached.
- [145] The native title party states it does not have confidence in the protective ability of the AHA to sufficiently limit the effect of the grant of the proposed leases on sites of particular significance. Specifically, it takes issue with the administrative approach or policy in relation to s 18(2) of the AHA (at paragraph 8 of NTP contentions). The native title party states the administration of that section has enabled the land owner (inclusive of the holder of a mining lease) to provide information to DAA on whether any Aboriginal site exists within an area (note the definition in s 4 of the AHA), as part of a land owner's application under s 18 to use the land in a way that would, without the consent of the Minister, amount to a breach of s 17 of the AHA. The native title party contends the information on sites should be sought from the traditional owners rather than the land owner, and proposed this to the Minister for Aboriginal Affairs on 4 June 2013.
- [146] It is difficult for this Tribunal to comment definitively on these issues, given the information provided. Nevertheless, the points raised highlight the difficulties in the relationship between the grantee party and the native title party, and the native title party's view of some of the regulatory processes which are put forward by the Government and grantee parties as focussing on preserving Aboriginal heritage. In relation to another tenement held by the grantee party (M47/1413), the native title party describes the grantee party's knowledge and coordinates of 27 sites, as submitted by the native title party in the course of the inquiry for that tenement (*FMG Pilbara v Cheedy*). The native title party states that the information was subsequently provided in database format directly to the grantee party, however, the grantee party did not provide the details of any of those sites to the Aboriginal Cultural Material Committee ('ACMC', an advisory committee established under the AHA and responsible for evaluating the importance of places and objects) when supplying information about nine sites it sought to destroy within the Firetail Priority Mining Area.
- [147] The native title party also details (at paragraph 7.6 and 8.4 of the NTP contentions) discontent with the handling of a complaint from Ms Sue Singleton on 5 November 2011 to the ACMC,

which they regard as amounting to a policy of disregarding information that comes from traditional owners in connection with s 18 of the AHA. The native title party states that the ACMC, ‘for no apparent reason’ chose not to investigate whether the grantee party was understating the number of sites in the areas subject to destruction under the grantee party’s s 18 application, after Ms Singleton requested that investigation (see paragraph 8.4 NTP contentions). The native title party emphasises that the destruction of nine sites occurred pursuant to s 18 of the AHA, relying on information from the landowner (the grantee party) in the absence of ACMC investigating the accuracy of the information given by the landowner, after a determination of the Tribunal in *FMG Pilbara v Cheedy* that there were no sites of particular significance likely to be affected by the grant.

[148] The grantee party has not responded to these allegations.

#### *Consideration*

[149] As for Satellite Springs, I am of the view that the excision from the first proposed lease and the hydro geological factors described by Mr Oppenheim will minimise any effect to that site.

[150] In relation to the remaining areas identified by the native title party, the question for this Tribunal is whether there is an area or site of particular significance (that is, of special or more than ordinary significance to the native title party) which will be affected by the grant of these two proposed leases (*Cheinmora v Striker Resources NL* at [34]-[35]). This is a fine and often difficult judgement to make, particularly given the vast amount of evidence and information provided by the native title party and other parties to this matter. As the Tribunal noted in *Weld Range v Simpson* (at [279]):

...All of a native title holder’s land is significant to the native title holder, but ... persons may speak of areas or sites that are of ‘particular significance’ in accordance with their traditions...

[151] In this matter, I am satisfied that the persons who provided statements and evidence for the native title party have knowledge of the areas of the proposed leases and can speak for those areas in accordance with their traditions. The area of *Ganyjingarringunha Ngurra* is too broad for me to conclude that it is, in itself, an area of particular significance. As such, my conclusions are based on whether there are any sites within that area, which are also within or have a nexus with the areas of the proposed leases, which are of particular significance to the native title party.

[152] For the reasons outlined in the examination of each site in paragraphs [121]-[136], I conclude that the following sites are sites of particular significance for the native title party:

***First proposed lease***

Site 27 Stone Arrangement/Grinding Stone

Site 45 *Gurndiwirndanha Wurndu*

***Second proposed lease***

Site 34 *Manggurla Thalu*

Site 46 *Wundu* (watercourse/spring) in a gorge

Site 64 *Ganyjingarringunha Wurndu*

[153] In this matter, given the nature of the mining operations as open pit, it would appear production could not take place in a way that would avoid these sites of particular significance, apart from perhaps Site 46 which is at the very border of the second proposed lease. As such, my conclusion is that areas of particular significance to the native title party traditions will be affected by the activities of the grantee party on the proposed leases.

[154] To mitigate against this, I consider that Extra Condition Two can be imposed on the grant of both proposed leases. In relation to that condition, as Member O’Dea noted in *FMG Pilbara v Yindjinbarndi I* (at [117]), ‘I do not understand why it would be that the State would exclude from that condition the provision of ‘cultural data’...I see no reason why the native title party should not also receive any cultural data, and therefore it is my intention to exclude that exception from the provision of extra condition two’. I adopt the same approach for both proposed leases.

**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**

[155] In the s 31(1)(a) statement, the native title party raised the following wishes relating to the use, management or control of specific land or waters that, at the date of submission (24 May 2013), they would seek to be covered in an agreement:

- (a) All sites of particular significance are to be properly identified and protected. Related to this issue, they state the grantee party is ‘responsible for destroying sites of particular significance to the Yindjibarndi People’ and that it is a ‘matter of public record that there currently exists a dispute between FMG and YAC over

FMG's questionable conduct in obtaining a number of other mining tenements and section 18 consideration under the [AHA] related to the development of the Solomon Project and the 'Firetail Prospect' (at page 9);

- (b) *Birdarra* Law should be respected and followed, including the principle of *Nyinyadt*. (I note the grantee party provided evidence of their letter in response, dated 11 September 2013 (GP Doc 22), stating that this request is vague);
- (c) Yindjibarndi People are to be guaranteed free access to their country under the right of privacy to carry out and record religious ceremonies and rituals for future generations. (The grantee party's letter in response, dated 11 September 2013, indicates they would be agreeable to the native title party accessing the land without restriction, except in relation to those parts which are used to explore or mine, or for related security or safety purposes); and
- (d) That proper management of the impact on their other native title rights and interests is to occur (the grantee party, in its reply letter dated 11 September 2013, stated that this was vague and not properly understood).

[156] The native title party, in its s 31(1)(a) statement, specifically states WMYAC is not authorised by YAC or the native title party to undertake heritage surveys or handle heritage matters on behalf of the native title party (as outlined at [44] earlier in this decision). For example, the native title party does not accept the accuracy of an anthropological report that WMYAC provided to the grantee party in September 2011. While there is no specific legislative requirement for the grantee party to have the native title party specifically undertake heritage surveys, it can be seen that this is a difficult point of contention between the parties in terms of their ongoing relationship.

[157] The grantee party refers to a letter dated 27 May 2013 from YAC to the grantee party (at TJW 13 and NTP Doc 4) in which the native title party states that it will not be participating in heritage surveys in the absence of a heritage protection agreement.

[158] In the NTP Joint Statement, the native title party states 'it is not our wish to prevent mining in our country because, under our traditional law, *Ninyadt* (the law of reciprocity) requires us to share the resources of our country with others and we acknowledge that mining produces benefits not just for mining companies but for Western Australia and Australia'. As noted



earlier, the native title party goes on to indicate the preference is to have mutually beneficial agreements in place with mining companies, and past experience of unsuccessful negotiations with the grantee party are briefly explained.

[159] The native title party state they are seeking a determination that the future act may be done subject to three conditions (at paragraph 17 NTP Joint Statement, as outlined earlier in this decision). In summary, the conditions can be expressed as:

1. The grantee party is not to interfere with or change *Ganyjingarringunha Ngurra* without the prior consent of the native title party (this area is explained in more detail at [111] of this decision);
2. Protection is to be given to sites of particular significance (referring to site numbers provided by the native title party and captured in ‘NNTT Map 3 – NTP Data’)
  - i. M47/1475: 14-19, 27, 29, 30, 45, 48;
  - ii. M47/1473: 8, 13, 19, 25, 32, 34, 35, 46, 64;
3. That the grantee party enters into a Regional Standard Heritage Agreement (RSHA) with the native title party and undertake certain heritage surveys.

[160] The grantee party has submitted reply material opposing the imposition of each of those conditions, largely on the basis that they are ambiguous.

[161] The Government party states they are unaware of specific evidence from the native title party, except that contained in the s 31(1)(a) statement as described earlier in this determination. This statement was made prior to the native title party contentions and evidence. No further material on this point was provided by the Government party following the native title party materials.

### *Consideration*

[162] In essence, the native title party are concerned about site protection, and applications for s 18 AHA processes to disturb sites. It appears the native title party is not opposed to mining as such, but would prefer that if it did proceed, then sufficient protections or agreements be provided to areas or sites of particular significance. As the Tribunal outlined in *Weld Range v Simpson* (at [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] [*Western Desert Lands v Holocene*] 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...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.

[163] In the present matter, the grantee party will be conducting open pit mining over both proposed leases, and infrastructure on one or both of the proposed leases. The activities of the grantee party will also be likely to affect sites of particular significance within both of the proposed leases, and as such I give weight to the wishes of the native title party, as expressed by their authorised representative in this matter.

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

#### *Evidence provided*

[164] The native title party did not submit contentions or evidence regarding the economic significance of the project.

[165] The Government party and grantee party contend that the grant of the proposed leases would be economically beneficial at local, State and national levels. Specifically, the grantee party states the local economy would be assisted by local communities providing services to the project. The Government party refers to *Australian Manganese v Stock* (at [58]) in support of its viewpoint that the project will benefit the local economy. The grantee party contends the improved management and use or development of a local resource and minerals would be beneficial at the local and State level. Both the grantee party and Government party point to royalty payments benefiting the State under the *Mining Act*, and the benefit to the nation through export income from selling iron ore.

[166] The grantee party also states ‘there can be little doubt’ that the project is of national significance (at paragraph 14.3 GP Contentions) and refers to Member O’Dea’s conclusion in *FMG Pilbara v Yindjibarndi 1*, that it ‘is a project of economic significance, which will benefit the State and the Nation, and that some positive economic effect may be experienced

by the local economy including by local Aboriginal people and in particular the Yindjibarndi' (at [111]).

### *Consideration*

[167] In this present matter, no evidence has been led to indicate that during negotiations any specific economic benefit (such as employment or contracting opportunities) has been offered to the Yindjibarndi people as represented by YAC, and therefore it appears the perceived benefits are to Aboriginal peoples generally. However, there is no evidence to contradict the grantee and Government party assessment of the general economic benefits of the project associated with the leases to the wider community, and so I accept that assessment.

### **Section 39(1)(e) – the public interest**

#### *Evidence provided*

[168] The Government party contends the grant of the proposed leases would serve the public interest by way of the local, State and national economic benefits already outlined, referring to *Evans v Western Australia* (at 215). In that matter, Nicholson J referred to the expression 'public interest' importing a discretionary value judgment and explained that the effect of the proposed act on the public interest in a healthy mining industry and economy can be taken into consideration. The Government party also refers to Member O'Dea's viewpoint in the specific circumstances of *Australian Manganese v Stock* that 'the public interest is served by the development of a mine of this size and potential economic significance' (at [59]).

[169] The grantee party contends the public interest is served due to the local, State and national economic benefits raised, and additionally the economic significance of the mining industry to Western Australia and Australia (citing *FMG Pilbara v Yindjibarndi 2* at [53], in which Member O'Dea drew upon findings in *Western Australia v Thomas* in stating the Tribunal accepts the mining industry is of considerable economic significance to Western Australia and Australia). The grantee party also refers to philanthropic activities of Mr and Mrs Forrest (Mr Forrest is the Founder and Chairman of Fortescue Metals Group Limited), inclusive of donations, pledges and establishing a Charitable Foundation whose objectives include ending Indigenous disparity in Australia through employment, and the general success of Fortescue Metals Group Limited, as factors lending support to the public interest issue.

[170] The native title party provided limited material on this point. Paragraph 16 of the NTP Joint Statement reads: ‘we acknowledge that mining produces benefits not just for mining companies but for Western Australia and Australia’, prior to noting the native title party’s preference to have a mutually beneficial agreement in place.

### *Consideration*

[171] As noted in *Western Desert Lands v Holocene*, the failure of an agreement to be negotiated between a native title party and a grantee party is not a consideration in relation to assessment of this limb of s 39. The Tribunal accepts there is a public interest in the development of the mining industry, and that there will be so in this specific matter.

### **Section 39(1)(f) – any other relevant matters**

[172] No further matters were raised by parties or considered by the Tribunal.

### **Section 39(4) – Issues relevant to the inquiry on which the negotiation parties agree**

[173] On the evidence before me, there are no relevant issues on which the parties agree.

### **Summary of conclusions in relation to s 39(1) criteria**

[174] Each of the s 39(1) criteria has been considered in these reasons for determination. Having regards to the evidence and information provided to the Tribunal, my conclusions can be summarised as follows:

- (a) No mining has been performed on the proposed leases to date, however, the native title party does not suggest mining should not proceed.
- (b) In relation to s 39(1)(a)(i)(ii) and s 39(2), the effect on native title rights, interests and way of life is such that on its own, it does not give rise to a decision that the acts must not be done. The Extra Condition One will mitigate those effects.
- (c) In relation to s 39(1)(a)(iii), I find that the future acts will not have a negative impact on the native title party’s social, cultural or economic structures, based on the evidence in this matter.

- (d) Freedoms in relation to s 39(1)(a)(iv), in particular freedom of access, has been a particularly sensitive and difficult issue between the parties. On its own, it does not give rise to a decision that the acts must not be done and the Extra Condition Three will mitigate those effects to some extent.
- (e) I have concluded there are sites of particular significance on each of the proposed leases in relation to s 39(1)(a)(v), and it is most likely that each of these will be affected by the grantee party's proposed activities. There is a public interest in acts not going ahead where there are sites of particular significance which will be affected (for example, *Western Desert Lands v Holocene* and *Weld Range v Simpson*). However, these considerations must be carefully balanced with other criteria such as other aspects relevant to the public interest and the economic significance of the acts (as outlined under s 39(1)(c)), and the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of land or waters (as outlined under s 39(1)(b)). For example, in *Minister for Mines v Evans* (at [75]), the Tribunal held that:

We have given weight to the public interest in a viable mining industry in Western Australia and to the right to negotiate provisions not being intended to produce an Aboriginal veto over mining, but to deal with its ongoing development in a way which has beneficial regard to native title and their right to be asked.

There is evidence that the grantee party is a significant iron ore producer for this State, as well as at a national level. These proposed leases form part of a well-established project and the economic benefits of the Solomon Project have been well-documented in this matter. For the purposes of s 39(1)(a)(v), it would be preferable if the native title party are able to access these sites and record them, or the grantee party is able to avoid one or more of the sites. The imposition of the Extra Condition Two, together with conditions 4, 5, 6a and 6b (outlined at [202]), will mitigate against the effects of the acts to some extent. For those reasons, on their own, the disturbance to the sites of particular significance would not be a factor in deciding the acts must not be done.

## CONDITIONS ON THE ACTS

### *Purpose of conditions*

[175] Conditions will usually not be imposed unless the evidence adduced supports a need for such (see *Magnesium Resources v Slater* at [92]-[96], where the ‘Koara 2’ conditions were considered). The purpose of the power in s 38(1)(c) to impose conditions is to address the effect of a proposed act on native title rights and interests (see *Western Australia v Thomas 2* at [106]).

[176] The Tribunal must make a determination, taking into account the criteria in s 39, which provides certainty to parties (see *Evans v Western Australia* per R D Nicholson J at 213-214; see also *Minister for Lands v Strickland* at [14]). As R D Nicholson J explained in *Evans v Western Australia* (at 214):

I regard it as inherent in s 38 the arbitral body not leave the outstanding issues between the parties unresolved. For conditions to permit of such issues being unresolved would not be in conformity with the legislation providing the power to make conditions.

[177] In that decision, the Federal Court regarded condition 3.1 to 3.7 of the original determination (*Re Koara*), which required further negotiation about proposed mining operations, to be an invalid exercise of power (see 214):

In my view this construction and understanding of s 38 follows from the need to have in mind the Act is to be construed consistently with its objects (s 3) and beneficially... It must be acknowledged the Act in its present form places the Tribunal in an impossible position. It is asked at the time of the determination of whether an act may be done to formulate conditions pertaining to a mining stage the nature of which is not yet known. It is not empowered to delegate to an arbitrator the resolution of conditions at a later time.

In the present matter, the nature of the mining activities has been explained in some detail by the grantee party, and it is clear that open pit mining will be conducted on both proposed leases.

[178] As for the breadth of content for conditions, the Tribunal’s comments in *Western Australia v Thomas 2* are informative. There, the view is that ‘s 38(1)(c) provides the Tribunal with a very wide discretion in relation to conditions’ (at [106]) and ‘at least as a general rule, conditions ought to relate to or be connected with the specific future act or acts the subject of the determination’, though the effect of the act in relation to the broader project can be relevant (at [108]-[109]). In the present matter, there is no doubt the grant of these two

proposed leases forms part of the larger Solomon Project, which is a project in the magnitude of billions of dollars. Also, ‘just as conditions may incidentally relate to or benefit persons other than native title parties, so may conditions incidentally relate to matters going beyond the particular tenements and their potential effects on native title’ (at [109]).

[179] In terms of defining who conditions apply to, I adopt the Tribunal's view in *Minister for Lands v Strickland* as follows (at [17]):

...the power in s 38(1)(c) does not extend to imposing conditions requiring the Government party specifically to do things in relation to the public generally, Aboriginal people or registered native title claimants who are not native title parties.

[180] In considering permissible conditions to impose under s 38(1)(c) of the Act, while keeping in mind the purpose already outlined, I note the limitations are few: s 38(2) of the Act prohibits profit-sharing conditions, and ss 41(3)-(4) and 41(5) of the Act place some requirements on a bank guarantee condition and trust condition respectively. I make my assessment of whether any conditions, either presented to me in this inquiry or self-evident from the facts, are appropriate according to the evidence adduced.

[181] The Government party have indicated they will impose a set of standard conditions on each of the proposed leases (see [50]-[51] of this determination). The Tribunal’s approach to such conditions is outlined in *Australian Manganese v Stock 2*. Accordingly, rather than impose those conditions, I accept the Government party’s submissions as an undertaking that such conditions will be applied to the proposed leases upon grant. The grantee party has indicated they intend to comply with the standard conditions.

[182] As raised above, the Government party and grantee party indicated they wished for a determination to be made that the acts may be done without further conditions. The native title party does not object to a determination that the acts may be done but seeks for three conditions to be imposed.

#### Native Title Party Proposed Condition 1

[183] The native title party states ‘the first condition is that the parts of *Ganyjingarringunha Ngurra* affected by the Tenements are protected’ and elaborates by saying ‘*Ganyjingarringunha Ngurra* should be protected through a condition that the Grantee Party is not to interfere with or damage *Ganyjingarringunha Ngurra* without the prior consent of the native title party’ (at

paragraphs 17 and 20 of the NTP Joint Statement). It states that the particular significance of *Ganyjingarringunha Ngurra* as a site complex is described in the Heritage Information Submission Form that was submitted to the DAA during 2013, and that what was contained in the Heritage Information Submission Form is fully supported and adopted by the signatories to the NTP Joint Statement.

[184] The grantee party has interpreted this condition as follows: ‘in essence, [what] the NTP seeks is a unilateral right to veto the mining activities of the GP [grantee party] within the relevant portion(s) of the Inquiry Tenements’ (at paragraph 5.2 GP Reply). The grantee party also states that it assumes the native title party’s first condition is seeking to deny the grantee party from conducting mining operations within the areas of the proposed leases which contain alleged sites of particular significance. The grantee party contends the proposed Condition 1 should not be imposed for the following reasons (at paragraph 5.21):

- (1) the Alleged Sites are not sites of particular significance to the NTP, as addressed in Part 6 of these Contentions; and
- (2) even if they were, there is no justification for the imposition of the wider First Condition given the areas occupied by the Alleged Sites.

[185] The grantee party questions which parts of the area are affected by the proposed leases as ‘it is not apparent to the Grantee Party what constitutes the boundaries of *Ganyjingarringunha Ngurra*’ (at paragraph 5.3 GP Reply). The grantee party provides an example of four differing descriptions of that area with reference to Mr Davies’ affidavit.

[186] The grantee party also takes issue with the way the area is described in the native title party Heritage Information Submission Form (see for example at paragraphs 5.4-5.6 of the GP reply). The grantee party (at paragraph 5.7 GP Reply) goes on to say that further review of the Heritage Information Submission Form shows that it:

- (1) does disclose the geospatial coordinates of various sites said to make up the alleged site complex sought to be registered as a site complex;
- (2) does refer to the “boundary” of the alleged site complex in terms relative to the sites which are said to comprise the site complex;
- (3) does not further identify the boundary of the alleged site complex other than by the above table, and presumably the shape files there referred to.

[187] In relation to proposed Condition 1, the native title party is seeking the requirement of written consent prior to impacting the area of *Ganyjingarringunha Ngurra*. Even though the area



extends beyond the proposed leases, the native title party has specified they seek protection of ‘the parts of *Ganyjingarringunha Ngurra* affected by the Tenements’ (at paragraph 17 NTP Joint Statement). This condition does not seek only protection of the sites of particular significance within the proposed leases, within *Ganyjingarringunha Ngurra*, but seeks for general protection and incorporates a requirement for prior written consent.

[188] In the present matter, the native title party has provided information to assist in locating the boundaries of the *Ganyjingarringunha Ngurra* (inclusive of the map of the *Ganyjingarringunha Nurra* showing the proposed leases) and has provided evidence of the significance of the area as a whole, reflected in the fact that it submitted the application to DAA for the area as a whole. However, I find the request too broad given the available evidence and furthermore, am not prepared to impose a condition requiring prior consent in the circumstances. As noted by the Tribunal in *Re Koara*, ‘Aboriginal people, whether native title holders or native title claimants, have a right to be asked about actions affecting their land but are not given a veto’ (at 80).

[189] As such, this condition is considered not to an appropriate condition which the Tribunal would consider imposing on the grant of either of these proposed leases.

#### Native Title Party Proposed Condition 2

[190] At paragraph 21 of the NTP Joint Statement, the native title party seeks for protection to ‘be given to the sites of particular significance that have already been identified in the Tenements’ as designated in the affidavit of Mr Davies, namely: Sites 14-19, 27, 29, 30, 45 and 48 within the first proposed lease and Sites 8, 13, 19, 25, 32, 34, 35, 46 and 64 within the second proposed lease.

[191] In relation to each site that Mr Davies claimed to be a site of particular significance, the grantee party raised various points as are summarised in the tables at Attachments E and F to this decision. As noted earlier in this decision, I have determined that Extra Condition Two will be imposed to mitigate the effects on those sites which I have found to be of particular significance.

### Native Title Party Proposed Condition 3

- [192] The third condition the native title party requests is as follows: ‘the Grantee Party enters into the Regional Standard Heritage Agreement with the native title party and undertakes comprehensive ethnographic and archaeological surveys over the parts of the land that have not yet been surveyed by the Native Title Party’ (at paragraph 29 of the NTP Joint Statement).
- [193] The grantee party opposes the Regional Standard Heritage Agreement (‘RSHA’) condition for the following reasons:
- (a) The grantee party states that an RSHA is applicable for exploration activities, not mining, and refers to RSHA definitions in support of this; and
  - (b) The grantee party identifies the two components to the condition (the first concerning entering into an RSHA and the second concerning surveys) and states ‘the proposed interrelationship between those obligations is unclear, and arguably contradictory’ (at paragraph 7.5 GP Reply).
- [194] The grantee party states there is no justification for the Tribunal to impose the obligation contained in an RSHA. The grantee party phrases this obligation (at paragraph 7.7 of GP Reply) as ‘blanket ethnographic and archaeological surveys’, though I note the wording of the native title party’s condition contains an exception for areas that have already been surveyed. The grantee party opposes the possibility of further heritage surveys by stating the proposed leases have already extensively been the subject of heritage surveys (referring to GP Doc 13) and it claims the native title party has not provided evidence of why those previous heritage surveys are inadequate (at paragraph 7.7 GP Reply). While the native title party’s viewpoints in relation to the heritage surveys that have already taken place have been clearly set out earlier in this decision, I agree with the grantee party that an RSHA condition is not intended for a mining lease, and is rather focussed on exploration tenements. However this is phrased, the native title party appears to seek some protection for sites identified in the proposed leases area, including those of particular significance to the native title party.

*Other conditions*

- [195] I have given consideration to the common set of Extra Conditions (as outlined at [53]) which are often raised by the Government party in such inquiries. As noted earlier in this decision, they have not been raised by the Government party in this inquiry, though I give them consideration as it is incumbent upon me to determine whether any conditions should be imposed, taking into account all evidence before me. I have already outlined reasons why I consider Extra Conditions One, Two and Three should be imposed on the grant of the two proposed leases in this matter.
- [196] I have given consideration to *Minister for Mines v Evans*, in which three Tribunal Members determined various mining leases could be granted subject to 17 conditions (commonly known as the ‘Koara 2 conditions’; see Appendices 1 and 2 to that decision). While the Koara 2 conditions applied to a matter where the nature and extent of mining activities were uncertain, in relation to this inquiry I have considered the conditions relating to access, cultural heritage and provision of information regarding future acts, particularly for s 18 AHA matters, which are relevant in the present inquiry.
- [197] The issue of access to the areas to be granted has been dealt with mainly under s 39(1)(a)(iv) above, where Extra Condition One is to be imposed on both leases. In addition, the grantee party has requested, and DMP has allowed that the area of Satellite Springs be excised from the grant of the first proposed lease. This area to be granted is due to the following evidence submitted: the letter and map from the grantee party to DMP dated 22 November 2013 (GP Doc 39); the status plan attached to DMP letter to the grantee party dated 24 December 2013 (GP Doc 46); the email from DMP to the grantee party dated 21 January 2014 attaching a status plan and tengraph quick appraisal both generated on 21 January 2014 (GP Doc 47); and finally the material in Attachment G to this decision. For certainty, this decision will impose a condition as follows:
- *The area to be granted as M47/1475 is the area specified in the Department of Mines and Petroleum’s diagram with associated coordinates and other data as set out at Attachment G to the National Native Title Tribunal’s decision in WF2013-0015-WF2013/0016, which is exclusive of ‘Satellite Springs’.*

[198] In relation to conditions covering cultural heritage, much of the native title party's evidence and contentions describe significant concern regarding preservation of cultural heritage sites, particularly in relation to past interactions with the grantee party and s 18 AHA applications, as described earlier. Detailed evidence has been provided by the native title party about the importance of specific sites, including sites of particular significance as described under s 39(1)(a)(v). My task is to make a decision based on the provisions of the Act, though I may take into consideration aspects of cultural heritage in so far as evidence is adduced relevant to the s 39 criteria.

[199] As the Tribunal stated in *Western Desert Lands v Holocene* (at [144]):

The most efficient and well resourced site protection system will not mean that the Project can proceed without interference with an Aboriginal site of particular significance to the native title party. However, if the Project were to proceed, I think the measures to involve Martu in consultation about it mean that there is a low likelihood that conditions will be breached.

This applies equally in this matter, where the grantee party is to use open cut mining over the proposed leases, and where it will be difficult, if not impossible, to avoid relevant sites in the process of that mining. As such, it is likely that s 18 AHA applications will need to be made by the grantee party before disturbing those sites. It is also likely that for those parts of the leases which have not been surveyed, ongoing difficulties and issues will be had by the grantee and native title party in relation to heritage surveys.

[200] Given the problematic history between the parties in this matter, which has been well documented in previous Tribunal determinations, and by the parties themselves in those matters and in this inquiry, the more certainty parties can have around such processes, the more likely the mining project will be able to progress smoothly within these two proposed leases, and the more likely the native title party will not consider their rights and interests to have been compromised. As such, I intend to impose a number of conditions in relation to cultural heritage. However, in my view, I cannot impose a condition on parties which will regulate 'who' must conduct cultural heritage activities. If current legislation does not so provide for who must conduct such, then it is beyond the scope of this Tribunal to so impose such a condition. I note the grantee party currently invites the native title party, through their representative YAC, to participate in such heritage activities, and it would seem incumbent on both parties to endeavour to pursue a way forward which could facilitate the mining

operations over these leases, for the next several decades. In that context, I intend to impose the following three conditions to both proposed leases in this matter:

- *If a survey or clearance is required on the Tenement to meet the requirements of the Aboriginal Heritage Act 1972 (WA) then the grantee party must give written notice to the native title party, through its authorised representative, of its intention to conduct a survey or clearance and when giving notice must include a suitable topographical map showing the areas proposed to be surveyed or cleared.*
- *The Government party must forthwith upon receipt by the Minister of a notice and recommendation from the Aboriginal Cultural Material Committee in respect of a site on the Tenement, give a copy of the recommendation and any related report excluding any confidential information provided to the Committee by other than members of the native title party, to the native title party's authorised representative.*
- *Where the Minister gives or declines to give consent under s 18 of the Aboriginal Heritage Act 1972 (WA) to the proposed use of the land the subject of the notice and recommendation, the Government party must forthwith inform the native title party, through its authorised representative, of the decision.*

## **Determination**

[201] The Government party intend to impose conditions and endorsements on the grant of the proposed leases, as outlined at [50]-[51].

[202] The determination of the Tribunal is that the acts, being the grant of mining leases 47/1475 and 47/1473 to FMG Pilbara Pty Ltd, may be done subject to the following conditions on both proposed leases:

1. Any right of the native title party (as defined in sections 29 and 30 of the *Native Title Act 1993* (Cth)) to access or use the land the subject of the mining lease is not to be restricted except in relation to those parts of the land which are used for exploration or mining operations or for safety or security reasons relating to those activities.
2. If the grantee party gives a notice to the Aboriginal Cultural Material Committee under section 18 of the *Aboriginal Heritage Act 1972* (WA) it shall at the same time serve a copy of that notice, together with copies of all

documents submitted by the grantee party to the Aboriginal Cultural Material Committee in support of the application (exclusive of sensitive commercial data), on the native title party, through their authorised representative.

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 safeguard the environment or any addendums thereafter to the Department of Mines and Petroleum for assessment and written approval; the grantee party must at the same time give to the native title party, through their authorised representative, 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. The area to be granted as M47/1475 is the area specified in the Department of Mines and Petroleum's diagram with associated coordinates and other data as set out at Attachment G to the National Native Title Tribunal's decision in WF2013-0015-WF2013/0016, which is exclusive of 'Satellite Springs'.
5. If a survey or clearance is required on the Tenement to meet the requirements of the *Aboriginal Heritage Act 1972* (WA) then the grantee party must give written notice to the native title party, through its authorised representative, of its intention to conduct a survey or clearance, and when giving notice must include a suitable topographical map showing the areas proposed to be surveyed or cleared.
6. The Government party must forthwith upon receipt by the Minister of a notice and recommendation from the Aboriginal Cultural Material Committee in respect of a site on the Tenement, give a copy of the recommendation and any related report excluding any confidential information provided to the Committee by other than members of the native title party, to the native title party authorised representative.

7. Where the Minister gives or declines to give consent under s 18 of the *Aboriginal Heritage Act 1972* (WA) to the proposed use of the land the subject of the notice and recommendation, the Government party must forthwith inform the native title party, through its authorised representative, of the decision.

**Helen Shurven**  
**Member**  
**31 July 2014**

## **ATTACHMENT A – Material accompanying the grantee party’s contentions**

The following documents accompanied the grantee party’s contentions received 12 December 2013:

1. GP Doc 1 – A copy of Tribunal determination *FMG Pilbara v Cheedy*;
2. GP Doc 2 – A copy of Tribunal determination *FMG Pilbara v Wintawari*;
3. GP Doc 3 – Order dated 15 April 2011 by Independent Person Steven Heath dismissing the native title party’s objection regarding the grantee party’s applications for miscellaneous licences 47/361, 47/362 and 47/363;
4. GP Doc 4 – A copy of Tribunal determination *FMG Pilbara v Yindjibarndi 1*;
5. GP Doc 5 – A copy of Tribunal determination *FMG Pilbara v Yindjibarndi 3*;
6. GP Doc 6 – Letter from DMP to the grantee party and native title party dated 7 November 2012 requesting information from the parties regarding the proposed leases. The letter enclosed the following in respect of each proposed lease:
  - a) A copy of the tenement application;
  - b) A copy of the draft tenement endorsements and conditions extract dated 5 November 2012;
  - c) A letter from DMP enclosing search results for the proposed leases from DIA’s Register of Aboriginal Sites, which indicated there were no registered sites and no other heritage places as at 5 November 2012; and
  - d) Extract of s 39 of the Act and information from DMP regarding mining, prospecting, exploration and associated legislation;
7. GP Doc 7 – A copy of a media release from Fortescue Metals Group Limited’s website entitled ‘Fortescue welcomes new Aboriginal contractor in the Pilbara’, dated 23 November 2012;
8. GP Doc 8 – A copy of a media release from Fortescue Metals Group Limited’s website entitled ‘Fortescue survey discovers 41,000 year old heritage site’ dated 12 December 2012;
9. GP Doc 9 – Western Australia Iron Ore Profile from the Department of State Development dated 2012;
10. GP Doc 10 – A copy of Tribunal determination *FMG Pilbara v Yindjibarndi 2*;
11. GP Doc 11 – A copy of a media release from Fortescue Metals Group Limited’s website entitled ‘Traditional Owners form historic mining joint venture’ dated 21 February 2013;



12. GP Doc 12 – A copy of a media release from Fortescue Metals Group Limited entitled ‘Traditional Owners move forward on path to economic independence’ dated 7 March 2013;
13. GP Doc 13 – Letter from Mr Ken Green (the grantee party representative) to the native title party and Government party representatives dated 12 March 2013, providing a proposed s 31(1)(b) agreement for the proposed leases and also enclosing:
  - a) Mining Statement and Mineralisation Report (pursuant to s74(1a) *Mining Act*) for each proposed lease, which set out the proposed work programme;
  - b) A copy of Fortescue Metal Group Ltd’s Annual Report 2011-2012;
  - c) Map detailing archaeological survey of 2 November 2012 (showing that 67.12 hectares of the 482.83 hectare size of M47/1473 was surveyed and 352.99 hectares of the 777.43 hectare size of M47/1475 was surveyed) and map detailing ethnographical survey of 2 November 2012 (showing the entirety of M47/1473 was surveyed and 777.24 hectares of the 777.43 hectare size of M47/1475 was surveyed);
  - d) A copy of Fortescue Metal Group Limited’s Procedure for Ground Disturbance Permits;
  - e) A copy of Fortescue Metal Group Limited’s Cultural Heritage Management Plan for Projects in the Pilbara Region in WA; and
  - f) A map of the proposed leases and nearby mining tenements already held by Fortescue Metals Group Ltd;
14. GP Doc 14 – A copy of a media release from Fortescue Metals Group Limited’s website entitled ‘Fortescue joins the campaign to close the gap in Indigenous health’ dated 18 March 2013;
15. GP Doc 15 – An email dated 24 May 2013 from the native title party representative to Mr David Crabtree. (DMP), and Mr Green, attaching the native title party’s submissions (‘s 31(1)(a) statement’) in relation to the proposed leases;
16. GP Doc 16 – Extract of the native title party’s claim from the Tribunal’s Register of Native Title Claims, accessed on 5 June 2013;
17. GP Doc 17 – Fortescue Metal Group Ltd’s 2012 Environmental Report dated 6 June 2013;

18. GP Doc 18 – A copy of a media release from Fortescue Metal Group Limited entitled ‘VTEC [Vocational Training and Employment Centre] class head to Christmas Creek after graduating from training course’ dated 11 June 2013;
19. GP Doc 19 – A copy of Fortescue Metal Group Limited’s Annual Report 2012-2013;
20. GP Doc 20 – A copy of Munderoo Foundation’s Annual Report 2012-2013;
21. GP Doc 21 – A copy of a media release from Fortescue Metal Group Limited entitled ‘Fortescue awards largest ever parcel of contracts to Traditional Owners’ dated 6 August 2013;
22. GP Doc 22 – Email from Mr Green to the native title party attaching a letter dated 11 September 2013, detailing contact between the parties and rescheduling of a mediation conference;
23. GP Doc 23 – A copy of a Metadata Statement for Aerial Imagery entitled ‘Solomon Mine Orthophoto 17 September 2013’;
24. GP Doc 24 – A copy of Fortescue Metals Group Limited’s Quarterly Report for the period ending 30 September 2013;
25. GP Doc 25 – Email dated 11 October 2013 from Mr Green to the native title party representatives Ms Araujo and Mr Irving responding to their email sent 11 October 2013 (which contained a Heritage Protocol for the grantee party’s consideration). Mr Green’s response: referred to mediation which took place on 10 October 2013; advised of the future act determination application being lodged on the afternoon of 11 October 2013; and asked whether information of known sites had been provided to the grantee party, inviting provision of that information;
26. GP Doc 26 – A copy of a news article published in the West Australian on 14 October 2013 entitled ‘Forrest to donate \$65m for WA education’;
27. GP Doc 27 – Search results extract from DAA’s Aboriginal Sites Database (also known as Register of Aboriginal Sites) generated 14 October 2013, showing no registered Aboriginal sites within the second proposed lease;
28. GP Doc 28 – Search results extract from DAA’s Aboriginal Sites Database generated 14 October 2013 showing no ‘other heritage places’ within the second proposed lease;
29. GP Doc 29 – Search results extract from DAA’s Heritage Survey Database generated 14 October 2013 showing three heritage surveys have been conducted within the second proposed lease;

30. GP Doc 30 – Search results extract from DAA’s Aboriginal Sites Database generated 14 October 2013 showing no registered Aboriginal sites within the first proposed lease;
31. GP Doc 31 – Search results extract from DAA’s Aboriginal Sites Database generated 14 October 2013 showing no ‘other heritage places’ within the first proposed lease;
32. GP Doc 32 – Search results extract from DAA’s Heritage Survey Database generated 14 October 2013 showing five heritage surveys have been conducted within the first proposed lease;
33. GP Doc 33 – A copy of a news article published in The Australian on 15 October 2013 entitled ‘Andrew Forrest to donate \$65m to University of Western Australia’;
34. GP Doc 34 – A copy of a news article published in The Australian on 16 October 2013 entitled ‘Andrew Forrest’s record \$65m gift boosts philanthropic stakes’;
35. GP Doc 35 – Fortescue Metal Group Limited’s Investor Site Tour Presentation dated 23 October 2013;
36. GP Doc 36 – An extract on Solomon Hub from Fortescue Metal Group Limited’s website, accessed 13 November 2013;
37. GP Doc 37 – An extract from Fortescue Metal Group Ltd’s website entitled ‘Port and Rail Infrastructure’ accessed 13 November 2013;
38. GP Doc 38 – A copy of DMP’s Tenement Report on tenement L47/362, generated 14 November 2013;
39. GP Doc 39 – Letter from Ms Johns of Fortescue Metals Group Limited to Mr Crabtree of DMP dated 22 November 2013 regarding WMYAC and Wirilu-Murra Tableland Heritage Pty Ltd’s assistance to identify Satellite Springs ethnographic site within the claim area of the native title party and notifying DMP of the intention to vary the tenement application for the first proposed lease to exclude that site;
40. GP Doc 40 – Article from the University of Western Australia’s *Uniview* publication, entitled ‘Andrew and Nicola Forrest launch UWA’s New Century Campaign with historic \$65m gift’, published Spring 2013;
41. GP Doc 41 – Company extract from Australian Securities and Investments Commission (‘ASIC’) for Munderoo Group Pty Ltd, dated 4 December 2013;
42. GP Doc 42 – Company summary extract from ASIC website for Munderoo Group Pty Ltd, accessed 9 December 2013;
43. GP Doc 43 – Affidavit of Mr Thomas James Weaver, Native Title Manager at Fortescue Metals Group Limited, affirmed 9 December 2013, provided with:

TJW 1 – Media announcement entitled ‘Fortescue awards more than \$1 billion in contracts to Aboriginal businesses’ dated 6 August 2013;

TJW 2 – Letter from KPMG dated 3 July 2013 reporting on factual findings to the management of Fortescue Metals Group Limited and asserting achievement of reaching the target of awarding \$1 billion in opportunities to Aboriginal contractors;

TJW 3 – Media announcement entitled ‘Fortescue awards more than \$200 million to Aboriginal joint venture at Solomon;

TJW 4 – A copy of Ngarluma and Yindjibarndi Foundation Ltd’s Constitution extracted from ASIC’s database on 8 December 2013;

TJW 5 – Notification of resolution for Ngarluma and Yindjibarndi Foundation Ltd, extracted from ASIC’s database;

TJW 6 – A copy of Ngarluma and Yindjibarndi Foundation Ltd’s resolution dated 20 September 2008 altering their Constitution;

TJW 7 – ASIC company extract for Wirlu-Murra Yindjibarndi Contracting No. 1 Pty Ltd;

TJW 8 – Rule book of WMYAC;

TJW 9 – Media announcement ‘Fortescue awards \$1.3 billion Kings contract to Leighton Contractors’ dated 24 June 2013;

TJW 10 – ASIC company extract for Process Resource Group Pty Ltd;

TJW 11 – Fortescue Metal Group Limited’s Ground Disturbance permits for Land Access dated 5 August 2011;

TJW 12 – Guidelines for the Management of Aboriginal Cultural Heritage dated July 2012; and

TJW 13 – Letter from Mr Irving to Fortescue Metal Group Limited’s Board of Directors dated 27 May 2013 drawing attention to Yindjibarndi Aboriginal Corporation RNTBC being the duly appointed agent for Yindjibarndi #1, enclosing the ‘notice of change of name, contact details or address for service of agent’ filed on 2 April 2004;

44. GP Doc 44 – Aerial photograph of Solomon Mine produced by the grantee party showing the proposed leases, the Yindjibarndi #1 claim boundary, the Eastern Guruma Native Title Determination boundary and various mining tenements held by Fortescue Metals Group Ltd, dated 9 December 2012; and

45. GP Doc 45 – A map of the first proposed lease and exploration licence 47/1334 produced by Fortescue Metals Group Ltd.

Note: GP Doc 46 and 47 were received later as described within the decision.

## **ATTACHMENT B – Annexures to Government party contentions**

The following annexures accompanied the Government party's contentions received 10 January 2014:

1. GVP 1 – The grantee party's application for mining tenement M47/1473 dated 14 November 2011;
2. GVP 2 – The grantee party's application for mining tenement M47/1475 dated 26 March 2012;
3. GVP 3 – A copy of the section 29 notice for the second proposed lease;
4. GVP 4 – A copy of the section 29 notice for the first proposed lease;
5. GVP 5 – Letter from DMP to the grantee party dated 7 November 2012 requesting information from the parties regarding the proposed leases to commence negotiations;
6. GVP 6 – A map prepared by DMP dated 21 October 2013 showing the native title party's claim, the boundaries of the proposed leases and the boundaries of granted tenements in the surrounding area;
7. GVP 7 – A map prepared by Landgate dated 18 October 2013 showing the native title party's claim, the proposed leases and the underlying unallocated crown land;
8. GVP 8 – Extract from the Tribunal's Register of Native Title Claims, as accessed on 7 June 2013, for Yindjibarndi #1;
9. GVP 9 – Tengraph Quick Appraisal for the second proposed lease, generated 21 October 2013;
10. GVP 10 – Tengraph Quick Appraisal for the first proposed lease, generated 21 October 2013;
11. GVP 11 – Tengraph Quick Appraisal for exploration licence 47/1334, generated 21 October 2013;
12. GVP 12 – Tengraph Quick Appraisal for exploration licence 47/1447, generated 21 October 2013;
13. GVP 13 – Tengraph Quick Appraisal for miscellaneous licence 47/362, generated 9 January 2014;
14. GVP 14 – Tengraph Quick Appraisal for exploration licence 47/1319, generated 9 January 2014;
15. GVP 15 – Draft tenement endorsement and conditions extract for the second proposed lease, created by DMP on 22 October 2013;

16. GVP 16 – Draft tenement endorsement and conditions extract for the first proposed lease, created by DMP on 22 October 2013;
17. GVP 17 – Government Gazette dated 18 October 1963 indicating Ministerial Approval of TR70/2703;
18. GVP 18 – Search results extract from DAA’s Aboriginal Sites Database generated 21 October 2013, showing no registered Aboriginal sites within the second proposed lease;
19. GVP 19 – Search results extract from DAA’s Aboriginal Sites Database generated 21 October 2013, showing no registered Aboriginal sites within the first proposed lease;
20. GVP 20 – Search results extract from DAA’s Heritage Survey Database generated 21 October 2013, showing four heritage surveys within the second proposed lease; and
21. GVP 21 – Search results extract from DAA’s Heritage Survey Database generated 21 October 2013 showing six heritage surveys with the first proposed lease.

### **ATTACHMENT C – Native title party contentions**

The following annexures accompanied the native title party's contentions received 7 and 12 March 2014:

1. Affidavit of Mr Philip Davies, Anthropologist and General Manager of Culture, Heritage and Religion of YAC, sworn 4 March 2014, with:
2. Annexure A to Mr Davies' affidavit: Two lists of significant Yindjibarndi heritage sites located within the first and second proposed leases, with sites regarded as constituting particular significance highlighted;
3. Annexure B to Mr Davies' affidavit: A description and photograph of the sites of particular significance within each proposed lease;
4. Statement by Members of the Native Title Party ('the Witness Statement') dated 4 March 2014, setting out reasons for requesting an on country hearing and signed by 28 Yindjibarndi people (two of whom are part of the Applicant for the native title claim);
5. A list of accompanying documents as follows:

NTP 1 – A letter from Ms Debbie Fletcher of the Office of Native Title to Mr Woodley of Juluwarlu Aboriginal Corporation dated 21 January 2008 regarding preparation of connection materials for the Yindjibarndi #1 native title determination application;

NTP 2 – Anthropological Report prepared for the Juluwarlu Aboriginal Corporation by Michael Robinson and Mark Chambers dated April 2008;

NTP 3 – Extract for Yindjibarndi #1 from the Tribunal's Register of Native Title Claims, as accessed on 6 May 2011;

NTP 4 – Letter from Yindjibarndi Aboriginal Corporation RNTBC to Fortescue Metals Group Ltd's Board of Directors dated 27 May 2013 regarding the duly appointed agent for the Yindjibarndi #1 Applicant and heritage surveys. The letter enclosed:

Form 114 – Notice of change in name, contact details or address for service of agent as filed with the Federal Court of Australia electronically on 2 April 2013; and

Letter from members of the Yindjibarndi #1 Applicant to Fortescue Metals Group Ltd dated 26 March 2013 regarding the Yindjibarndi #1 native title determination application;



NTP 5A –Section 18 Notice: Firetail Priority Mining Area (from the grantee party to the DIA’ s Aboriginal Cultural Material Committee dated 18 February 2011);

NTP 5B –Section 18 Notice: Firetail Priority Infrastructure Area (from the grantee party to the DIA’s Aboriginal Cultural Material Committee dated 18 February 2011);

NTP 5C – Section 18 Notice: Firetail, Conveyors and Trinity TSF (grantee party as applicant, submitted to the DIA’s Aboriginal Cultural Material Committee on 19 August 2011);

NTP 5D – Section 18 Notice: Firetail, Central, West and Rail Loop (grantee party as applicant, dated 7 October 2011);

NTP 5E – Section 18 Notice: Firetail West and Trinity (grantee party as applicant, dated 7 October 2011);

NTP 5F –Section 18 Notice: Mining and Infrastructure Phase 7 (grantee party as applicant, dated 24 February 2012);

NTP 5G – Section 18 Notice: Mining and Infrastructure Phase 8 (grantee party as applicant, dated 27 April 2012);

NTP 5H – Letter from Ms Lisa Maher, Fortescue Metal Group Limited, to Mr Phil Davies and Mr Michael Woodley, Yindjibarndi Aboriginal Corporation RNTBC, dated 7 February 2012. The letter advised that, as of 2012, Wirilu-Murra Tableland Heritage would manage heritage survey work for Solomon Project Area;

NTP 6A – Letter from Mr George Irving on behalf of Yindjibarndi Aboriginal Corporation RNTBC to DIA’s Aboriginal Cultural Materials Committee dated 10 July 2012 regarding the Section 18 AHA Notice ‘Mining and Infrastructure Phase 9’ (Fortescue Metals Group Limited as applicant) to be considered by the ACMC on 11 July 2012 and also regarding YAC’s application to the Commonwealth Minister for a declaration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (‘ATSIHPA’) in respect of land the subject of that s 18 AHA application. The following documents accompanied the letter:

Annexure 1: A copy of the 'Notice of an application for the protection of an area in the Hamersley Ranges, Western Australia, within a larger area that is the subject of the native title application referred to as the Yindjibarndi No. 1 claim' published by the Department of Sustainability, Environment, Water, Population and Communities in relation to the ATSIHPA in the Pilbara Echo on 2 June 2012;

Annexure 2: A copy of a database (listing data such as survey numbers, sites, coordinates, whether to avoid, and the existence of a s16 or s 18 AHA application) and a map entitled 'Map showing sites from Sue Singleton's Database in or near the land in FMG's s 18 Notice for Mining and Infrastructure Phase 9 which is referred to by Alpha Archaeology as: the Firetail North Project Area'. The notice allowed for submissions to be submitted up until 15 June 2012;

Annexure 3: An extract from YAC's Yindjibarndi Heritage Report for the ACMC in response to the grantee party's February 2011 s 18 AHA Application at 'Firetail Priority Mining Area and Firetail Priority Infrastructure Area' prepared by Juluwarlu Group Aboriginal Corporation for and on behalf of YAC (as trustee for the Yindjibarndi People), dated May 2011 and enclosing a map entitled 'Yindjibarndi Heritage Report';

Annexure 4: Letter from an archaeologist at Abel Archaeology, Dr Graham Knuckey to Ms Fiona Hook, the Chairperson of the Australian Association of Consulting Archaeologists Inc, dated 22 December 2011, regarding Yindjibarndi's call for expressions of interest for an archaeologist to carry out work within Solomon Hub. The letter attaches conditions proposed by Fortescue Metals Group Limited applicable to Yindjibarndi People entitled 'Access Authority Process and Entry Conditions';

Annexure 5: An extract (pages 30-31) of an Aboriginal Heritage Survey Report: FMG Solomon (Firetail) Project, Pilbara WA (YIN\_023 & YIN\_026' by Mr Phil Czerwinski, with the client listed as Fortescue Metals Group Limited, dated July 2009;

Annexure 6: Affidavit of Mr Michael Woodley (sworn 1 April 2010, though I note the document was signed on 8 April 2011) in relation to six miscellaneous licences and M47/1453;

Annexure 7: Affidavit of Mr Ned Cheedy (sworn 7 April 2010, though I note the document was signed on 8 April 2011) in relation to the same tenements as in Mr Woodley's affidavit immediately above;

Annexure 8: Letter from Ms Sue Singleton, Eureka Heritage to The Registrar of Aboriginal Sites, DIA, dated 5 November 2011 with subject line 'Veritas and Eureka Heritage Survey Reports – Firetail and Solomon Project Area'

Annexure 9: A copy of an Office of the Registrar of Indigenous Corporations' General Report for WMYAC, for financial year ending 30 June 2011;

NTP 6B – Letter from State Solicitor's Office to YAC and WMYAC, dated 8 September 2011 with subject line 'FMG Pilbara Pty Ltd v Minister for Indigenous Affairs – Review Application in State Administrative Tribunal' enclosing:

- i. FMG Pilbara Pty Ltd's State Administrative Tribunal application (received 5 August 2011);
- ii. DIA form s 10 Notice Firetail Mining Area (applicant as the grantee party) with three maps;
- iii. Briefing Note from the Registrar of Aboriginal Affairs to the Minister for Indigenous Affairs dated 2 June 2011 with subject line 'Notice – s 18 of AHA';
- iv. Letter to Mr Grant Preller of the grantee party from the Honourable Peter Collier MLC (Minister for Indigenous Affairs), dated 30 June 2011, granting consent for use of the land the subject of the s 18 AHA notice dated 18 February 2011;

NTP 6C – A copy of the Minister for Indigenous Affairs' 'Respondents Chronology and Reasons for the Decision on the Reconsideration dated 13 December 2011 pursuant to Order 3 dated 30 December 2011' (between FMG Pilbara Pty Ltd- applicant) and the Minister for Indigenous Affairs – respondent) in the State Administrative Tribunal of Western Australia, dated 13 January 2012. The document provides that on 30 June 2011 the Minister for Indigenous Affairs granted conditional consent to the Applicant, for which the grantee party applied to the State Administrative Tribunal for review of that decision. On 13 December 2011 the Minister for Indigenous Affairs makes a reconsidered decision;

NTP 6D – Letter from Ken Green to the State Administrative Tribunal, dated 9 March 2012 regarding an application under the AHA ‘s18(5): Consent to Use of Land’. The letter enclosed:

- i. A copy of the application by FMG Pilbara Pty Ltd for review under s18(5) of the AHA;
- ii. A copy of a letter dated 7 February 2012 from the Minister for Indigenous Affairs containing a reviewable decision;
- iii. A copy of a notice dated 9 December 2011 given by the Applicant under s 18(2) of the AHA giving rise to the reviewable decision;
- iv. A cheque for the State Administrative Tribunal’s fee;

NTP 6E – Statement by Mr Brad Goode, undated, regarding his past employment with Fortescue Metals Group Limited and his viewpoints on the significance of Kangeenarina Creek;

NTP 7A – Letter from YAC RNTBC to the Honourable Peter Charles Collier MLC, Minister for Aboriginal Affairs, dated 4 June 2013 raising concerns about processes resulting in granting ministerial consent under s 18 AHA and future acts affecting the Yindjibarndi #1 claim. The letter enclosed:

Attachment A: A copy of Federal Court Form 114 (Notice of change in name, contact details or address for service of agent as filed with the Federal Court of Australia electronically on 2 April 2013);

Attachment B: A copy of a document entitled ‘Resolutions of the Applicant for the Yindjibarndi #1 Native Title Determination Application’ to appoint an agent and solicitor for Yindjibarndi #1 , dated 26 March 2013 and signed by members of the Yindjibarndi #1 claim;

Attachment C: Letter from the Office of Native Title to Michael Woodley, Juluwarlu Aboriginal Corporation, dated 21 January 2008 with subject line ‘Preparation of Connection Materials for Yindjibarndi #1 Native title Determination Application (WAD6005/03)’;

Attachment D: Letter to The Aboriginal Cultural Material Committee, DIA from YAC, dated 8 October 2007 regarding 'FMG Notices under s 18 of the AHA to be considered by ACMC on 8 May 2013' and enclosing a map;

Attachment E: A copy of the Minutes of the Ordinary Meeting of Aboriginal Cultural Material Committee held on 1 June 2011;

NTP 7B – Letter from the Honourable Peter Collier MLC, Minister for Aboriginal Affairs, to Mr George Irving, representative of YAC, dated 10 July 2013, in response to YAC's letter of 4 June 2013 regarding processes which have previously resulted in the granting of ministerial consents under s18 AHA to FMG Pilbara Pty Ltd;

NTP 7C – Letter dated 29 May 2013 from the Freedom of Information Coordinator, DIA, to Dr Frank Rijavec, YAC, regarding a State Administrative Tribunal matter Freedom of Information Application FOI-010-2013. The letter enclosed a copy of receipt of cheque for cost of documents, together with:

Attachment 1: Letter from Green Legal to Minister for Indigenous Affairs, dated 27 February 2012 requesting reasons for consent under s18(5) of the AHA;

Attachment 2: Email correspondence between Ms Christine Bolton, DIA and Ms Roberta Molson, Fortescue Metals Group Limited, dated 23 February 2012 regarding two letters of s 18 AHA consent and provision of annexure 1 to the s 18 consent for Firetail West and Trinity. A map is also attached by Ms Bolton;

Attachment 3: Email correspondence between Ms Deb Bentley, Department of Premier and Cabinet ('DPC') and Mr Alexander Rorrison, DIA, dated 8 March 2012 regarding a request for reasons for the Minister's decision and information that the Minister considered;

Attachment 4: Email correspondence between Mr Alexander Rorrison, DIA, Ms Kathryn Przywolnik and Ms Jenny Joy, DIA, dated 7 and 12 March 2012 regarding preparing a reply to Fortescue Metal Group Limit's request for reasons for s 18(5) AHA consent;

Attachment 5: A copy of the reasons for the decision of the Minister for Indigenous Affairs dated 6 February 2012 in the matter of a notice by FMG Pilbara Pty Ltd pursuant to s 18 AHA;

Attachment 7: Email correspondence between 12-13 March 2012 between Mr Ken Green (Green Legal), Mr Alexander Rorrison and Mr Aaron Rayner, DIA, regarding Environmental Approvals for ‘Application DR62/2012 FMG Pilbara Pty Ltd v Minister for Indigenous Affairs’;

Attachment 8: Proposal for the development and operation of Solomon Iron Ore Project, dated 19 April 2011, attaching Statement No 862 (Statement that a proposal may be implemented pursuant to the provisions of the *Environmental Protection Act 1986* (WA) dated 19 April 2011);

Attachment 9: Letter dated 28 April 2011 from Ms Michelle Wicks, Department of Sustainability, Environment, Water, Population and Communities, to Mr Sean McGuide (Fortescue Metals Group Limited), regarding the ‘Decision on approval – Solomon Iron Ore Project, Hamersley Ranges, Pilbara, WA (EPBC 2010/5567)’. The letter advised that the proposal to construct the Solomon Iron Ore Project has been considered in accordance with Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and advising of approval;

Attachment 10: FMG s18 application – Assessment of 17 heritage places between 23 to 25 November 2011;

Attachment 14: State Administrative Tribunal Order handed down by DP Judge David Parry on 21 March 2012, regarding Application DR62/2012 (the matter of FMG Pilbara Pty Ltd and the Minister for Indigenous Affairs lodged 9 March 2012);

Attachment 15: Briefing note dated 10 April 2012 from the Director General, DIA, to the Minister for Indigenous Affairs, regarding FMG Pilbara Pty Ltd’s s 18 AHA application. The briefing note included a recommendation that the Minister resolves Fortescue Metals Group Limited’s application by deleted condition 1 of the consent dated 7 February 2011 pursuant to s 18 AHA;

Attachment 16: Untitled map

Attachment 17: Email correspondence between 11-12 April 2012 between Ms Christina Bubrzycki, DIA, Ms Debra Bentley, DPC, Mr Aaron Rayner, and Mr Alexander Rorrison, DIA, regarding the provision of documents to the State Administrative Tribunal in relation to the Minister’s decision and regarding

Fortescue Metals Group Limited's construction of a haul road in the Condition 1 area;

Attachment 18: Email correspondence ranging from 12-17 April 2012 between Mr Joshua Berson, State Solicitor's Office, and Mr Alexander Rorrison, DIA, regarding a hearing for Fortescue Metals Group Limited's State Administrative Tribunal (SAT) application DR62/2012;

Attachment 19: Briefing note dated 28 May 2012 from the Director General, DIA to the Minister for Indigenous Affairs, regarding FMG Pilbara Pty Ltd Application to the State Administrative Tribunal;

Attachment 20: State Administrative Tribunal Order handed down by Sessional Member Peter Curry on 20 April 2012, regarding Application DR62/2012 lodged 9 March 2012, ordering that the Minister's reviewable decision dated 7 February 2012 be varied by deleting condition 1, renumbering accordingly, and notifying YAC and WMYAC;

Attachment 21: Letter from the Minister for Indigenous Affairs to Mr Ken Green dated 19 March 2012 with subject line 'Green Legal Pty Ltd request for reasons for consent under s18(5) of the AHA 1972 – FMG Pilbara Pty Ltd';

Attachment 22: Memorandum dated 19 July 2012 from the Director General, DIA, to the Minister for Indigenous Affairs, with subject line 'Ken Green request for consent under s18(5) of AHA 1972' recommending the Minister consider correspondence from Mr Green;

Attachment 23: Letter dated 25 July 2012 from the Minister for Indigenous Affairs to Mr Ken Green, Green Legal, following on from Mr Green's letter of 7 February 2012 and advising that the negotiated outcome has been concluded;

Note: Attachments 6 and 11-13 were not provided to the Tribunal and parties. However, the pagination of the entire NTP 7 is consistent without gaps.

NTP 8 – DIA's Heritage Information Submission Form completed by the native title party and dated 7 June 2013, with supporting documents as follows:

Attachment A: Locations of sites recorded throughout the area known as *Ganyjingarringunha Ngurra*;

Attachment B: Photos and descriptions of various cultural sites (Photos of Ganyjingarringunha Wundu taken 18 May 2013 and an accompanying list of sacred, ritual and ceremonial sites; sites of historical, anthropological, archaeological and ethnographical significance; other relevant information including sites of outstanding aesthetic value; four photos of Bangkangarra (Satellite Springs), two photos of a burial cave, one photo of a scar tee, one photo of a walled niche, one photo of Ngarda face in rock, one photo of Manggurla Thalu (fertility increase site), seven photos of Ganyjingarringunha Wundu (permanent watercourse), a photo looking over cave engravings and an ochre source)

NTP 9 – Letter from DIA to Fortescue Metals Group Limited dated 4 March 2011 regarding request for further information for the s 18 notice under the AHA by Pilbara Infrastructure Pty Ltd (proposed constructions and operation of the ‘Firetail Priority Mining Area’) in relation to a portion of tenement M47/1413;

NTP 10 – A copy of the grantee party’s ‘Section 18 Notice: Mining and Infrastructure Phase 9 - Application for consent to certain uses’ lodged with DIA, dated 18 June 2012. The following appendices accompanied the application:

Appendix 1: FMG Pilbara Pty Ltd company details from Australian Securities and Investment Commission (ASIC);

Appendix 2: Tenement summary reports from DMP’s Mining Tenement Register Search in respect of M47/1413, M47/1431 and M47/1409;

Appendix 3: Map of general location of the Land subject to the Notice

Appendix 4: Mining and Infrastructure Phase 9 map displaying s 18 boundary and sites (archaeologically-surveyed areas);

Appendix 5: Mining and Infrastructure Phase 9 map displaying s 18 boundary sites (ethnographic-surveyed areas);

Appendix 6: s16/S18 overview map of Solomon Project;

Appendix 7: Fortescue Metals Group Limited’s Solomon Project Construction Environmental Management Plan dated 14 March 2011, approved by the Department of Environment and Conservation;



Appendix 8: Memorandum of key points for consideration in relation to Fortescue Metals Group s 16 and 18 AHA submissions, enclosing a copy of the Tribunal's determination *FMG Pilbara v Yindjibarndi 1*;

Appendix 9: Presentation on the Cultural Heritage Management Plan development, discussed with WMYAC on 8 June 2011;

Appendix 10: Fortescue Metals Group Limited's Cultural Heritage Management Plan for Solomon Project dated July 2011;

Appendix 11: Letter from Fortescue Metals Group Limited to YAC inviting comments/input from YAC and its heritage arm Juluwarlu on the Cultural Heritage Management Plan;

Appendix 12: Letter dated 7 February 2012 from Fortescue Metals Group Limited to YAC notifying them that Wirlu Murra Yindjibarndi Heritage is to manage heritage survey work as of 2012;

Appendix 13: Letter dated 20 April 2012 from Fortescue Metals Group Limited to Juluwarlu Aboriginal Corporation and WMYAC notifying them of the intention to submit a s 18 AHA application (Notice at Solomon Mine Project 'Mining and Infrastructure Phase 9');

Appendix 14: A copy of the presentation for the FMG Heritage Subcommittee meeting on 17 May 2012 regarding a s 18 AHA application (Mining and Infrastructure Phase 9);

Appendix 15: Email dated 15 May 2012 from Mr Andrew Munro of Fortescue Metals Group Limited to WMYAC and Juluwarlu recipients attaching heritage work instruction for ethnographic comment on ten sites in the 'Mining and Infrastructure Phase 9' section 18 AHA land;

Appendix 16 Archaeology report prepared by Alpha Archaeology entitled 'Section 18 Infrastructure Phase 9 Solomon Mining and Infrastructure Project WA' for client Fortescue Metals Group Limited and dated 25 May 2012;

Appendix 17: A report on Ethnographic Aboriginal Heritage Survey of Solomon Project in the Eastern Pilbara Region of Western Australia by Mr Brad Goode and Dr Peter Gifford of Brad Goode and Associates Consulting Anthropologists and Archaeologists. Attached to the report were the following appendices:

Appendix 1: Map of the Project Area;

Appendix 2: DIA Site Search Results;

Appendix 3: FMG Survey Requests;

Appendix 4: Meeting attendees for the Wirilu-Murra meeting held on 13 July 2011 (inclusive of Fortescue Metals Group Limited attendees);

Note: In between Appendix 17 and 18 the following report was provided: Ethnographic Report entitled 'Report on Yindjibarndi Ethnographic Aboriginal Heritage Survey in Firetail and Conveyors Rail Loop and Wedge Areas' produced for Fortescue Metals Group Limited and prepared by David Raftery trading as David Art, dated October 2010;

Appendix 18: Ethnographic report for a s 18 AHA application covering ten Aboriginal Sites regarding the FMG Solomon Mine Site in Pilbara WA. The report was prepared by Mr Czerwinski and Mr Birckhead, dated May 2012;

Appendix 19: A letter from Integra Legal on behalf of WMYAC to the ACMC dated 25 May 2012 addressing various matters, inclusive of their non-objection to Fortescue Metals Group Limited's s 18 AHA notice.

NTP 11 – Document entitled 'Preliminary Advice Exp-Yin-026 (And Others) Firetail and Valley of the Queen Project Areas' by Western Heritage Research Pty Ltd, dated April 2009;

NTP 12 – Draft report prepared by David Raftery for Fortescue Metals Group Limited entitled 'Preliminary Heritage Survey Solomon Project Area – Yindjibarndi Group' conducted on 10-11 July 2010, enclosing a map showing heritage survey requests as supplied by Fortescue Metals Group Limited;

NTP 13 – Report of a Section 18 [AHA] Ethnographic Survey and consultations regarding archaeological sites at FMG's Firetail Priority and Infrastructure Area (M47/1431 and M47/1413) prepared by David Raftery, dated December 2010;

NTP 14 – Project advice for Fortescue Metals Group Limited's Solomon Project (field dates 1 May to 7 May 2005) prepared by Phil Czerwinski from consultant group ACHM dated 21 May 2009. The following were attached:

Attachment 1: Generalised Project Area Map;

Attachment 2: GIS Spatial Data (MapInfo Files);

NTP 15 – A report on Ethnographic Aboriginal Heritage Survey of Solomon Project in the Eastern Pilbara Region of Western Australia by Mr Brad Goode and Dr Peter Gifford of Brad Goode and Associates Consulting Anthropologists and Archaeologists dated August 2011. The following attachments are included:

Appendix 1: Map of the Project Area

Appendix 2: DIA Site Register Search results

Appendix 3: FMG Survey Requests

Appendix 4: Meeting Attendees for the Wirlu-Murra meeting held on 13 July 2011 (inclusive of Fortescue Metals Group Limited attendees);

NTP 16 – Briefing note dated 23 December 2011 from the Director General, DIA, to the Minister for Indigenous Affairs with subject line ‘Application by FMG Pilbara Pty Ltd Pursuant to Section 18, AHA 1972, “Tailing Storage Facility and Firetail and Kings Mining Areas”’. The document contains a recommendation that the ‘Minister considers the draft letter of consent to FMG’;

NTP 17 – Document entitled ‘FMG Section 18 Application Solomon Phase 15 (September 2013)’ to the DIA. The following attachments are included:

Appendix 1: FMG Pilbara Pty Ltd company details from Australian Securities and Investment Commission (ASIC);

Appendix 2: Tenement reports from Mineral Titles Online (DMP) in respect of M47/1413, M47/1431 and M47/1409;

Appendix 3: Map of general location of the Land subject to the Notice

Appendix 4: Mining and Infrastructure Phase 9 map displaying s 18 boundary and sites (archaeologically-surveyed areas);

Appendix 5: Mining and Infrastructure Phase 9 map displaying s 18 boundary sites (ethnographic-surveyed areas);

Appendix 6: s16/S18 overview map of Solomon Project;

Appendix 7: Fortescue Metals Group Limited’s Solomon Project Construction Environmental Management Plan dated 14 March 2011, approved by the Department of Environment and Conservation;

Appendix 8: Memorandum of key points for consideration in relation to Fortescue Metals Group s 16 and 18 AHA submissions, enclosing a copy of the Tribunal's determination *FMG Pilbara v Yindjibarndi 1*;

Appendix 9: Guideline for the Management of Aboriginal Cultural Heritage, published by Fortescue Metals Group Limited and dated July 2013;

Appendix 10: Letter dated 7 February 2012 from Fortescue Metals Group Limited to YAC notifying them that Wirlu Murra Yindjibarndi Heritage is to manage heritage survey work as of 2012;

Appendix 11: Letter dated 27 May 2013 from YAC to Fortescue Metals Group Limited regarding agency arrangements for Yindjibarndi #1 and viewpoints on cultural heritage matters;

Appendix 12: Letter dated 16 August 2013 from Fortescue Metals Group Limited to YAC & WMYAC notifying them of their intention to submit a s18 AHA Notice (Proposed notice for Solomon Mine Project Mining and Infrastructure Phase 15);

Appendix 13: Fortescue Metals Group Limited's Presentation to WMYAC Heritage Sub Committee dated 4 September 2013;

Appendix 14: Email correspondence dated 21 January 2013, 8 February 2013, 21 February 2013 and 3 May 2013 between Ms Joanne Burke of Fortescue Metals Group Limited to other staff, a Terra Rosa Cultural Resource Management Pty Ltd consultant staff member and Mr Michael Woodley and Mr Phil Davies, in which YAC is invited to participate in heritage surveys and heritage work instructions for 18 sites in total are provided to recipients;

Appendix 15: Email correspondence dated 2 September 2013 from Ms Joanne Burke, Fortescue Metals Group Limited, to YAC, providing a draft s 18 AHA Notice (Solomon Mining and Infrastructure Phase 15) and inviting feedback/comments;

Appendix 16: Archaeological Report entitled 'Final Report for Results of Indigenous Archaeological Assessment Work in 2012, Solomon Mining & Infrastructure, Western Australia: Results of Stage 25-27 May 21st – 29th June 2012' prepared for Fortescue Metals Group Limited by Alpha Archaeology Pty Ltd, dated 7 November 2012;

Appendix 17: Archaeological and Ethnographic Report by Terra Rosa Cultural Resource Management Pty Ltd entitled 'Report of an Archaeological Excavation Program and Heritage Assessment of the Solomon Phase 15 Kings Waste Dump Area conducted by the Yindjibarndi Traditional Owners and Terra Rosa Cultural Resource Management Pty Ltd for Wirilu-Murra Tableland Heritage Pty Ltd on behalf of YAC and prepared for Fortescue Metals Group Limited' dated September 2013;

Appendix 18: Letter from WMYAC to Aboriginal Cultural Materials Committee, dated 18 September 2013, describing non-objection to a Fortescue Metals Group Limited s 18 AHA Notice;

Appendix 19: Pie graph entitled 'Solomon Project: Frequency of Recorded Heritage Places as at 2 September 2013' prepared by Fortescue Metals Group Limited;

Appendix 20: Pie graph entitled 'Solomon Project Heritage Protection Overview as at 2 September 2013', prepared by Fortescue Metals Group Limited;

NTP 18 – FMG Section 18 Application Solomon Phase 16 to the DIA. The following attachments are included:

Appendix 1: FMG Pilbara Pty Ltd company details as listed on ASIC

Appendix 2: Tenement summary reports from DMP's Mining Tenement Register Search in respect of M47/1431 and M47/1453

Appendix 3: Map entitled 'Location overview s 18 Land & Sites Kings, Solomon' prepared by Fortescue Metals Group Limited and dated 2 December 2013;

Appendix 4: Map entitled 'Mining and Infrastructure Phase 16 Kings, Solomon Archaeological Overview' prepared by Fortescue Metals Group Limited and dated 2 December 2013;

Appendix 5: Map entitled 'Mining and Infrastructure Phase 16 Kings Solomon Ethnographic Overview' prepared by Fortescue Metals Group Limited and dated 2 December 2013;

Appendix 6: Map entitled 's 18 Overview Map Solomon' prepared by Fortescue Metals Group Limited and dated 2 December 2013;

Appendix 7: Fortescue Metals Group Limited's Construction Environmental Management Plan (Solomon Environment), dated 10 October 2012;

Appendix 8: A memorandum of key points dated 8 December 2011 in relation to (and attaching a copy of) the Tribunal's decision *FMG Pilbara v Yindjibarndi* 1;

Appendix 9: Fortescue Metals Group Limited's Guideline for the Management of Aboriginal Cultural Heritage for Fortescue Project Areas, dated July 2013;

Appendix 10: Letter dated 7 February 2012 from Fortescue Metals Group Limited to YAC notifying them that Wirlu Murra Yindjibarndi Heritage is to manage heritage survey work as of 2012;

Appendix 11: Letter dated 27 May 2013 from YAC to Fortescue Metals Group Limited regarding agency arrangements for Yindjibarndi #1 and viewpoints on cultural heritage matters;

Appendix 12: Email dated 6 November 2013 from Ms Sharan Shaskar of Terra Rosa Cultural Resource Management Pty Ltd to Mr Michael Gallagher, Mr Scott Chisholm, Mr Michael Woodley and Mr Philip Davies attaching a letter dated 6 November 2013. The letter notified them of the intention to submit a s 18 AHA notice at Solomon Mine Project in respect of land known as 'Mining and Infrastructure Phase 16' and two maps were enclosed;

Appendix 13: Fortescue Metals Group Limited's Powerpoint Presentation entitled 'Yindjibarndi (WYAC) Heritage Sub Committee' dated 29 November 2013;

Appendix 14: Email correspondence from Ms Joanne Burke dated 21 January 2013 to various recipients (including staff/members of Terra Rosa Cultural Resource Management Pty Ltd, Fortescue Metals Group Limited, Juluwarlu and WMYAC) inviting YAC to participate in heritage surveys and attaching various heritage work instructions, maps and data for planned field trips, dated between 21 January 2013 and 13 June 2013;

Appendix 15: Email correspondence from Ms Roberta Molson providing YAC and Juluwarlu recipients with a draft s 18 AHA Notice referred to as 'Solomon (YIN) Mining and Infrastructure Phase 16', dated 28 November 2013;

Appendix 16: Archaeological Report in respect of E47/1334 and E47/1447 prepared for Fortescue Metals Group Ltd by Veritas Archaeological and History Service, dated 11-18 September 2009;

Appendix 17: Archaeological Report prepared for Fortescue Metals Group Limited by Veritas Archaeological and History Service and Eureka Heritage, dated August 2011;

Appendix 18: Archaeological Report in respect of assessment work between 21 May to 29 June 2012, prepared for Fortescue Metals Group Ltd by Alpha Archaeology Pty Ltd, 7 November 2012;

Appendix 19: Report of an archaeological excavation program and heritage assessment prepared for Fortescue Metals Group Limited by Terra Rosa Cultural Resource Management Pty Ltd dated December 2013;

Appendix 20: Letter dated 18 September 2013 on behalf of WMYAC to DAA's Aboriginal Cultural Materials Committee in relation to various matters inclusive of WMYAC's non-objection to Fortescue Metals Group Limited's s 18 AHA submissions for consent to use of specific land;

Appendix 21: Pie graph entitled 'Solomon Project Heritage Protection Overview as at 2 September 2013', prepared by Fortescue Metals Group Limited

Appendix 22: Pie graph showing the Solomon Project Heritage Protection Overview, as at 28 November 2013;

NTP 19A – WMYAC General Report to ORIC as at 30 June 2012, dated 27 May 2013;

NTP 19B – WMYAC General Report to ORIC as at 30 June 2013, dated 14 January 2014;

NTP 20 – Letter dated 27 January 2012 from the Honourable Peter Collier MLC, Minister of Indigenous Affairs, to Ms Roberta Molson, Heritage Approvals Superintendent at Fortescue Metals Group Limited, responding to FMG Pilbara Pty Ltd and The Pilbara Infrastructure Pty Ltd's s 18 Notice (dated 16 September 2011 to the ACMC under s 18(2) of the AHA in relation to M47/1409, M47/1413 and M47/1431) and granting use of the land subject to conditions 1-6.

## **ATTACHMENT D**

### **Registered native title rights and interests from the Register of Native Title Claims for Yindjibarndi #1 (WC2003/003)**

#### REGISTERED NATIVE TITLE RIGHTS AND INTERESTS (AS ENTERED 8 AUGUST 2003)

Where an area is covered by a previous non exclusive possession act (s.23F), the native title claim group, does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.

The native title claim group does not claim native title rights and interests that are extinguished by operation of law. The applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

AREA A (Where a claim to exclusive possession can be sustained).

#### RIGHTS

- (1) The right to possess, occupy, use and enjoy the area as against the world.
- (2) A right to occupy the area;
- (3) A right to use the area;
- (4) A right to enjoy the area;
- (5) A right to be present on or within the area;
- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;
- (9) A right to hunt in the area;
- (10) A right to fish in the area;
- (11) 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;
- (12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
- (14) A right to make decisions about the enjoyment of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;
- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in 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 ceremonies within the area;
- (23) A right to participate in ceremonies within the area;
- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;
- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
- (30) A right to control access of others to the area.
- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
- (37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;



- (38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
- (39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
- (40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
- (41) A right to use and/or enjoy resources, other than minerals and petroleum. for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
- (42) A right to take fauna;
- (43) A right to take flora (including timber);
- (44) A right to take soil;
- (45) A right to take sand;
- (46) A right to take stone and/or flint;
- (47) A right to take clay;
- (48) A right to take gravel;
- (49) A right to take ochre;
- (50) A right to take water;
- (51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32) - (41) above) and/or in the said form (set out at sub-paragraphs (42) - (50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;
- (53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
- (55) A right, in relation to any activity occurring on the area, to
  - i. maintain,
  - ii. conserve; and/or
  - iii. protect significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
- (56) A right, in relation to any activity occurring on the area, to -
  - i. maintain
  - ii. conserve; and/or
  - iii. protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;
- (57) A right, in relation to a use of the area or an activity within the area, to:
  - i. (i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs
  - ii. (ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled;
- (59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;
- (60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

AREA B (Where a claim to exclusive possession cannot be sustained).

#### RIGHTS

- (2) A right to occupy the area;

- (3) A right to use the area;
- (4) A right to enjoy the area;
- (5) A right to be present on or within the area;
- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;
- (9) A right to hunt in the area;
- (10) A right to fish in the area;
- (11) 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;
- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in 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 ceremonies within the area;
- (23) A right to participate in ceremonies within the area;
- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;
- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
- (37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
- (38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;
- (39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
- (40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
- (41) A right to use and/or enjoy resources, other than minerals and petroleum for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
- (42) A right to take fauna;
- (43) A right to take flora (including timber);
- (44) A right to take soil;
- (45) A right to take sand;
- (46) A right to take stone and/or flint;
- (47) A right to take clay;
- (48) A right to take gravel;
- (49) A right to take ochre;
- (50) A right to take water;
- (53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
- (55) A right, in relation to any activity occurring on the area, to
  - i. maintain,
  - ii. conserve; and/or

- ii. protect significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
- (56) A right, in relation to any activity occurring on the area, to -
- i. maintain
  - ii. conserve; and/or
  - iii. protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;
- (59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;
- (60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

AREA C (Where a claim to exclusive possession cannot be sustained over 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).

#### RIGHTS

- (2) A right to occupy the area;
- (3) A right to use the area;
- (4) A right to enjoy the area;
- (5) A right to be present on or within the area;
- (6) A right to be present on or within the area in connection with the society's economic life;
- (7) A right to be present on or within the area in connection with the society's religious life;
- (8) A right to be present on or within the area in connection with the society's cultural life;
- (11) 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;
- (13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong;
- (15) A right of access to the area;
- (16) A right to live within the area;
- (17) A right to reside in 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;
- (22) A right to conduct ceremonies within the area;
- (23) A right to participate in ceremonies within the area;
- (24) A right to hold meetings within the area;
- (25) A right to participate in meetings within the area;
- (26) A right to teach as to the physical attributes of the area;
- (27) A right to teach as to the significant attributes of the area;
- (28) A right to teach upon the area as to the significant attributes of the area;
- (29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
- (32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
- (33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
- (34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
- (35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
- (36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in or within the area;
- (37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
- (38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing on, in or within the area;

- (39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration on, in or within the area;
- (40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes on, in or within the area;
- (41) A right to use and/or enjoy resources, other than minerals and petroleum for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;
- (43) A right to take flora (including timber);
- (44) A right to take soil;
- (45) A right to take sand;
- (46) A right to take stone and/or flint;
- (47) A right to take clay;
- (48) A right to take gravel;
- (49) A right to take ochre;
- (50) A right to take water;
- (53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;
- (55) A right, in relation to any activity occurring on the area, to
  - i. maintain,
  - ii. conserve; and/or
  - iii. protect significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
- (56) A right, in relation to any activity occurring on the area, to -
  - i. maintain
  - ii. conserve; and/or
  - iii. protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;
- (59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;
- (60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

The rights found at paragraphs (44) - (48) in Areas A, B and C are found on the basis that the substances referred to are not interpreted as "minerals and petroleum" for the purposes of the Act.

Attachment E

FIRST PROPOSED LEASE (M47/1475)						
Site no	Site asserted to be of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
14, 15 & 16	<b>Scar trees</b> <i>Note: sites are not within the reduced area of M47/1475</i>	<ul style="list-style-type: none"> <li>Coordinates and a photograph of each are provided in Mr Davies' affidavit.</li> <li>Mr Davies deposes that scar trees are 'constant reminders of how Yindjibarndi people utilise the resources offered to them by <i>Minkala</i> (the Yindjibarndi name for God). I have been told by the Yindjibarndi People that <i>Burdud</i> Law demands that when the resource is cut from the tree, the scar does not permanently damage the tree. The wood was cut from these trees to make a <i>Yarra</i> (shield), <i>mirru</i> (spearthrower) or <i>mirrurdu</i> (dish)' (page 22 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>Scar trees are stated to be 'of particular significance to us in accordance with our traditions because they are proof of our ancestors' possession, occupation, use and enjoyment of our country and they remind us that their spirits remain ever-present in the country and watch over us' (paragraph 26 NTP Joint Statement)</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party states the sites 'Undeniably lie outside the area proposed' (paragraph 6.4)</li> </ul>	Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wiru-Murra Yindjibarndi Aboriginal Corporation.	Mr May is an anthropologist employed by an independent consultancy company, Terra Rosa Cultural Resource Management Pty Ltd.
17	<b>Jinbi (spring/permanent water)</b> <i>Note: site is not within the reduced area of M47/1475</i>	<ul style="list-style-type: none"> <li>Coordinates and a photograph are provided in Mr Davies' affidavit.</li> <li>Mr Davies states it is 'associated with religious song and narrative and is a named place of particular aesthetic and ethnographic significance for Yindjibarndi people' (page 23 Mr Davies' affidavit)</li> </ul>	[Not addressed]	[Not addressed]	[Not addressed]	[Not addressed]
18	<b>Rock shelters/ochre sources</b>	<ul style="list-style-type: none"> <li>Coordinates and photograph provided in Mr Davies' affidavit.</li> <li>Mr Davies states 'ochre plays an integral part in the religious, cultural and spiritual life of the Yindjibarndi People' (page 24 Mr Davies' affidavit)</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement)</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party contends Mr Davies' affidavit (a) does not establish that ochre is obtained from the site or is used for ceremonial purpose (paragraph 6.58) and (b) does not suggest that site 18 contains evidence of historical human occupation (paragraph 6.59)</li> <li>The grantee party contends Mr Sandy and Mr May's affidavits cast doubt on whether site 18 is an ochre source for ceremonial purpose (paragraph 6.60)</li> <li>The grantee party contends that paragraph 6.16-6.20 (in relation to site</li> </ul>	<ul style="list-style-type: none"> <li>Mr Sandy states he visited site 18 on 1 April 2014 with the other Yindjibarndi men [assumedly Jimmy Horace, Rodney Adams, Glen Toby and Dillon Locker] (paragraph 15).</li> <li>Mr Sandy states that he and the other Yindjibarndi men agreed, during 1 April 2014 discussions, that they have never collected ochre from this site and it is unlikely that Yindjibarndi people would collect ochre from there because (a) they are too difficult to get to and (b) the ochre was too hard (paragraphs 17-18).</li> <li>Mr Sandy states that he and the</li> </ul>	<ul style="list-style-type: none"> <li>Mr May states that he and others (see paragraph 20 for list) attended the site on 1 April 2014, during which: <ul style="list-style-type: none"> <li>Mr May inspected yellow or white-coloured sediment layers in the walls of the rock shelters.</li> <li>Mr May concluded the sediment layers were not of a nature he would normally associate with an ochre source (they were fibrous where as typical ochre in Yindjibarndi country is of the nature of a fine ground powder located in and near creek beds) (paragraph 29).</li> </ul> </li> </ul>

**FIRST PROPOSED LEASE (M47/1475)**

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				8 within M47/1473) also apply to this site (paragraph 6.61)	Yindjibarndi men did not see anything left by their ancestors (paragraphs 15 & 17).	<ul style="list-style-type: none"> <li>o The Yindjibarndi men told him (a) it may be possible but very time consuming to extract ochre there and (b) the ochre they use for ceremony is very different (paragraphs 29 &amp; 30).</li> <li>• Mr May states on 1-2 April 2014 he discussed the site with Yindjibarndi men, laying out a map, and was informed it was not a traditional place for gathering ochre (paragraph 32).</li> </ul>
19	<b>Rock shelters/ ochre sources</b>	<ul style="list-style-type: none"> <li>• Coordinates and a photograph are provided in Mr Davies' affidavit.</li> <li>• Mr Davies states 'ochre plays an integral part in the religious, cultural and spiritual life of the Yindjibarndi People' (at page 24 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party states ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party contends it is not apparent from the photograph that the site contains an ochre source (paragraph 6.62).</li> <li>• The grantee party contends that Mr Sandy's and Mr May's affidavits cast doubt on whether the site is an ochre source for ceremonial purposes (paragraph 6.63).</li> <li>• The grantee party contends that paragraph 6.16-6.20 (in relation to site 8 within M47/1473) also apply to this site (paragraph 6.64).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Sandy states that he and the other attendees visited site 19 on 1 April (paragraphs 10 &amp; 15)</li> <li>• Mr Sandy states that he and the other Yindjibarndi men agreed, during their 1 April 2014 discussions, that they have never collected ochre from this site (paragraphs 15 &amp; 17) and it's unlikely that Yindjibarndi people would collect ochre from there because (a) of difficulty of access and (b) the ochre was too hard (paragraph 18).</li> <li>• Mr Sandy states he and the other Yindjibarndi men did not see anything left by their ancestors (paragraph 17).</li> </ul>	<ul style="list-style-type: none"> <li>• The comments in relation to site 18 are applicable (see paragraphs 29-33).</li> </ul>
27	<b>Stone arrangement /grinding stone</b>	<ul style="list-style-type: none"> <li>• Coordinates and a photograph are provided in Mr Davies' affidavit.</li> <li>• Mr Davies states they are 'highly significant features' and are often places inside rock shelters/caves (at page 25 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party regards the stone arrangement and grinding stone as being particularly significant as they 'are proof of our ancestors' possession, occupation, use and enjoyment of our country and they remind us that their spirits remain ever-present in the country and watch over us' (paragraph 26 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party contends it is not apparent from the photograph that the site contains grinding stone or a stone arrangement (paragraph 6.65), however, the grantee party accepts Mr Sandy's and Mr May's views that the site contains a stone arrangement and is an Aboriginal site (paragraph 6.68).</li> <li>• The grantee party states that Mr Davies does not actually assert (a) that the site contains a stone arrangement or (b) why he holds that view (if he</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Sandy states that he and the other Yindjibarndi men visited the site [on 1 April 2014; see paragraph 10] (paragraph 29)</li> <li>• Mr Sandy states that he and the other Yindjibarndi men saw the stones and agreed they were put there by their ancestors (paragraphs 29-30).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr May states that this site was subject to an Alpha Archaeology Report in 2011 (extracts attached at LMP1); Alpha Archaeology formed the opinion that the site was an Aboriginal Site under AHA and disturbance to the sites was acceptable to the relevant Yindjibarndi Traditional Owners (paragraphs 15-17).</li> <li>• Mr May states that he inspected the site on 1 April 2014 with Ms Golden and the traditional owners and they could not identify (a) the single flaked artefact</li> </ul>

FIRST PROPOSED LEASE (M47/1475)						
Site no	Site asserted to be of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
				does) (paragraphs 6.66-6.67). • The grantee party contends it is not a site of particular significance and should not be subject to a condition (paragraph 6.69)	Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wiru-Murra Yindjibarndi Aboriginal Corporation.	Mr May is an anthropologist employed by an independent consultancy company, Terra Rosa Cultural Resource Management Pty Ltd.
29	<b>Walled niche</b>	<ul style="list-style-type: none"> <li>• Mr Davies' affidavit provides coordinates and a photograph.</li> <li>• Mr Davies describes the walled niche being situated in a gully with small stones placed to form a barrier; behind the barrier is a large chamber 'that may well hold highly significant religious artefacts; or the skeletal remains of Yindjibarndi persons' (at page 26 Mr Davies' affidavit).</li> <li>• Mr Davies describes Yindjibarndi people informing him to be cautious when investigating or discussing walled niches, stone arrangements or material stored in the shelter/cave due to powerful supernatural forces associated with some of the stores items (page 26).</li> <li>• He states the locations of the niches are only disclosed in highly unusual circumstances (page 26 Mr Davies' affidavit).</li> <li>• The Heritage Information Submission Form (Doc 8 accompanying the native title party's contentions) contains a description of <i>Yamararra</i> (rock-shelters and caves), indicating many of the caves have 'walled niches, behind which sacred artefacts have been hidden that were used in <i>Birdarra</i> Law ceremonies by senior Yindjibarndi Lawmen of previous generations. The objects in these <i>Yamararra</i> should not be disturbed because they are very dangerous' (at 7 of NTP Doc 8)</li> </ul>	[Not addressed]	<ul style="list-style-type: none"> <li>• The grantee party contends it is not apparent from the photograph that the site is actually walled (paragraph 6.70).</li> <li>• The grantee party states Mr Davies does not explain why he holds the view that the stones have been placed rather than having fallen (paragraph 6.72).</li> <li>• GP contends less weight should be given to Mr Davies' evidence as he is employed by YAC and has shown a 'lack of reasoning' (paragraph 6.72).</li> <li>• The grantee party states that Mr Davies only says the larger chamber <i>may well</i> hold highly significant religious artefacts or skeletal remains (paragraph 6.73).</li> <li>• The grantee party contends the affidavits of Mr Sandy and Mr May cast doubt on whether the site is a walled niche (paragraph 6.74).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Sandy states that he and other Yindjibarndi men visited the site [on 1 April 2014; par 10] (paragraph 32) and agreed the stones inside the rock shelter were roof-fall; they did not believe it to be a walled niche (paragraph 33).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr May states that he inspected the site on 1 April 2014 with Ms Golden and traditional owners (paragraph 20).</li> <li>• Mr May states the Yindjibarndi men expressed the view that the stones most likely represented roof-fall and had not been modified for traditional use (paragraph 48).</li> </ul>

**FIRST PROPOSED LEASE (M47/1475)**

Site no	Site asserted to be of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
30	Cave/rock shelter, ochre source, artefact scatter, Gandi (sacred stones)	<ul style="list-style-type: none"> <li>• Photograph and coordinates are provided in Mr Davies' affidavit.</li> <li>• Mr Davies describes the site as containing sacred stones and providing a source of ochre (page 27 Mr Davies' affidavit).</li> <li>• He also states that, as the sites are highly sensitive for religious and cultural purposes, ordinarily, Yindjibarndi men would not divulge the location of these sites or publicly discuss them (page 27 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party states ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party contends it is not particularly significant and should not be subject to a condition (paragraph 6.82)</li> <li>• The grantee party asserts it is not clear whether Mr Davies' statement that the site contains <i>gandi</i> is personal knowledge or something he has been told (paragraphs 6.76-6.77)</li> <li>• The grantee party states that Mr Davies does not assert that (a) ochre is obtained from the site (b) that ochre there obtained is used for ceremonial purpose (c) that <i>gandi</i> are obtained or (d) that <i>gandi</i> obtained are used for ceremonial purpose (paragraph 6.78)</li> <li>• The grantee party assumes the alleged presence of <i>gandi</i> within the site is the reason why disclosing the location is a sensitive matter (paragraph 6.79)</li> <li>• The grantee party notes (a) Mr Sandy's affidavit states that Yindjibarndi men do not collect <i>gandi</i> from the site or tenement and (b) Mr May's affidavit is similar (paragraphs 6.80-6.81)</li> </ul>	<p>Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wirlu-Murra Yindjibarndi Aboriginal Corporation.</p> <ul style="list-style-type: none"> <li>• Mr Sandy states he visited the site with other Yindjibarndi men [on 1 April 2014; par 10] (paragraph 35)</li> <li>• Mr Sandy states no ceremonial preparations (of the kind described in Mr Woodley's affidavit dated 4 February 2011 (at 6.7-6.8 therein)) take place at Woodbrook; Mr Sandy re referred to par 44 of his own earlier affidavit dated 28 Feb 2011 which contained the same statement (paragraph 36).</li> <li>• Mr Sandy indicates initiated men do not collect resources for initiation ceremonies from the area covered by the old leases (M47/1409, M47/1411, M47/1413, M47/1431) or the two proposed leases (paragraph 37).</li> <li>• Mr Sandy states that he and the other Yindjibarndi men agreed that they have never collected ochre from the site, are unaware of others gathering ochre from the site and they didn't see anything left by their ancestors (paragraph 38).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr May states this site was subject to an Alpha Archaeology Report in 2011 (extracts attached at LMP1); Alpha Archaeology formed the opinion that the site was an Aboriginal Site under AHA and disturbance to the sites was acceptable to the relevant Yindjibarndi Traditional Owners (paragraphs 15-17)</li> <li>• Mr May does not state that he and the others visited the site (but assumedly he did as the site is not included in his list of sites that were not visited).</li> <li>• Mr May states the Yindjibarndi men advised him that (a) the site was not a traditional area to source ochre and (b) <i>gandi</i> (sacred stones) were not present (paragraph 50).</li> </ul>
45	Gurdiwirnd-anha Wurndu	<ul style="list-style-type: none"> <li>• The perimeter, area in hectares and a photograph are all provided in Mr Davies' affidavit.</li> <li>• Mr Davies describes it as a natural landscape feature 150 metres in length, 12-15 metres in width and 10 metres in height (page 28 Mr Davies' affidavit)</li> <li>• Mr Davies states it was formed during the</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party states it 'is a sacred site for us because it was created by the actions of a Marrga as described in the affidavit of Philip Davies' (paragraph 27 NTP Joint Statement)</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party states it was described by Mr Davies as being an area, not a site, and no spatial coordinates are provided in the Davies affidavit for areas (paragraph 6.4(2)(b)(c)).</li> <li>• The grantee party regards the photograph and description on page</li> </ul>	[Not addressed]	[Not addressed]



FIRST PROPOSED LEASE (M47/1475)						
Site no	Site asserted to be of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
		creation times when a spear was placed on the ground for battle and it has religious, ceremonial, song and spiritual narratives associated with it. He also states the <i>Gurdirndanha</i> is located just outside the first proposed lease and the <i>Wurndu</i> is a gorge that was created by the action of the spear being placed on the ground creating cliff edges; it is within the first proposed lease. Yindjibarndi narrative about the site is provided (page 28 Mr Davies' affidavit)		28 of Mr Davies' affidavit as insufficient to identify where the area is (paragraph 6.4(2)(c)).		
48	<b>Ganyjingaringunha Wurndu (Kanjeenarina Creek)</b> <i>Note: site does not fall in the reduced area of M47/1475</i>	<ul style="list-style-type: none"> <li>Perimeter, area in hectares and a photograph are provided in Mr Davies' affidavit.</li> <li>At this site Mr Davies witnessed the <i>Wathamardu (Marban)</i> reciprocity ceremony being performed by Mr Michael Woodley with Mr Tom Jacobs. Further details could not be provided due to cultural sensitivities (page 30 Mr Davies' affidavit).</li> </ul>		<ul style="list-style-type: none"> <li>The grantee party states it was described by Mr Davies as being an area, not a site, the significance being that no coordinates are provided in the Davies affidavit in relation to areas (paragraph 6.4(2)(b)(d)).</li> <li>The grantee party contends this creek lies outside the tenement (referring to GP Doc 44) and states the native title party has failed to appreciate the amendment to the area of the tenement (paragraph 6.4(2)(d)).</li> </ul>	[Not addressed]	[Not addressed]

Attachment F

SECOND PROPOSED LEASE (M47/1473)						
Site no	Site of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
8	Group of caves (Yamarrara) with ochre	<ul style="list-style-type: none"> <li>Coordinates and photograph are provided in Mr Davies' affidavit.</li> <li>Mr Davies states the ochre makes this site significant (page 12 Mr Davies' affidavit).</li> <li>Mr Davies states Yindjibarndi people told him on the 18/05/2013 field trip that (a) ochre is an integral component of ritualised religious ceremonies for Yindjibarndi people and (b) only the <i>Ngurrara</i> or the <i>Tharngungarli</i>, the Yindjibarndi boss for that <i>Ngurra</i> [a specific home area as Yindjibarndi country is divided into 13 <i>Ngurra</i>], can sanction others to gather the ochre, which needs to come from an area close to the ceremony site (page 13 Mr Davies' affidavit).</li> <li>Mr Davies states 'the rich source of ochre from Site 8 ensures that Yarna (ochre) is available for ceremonies performed, while the rock shelters/caves hold the spirits, knowledge and physical remains of the Yindjibarndi ancestors' (page 13 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party contends it is not a site of particular significance and it should not be subject to a condition (paragraph 6.20).</li> <li>The grantee party contends the photographs of the four caves in Mr Davies' affidavit 'may be misleading' and further notes: <ul style="list-style-type: none"> <li>Site 8 appears to have the same coordinates as site 62 in the Heritage Submission Form (NTP Doc 8). The grantee party also notes a discrepancy between Mr Davies' affidavit and the Heritage Form when they are describing Figure 1 and 2 (paragraphs 6.5 - 6.11 grantee party reply).</li> <li>Mr Davies' affidavit does not assert that ochre (a) is in fact obtained from site 8 or (b) is in fact used for ceremonial purpose (paragraphs 6.13 - 6.16).</li> </ul> </li> <li>The grantee party refers to evidence given for a Tribunal inquiry over M47/1431, E47/1398 and E47/1399 where Member O'Dea was unable to find that ochre was collected or ceremonies conducted within the tenement; the grantee party states M47/1431 and the proposed leases are contiguous (paragraphs 6.17-6.18).</li> </ul>	<p>Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wirru-Murra Yindjibarndi Aboriginal Corporation.</p> <ul style="list-style-type: none"> <li>Mr Sandy states that he and the others did not visit this specific site on their 1 April 2014 visit, but talked about the site while on the tenement (paragraph 16).</li> <li>Mr Sandy states that he and other Yindjibarndi men agreed, during their 1 April 2014 discussions, that they have never collected ochre from this site (paragraph 17) and it's unlikely that Yindjibarndi people would collect ochre from there because (a) of difficulty accessing it and (b) the ochre was too hard (paragraph 18).</li> </ul>	<p>Mr May is an anthropologist employed by an independent consultancy company, Terra Rosa Cultural Resource Management Pty Ltd.</p> <ul style="list-style-type: none"> <li>Mr May states that he and the others (see paragraph 20 for list) did not visit this site on 1 April 2014 due to accessibility and the Yindjibarndi men saying they had sufficient knowledge to discuss the cultural values of those sites in relation to the broader landscape (paragraph 25).</li> <li>Mr May describes discussing the site, on 1 &amp; 2 April 2014, with the Yindjibarndi men by laying out a map; he was informed it was not a traditional place for gathering ochre and that they know the ochre collection places within the wider area (paragraph 32).</li> </ul>
13	Group of two caves with ochre	<ul style="list-style-type: none"> <li>Mr Davies states there is a permanent water source known as Kanjeenarina Creek located a few hundred metres from this ochre site, which makes the ochre site significant in terms of the ability to carry out ceremonies (page 14 Mr Davies' affidavit).</li> <li>Mr Davies describes a <i>Galharra</i> boss</li> </ul>	<ul style="list-style-type: none"> <li>In relation to ochre sources, the native title party states that they are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party challenges Mr Davies' statement (about the ochre source being significant for carrying out ceremonies, due to being a few hundred metres from Kanjeenarina Creek) by saying the creek is 600m away (paragraphs 6.22-6.23).</li> <li>The grantee party asserts that Mr Davies' affidavit does not establish that ochre is in</li> </ul>	<ul style="list-style-type: none"> <li>Mr Sandy states that and the others did not visit the site on their 1 April 2014 visit, but talked about the site while on the tenement (paragraph 16).</li> <li>Mr Sandy states that he and the other Yindjibarndi men agreed, during the 1 April 2014 discussions, that they have never collected ochre from this site and it's</li> </ul>	<ul style="list-style-type: none"> <li>Mr May states that he and the others did not visit this site on 1 April 2014 due to (a) accessibility and (b) the Yindjibarndi men saying they had sufficient knowledge to discuss the cultural values of those sites in relation to the broader landscape (paragraph 25).</li> </ul>

**SECOND PROPOSED LEASE (M47/1473)**

Site no	Site of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
		called <i>Mirduwarra</i> , whose knowledge of and access to ochre within each quarter of the 13 Ngurra [home areas] of Yindjibarndi country is essential for carrying out ceremonies specific to the <i>Mirduwarra</i> 's home area and <i>Galharra</i> (page 13 Mr Davies' affidavit).	Statement).	fact obtained nor is in fact used for ceremonial purpose at the site (paragraph 6.24) <ul style="list-style-type: none"> <li>The grantee party asserts that paragraphs 6.16 to 6.20 (in respect of Site 8 above) are applicable to this site (paragraph 6.25)</li> </ul>	unlikely that Yindjibarndi people would collect ochre from there because (a) of difficulty of access and (b) the ochre was too hard (paragraphs 17- 18).	<ul style="list-style-type: none"> <li>Mr May states that on 1-2 April 2014 he discussed the site with the Yindjibarndi men and lay out a map; he was informed it was not a traditional place for gathering ochre and that they know the ochre collection places within the wider area (paragraph 32).</li> </ul>
19	<b>Cave ochre source</b>	<ul style="list-style-type: none"> <li>Coordinates are provided but there is no photograph or written description provided in Mr Davies' affidavit.</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party notes no photograph is provided in Mr Davies' affidavit.</li> <li>The grantee party asserts that paragraphs 6.16 to 6.20 (in respect of Site 8 above) are applicable to this site (paragraph 6.28).</li> </ul>	[Not addressed]	[Not addressed]
25	<b>Rock shelter/cave with ochre</b>	<ul style="list-style-type: none"> <li>Photograph and coordinates provided in Mr Davies' affidavit.</li> <li>Mr Davies states that Mr Michael Woodley and Mr Thomas Jacobs told him that the site is significant due to the ochre's role in ritualised Yindjibarndi ceremony. Mr Davies states participants 'adorn themselves in a culturally appropriate manner with the natural properties of their homeland in a demonstration of understanding and respect for everyone the country and their ancestors (whose spirits live within the country) provide' (page 14 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states that ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which must be performed under our traditional law' (paragraph 22 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party asserts that Mr Davies' affidavit does not establish that ochre (a) is in fact obtained or (b) is in fact used for ceremonial purpose at the site (paragraphs 6.30-6.31).</li> <li>The grantee party asserts that paragraphs 6.16 to 6.20 (in respect of Site 8 above) are applicable to this site (paragraph 6.32).</li> </ul>	<ul style="list-style-type: none"> <li>Mr Sandy states that he and the others did not visit the site on their 1 April 2014 visit, but talked about the site while on the tenement (paragraph 16).</li> <li>Mr Sandy states that he and the other Yindjibarndi men agreed, during their 1 April 2014 discussions, that they have never collected ochre from this site and that it's unlikely that Yindjibarndi people would collect ochre from there because (a) of difficulty with access and (b) the ochre was too hard (paragraphs 17 &amp; 18).</li> </ul>	<ul style="list-style-type: none"> <li>Mr May states that he and the others did not visit this site on 1 April 2014 due to (a) accessibility and (b) the Yindjibarndi men saying they had sufficient knowledge to discuss the cultural values of those sites in relation to the broader landscape (paragraph 25).</li> <li>Mr May describes discussing this site on 1-2 April 2014 with the Yindjibarndi men; he lay out a map and was informed it was not a traditional place for gathering ochre and that they know the ochre collection places within the wider area (paragraph 32).</li> </ul>
32	<b>Rock shelter/cave with ochre</b>	<ul style="list-style-type: none"> <li>Photograph and coordinates provided in Mr Davies' affidavit.</li> <li>Mr Davies describes how Yindjibarndi informants explained to him that obtaining ochre is essential for the maintenance of religious and spiritual life, that it must be</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states that ochre sources are 'of particular significance because they are needed by the <i>Ngurrara</i> who come from <i>Garliwinyji Ngurra</i> so they can perform the religious ceremonies and rituals, which</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party asserts that Mr Davies' affidavit does not establish that ochre is in fact (a) obtained at the site or (b) used for ceremonial purpose at the site (paragraphs 6.34-6.35)</li> <li>The grantee party asserts that paragraphs</li> </ul>	<ul style="list-style-type: none"> <li>Mr Sandy states that he and others did not visit the site on their 1 April 2014 visit, but talked about the site while on the tenement (paragraph 16)</li> <li>Mr Sandy and other Yindjibarndi men agreed, during 1 April 2014 discussions,</li> </ul>	<ul style="list-style-type: none"> <li>Mr May states that he and the others did not visit this site on 1 April 2014 due to (a) accessibility and (b) the Yindjibarndi men saying they had sufficient knowledge to discuss the cultural values of those sites in relation</li> </ul>

**SECOND PROPOSED LEASE (M47/1473)**

Site no	Site of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
		extracted in accordance with <i>Birdarra</i> Law to avoid the <i>Ngurrara</i> being disciplined, and he states he has witnessed traditional songs used during the collection process at <i>Ganyjingarringunha</i> (page 15 Mr Davies' affidavit).	must be performed under our traditional law' (paragraph 22 NTP Joint Statement).	6.16 to 6.20 (in respect of Site 8 above) are applicable to this site (paragraph 6.36)	that they have never collected ochre from this site and that it's unlikely that Yindjibarndi people would collect ochre from there because (a) of difficulty with access and (b) the ochre was too hard (paragraphs 17 & 18).	to the broader landscape (paragraph 25). • Mr May describes discussing this site on 1-2 April 2014 with the Yindjibarndi men; he lay out a map and was informed it was not a traditional place for gathering ochre and that they know the ochre collection places within the wider area (paragraph 32).
34	<b>Manggurla Thalu</b>	<ul style="list-style-type: none"> <li>• A photograph and coordinates are provided in Mr Davies' affidavit.</li> <li>• The Heritage Submission Form (at page 13-14 of NTP Doc 8) states it is a requirement under <i>Birdarra</i> Law for those who work the <i>Manggurla Thalu</i> to get painted up with local ochre (referred to at paragraph 9.9 NTP Contentions)</li> <li>• Mr Davies describes witnessing (on 18/5/2013) Mr Michael Woodley demonstrating how to ritually work a men's fertility site known as <i>Manggurla Thalu</i> which involved being painted up in ochre and, depending on who the ceremony is directed towards, may involve collecting a specific kind of bark to wear as a mask (page 16 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party states it is particularly significant because it is a fertility site (paragraph 23 NTP Joint Statement)</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party emphasises that all Mr Davies saw was a <i>demonstration</i> from Mr Woodley (paragraph 6.38)</li> <li>• The grantee party notes Mr Woodley hasn't given evidence in relation to the site or demonstration (paragraph 6.39).</li> <li>• The grantee party states little particularisation was provided about the significance of the site in Mr Davies' affidavit and also in NTP Joint Statement (paragraph 6.40).</li> <li>• The grantee party contends the affidavits of Mr Sandy ([19]-[21]) and Mr May ([34]-[36]) cast doubt on site 34 being a <i>Manggurla Thalu</i> (paragraph 6.43).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Sandy and other Yindjibarndi men visited the site [on 1 April 2014; see par 10] (paragraph 20) and they don't believe it is a <i>thalu</i> site because their grandfathers never told them about it and they don't know any stories about it (paragraph 21).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr May states that he and the others inspected the site on 1 April 2014 (paragraph 35).</li> <li>• Mr May describes the Yindjibarndi providing reasons to him why the site is not believed to be a <i>manggurla thalu</i> (reasons include: grandfathers hadn't told them about it; lack of archaeological or aesthetic evidence; features of the stone; lack of flaked stone artefacts in the area; paragraph 36(1)-(4))</li> </ul>
35	<b>Yamararra (cave) with potential engraving</b>	<ul style="list-style-type: none"> <li>• A photograph and coordinates are provided in Mr Davies' affidavit.</li> <li>• Mr Davies describes the potential engraving having been identified by two Yindjibarndi men on 17 May 2013 who saw the figures of two <i>Marrga</i> on a large flat rock inside the cave, which is part of a gorge (page 17 Mr Davies' affidavit.)</li> <li>• Mr Davies indicates he could not see the <i>Marrga</i> figures himself, but noted the two Yindjibarndi men saw them when the</li> </ul>	<ul style="list-style-type: none"> <li>• The native title party states this site 'contains a boulder upon which there is an engraving of two <i>Marrga</i> that can only be seen when the sun is at a certain angle. We believe the engraving is sacred and that it should be protected and not moved' (paragraph 24 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>• The grantee party asserts it is impossible to verify whether the shape seen by John and Hayden Woodley (but not by Mr Davies) actually exists as a description of the shape representing the two <i>Marrga</i> was not provided (paragraph 6.46).</li> <li>• The grantee party notes that neither John nor Hayden Woodley signed the NTP Joint Statement (paragraph 6.47).</li> <li>• The grantee party asserts it is impossible to verify Mr Davies' evidence that site 35</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Sandy states that he and the other Yindjibarndi men visited the site [on 1 April 2014; paragraph 10] and they couldn't see any engraving on the slab of roof-fall (paragraph 23).</li> </ul>	<ul style="list-style-type: none"> <li>• Mr May states that he and the others inspected the site on 1 April 2014 (paragraph 38).</li> <li>• Mr May states that he, along with Ms Golden and Yindjibarndi men, did not believe the engravings existed (Ms Golden attributed discolouration of the surface to water movement; there was no indentation, groove or polish; the discolouration bore no resemblance with other engravings in the Solomon</li> </ul>

**SECOND PROPOSED LEASE (M47/1473)**

Site no	Site of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
		sunlight was at a particular angle. The cave is regarded as easily accessible and holding evidence of Yindjibarndi occupation. The Yindjibarndi people informed Mr Davies they do not want the cave and its contents disturbed (page 17 Mr Davies' affidavit).		shows evidence of occupations (paragraph 6.48). • The grantee party contends the affidavits of Mr Sandy and Mr May cast doubt on whether site 35 contains an engraving (paragraph 6.49)	Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wirlu-Murra Yindjibarndi Aboriginal Corporation.	Mr May is an anthropologist employed by an independent consultancy company, Terra Rosa Cultural Resource Management Pty Ltd.  Hug project area) (paragraph 38).
46	<b>Wundu (watercourse /spring)</b>	<ul style="list-style-type: none"> <li>Coordinates and a photograph are provided in Mr Davies' affidavit.</li> <li>Mr Davies was told by the Yindjibarndi informants that the watercourse and associated <i>Jinbi</i> (spring) are believed to be sacred and should not be disturbed; it is a significant feature as it is associated with <i>Ganyjingarringunha Wurndu</i> (Kanjeenarina Creek) and has numerous <i>Yamamarrara</i> (caves) located within it (page 18 Mr Davies' affidavit).</li> </ul>	<ul style="list-style-type: none"> <li>The native title party states 'these <i>Yamararra</i> are sacred to us because they contain either the physical remains of our deceased ancestors or their sacred gear, which they used in our Law ceremonies and which remain highly dangerous. They should not be approached unless in the company of a senior Yindjibarndi Lawman. We believe the <i>Wurndu</i> is sacred because it runs into <i>Ganyjingarringuna Wundu</i> and is therefore part of <i>Barrimirndi's Ngurra</i>' (paragraph 25 NTP Joint Statement).</li> </ul>	<ul style="list-style-type: none"> <li>The grantee party contends the photograph in Mr Davies' affidavit does not show a spring and is not conclusive as to the existence of a watercourse (paragraph 6.50).</li> <li>The grantee party contends it is arguable whether the site falls within the tenement boundary (comparing coordinates in Mining Tenement Register Search and Mr Davies' coordinates; the grantee party states the site is located 6.12 metres to the north of the tenement (paragraphs 6.51-6.53).</li> <li>Even if it is located within tenement, the grantee party does not accept it is particularly significant (paragraph 6.56) because: <ul style="list-style-type: none"> <li>The basis of sacredness is not explained in Mr Davies affidavit (paragraph 6.54)</li> <li>The grantee party regards the affidavits of Mr Sandy and Mr May as casting doubt on whether the site is a spring or is significant (paragraph 6.55).</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Mr Sandy stated he and the other men did not visit the site, but talked about it when they were at site 34 (paragraph 26).</li> <li>Mr Sandy states that based on those discussions, they agreed (a) there may be rock holes but no spring as a spring requires an underground source (b) the site had no sacred value (paragraph 27).</li> </ul>	<ul style="list-style-type: none"> <li>Mr May states that he and the others did not visit this site on 1 April 2014 due to (a) accessibility and (b) the Yindjibarndi men saying they had sufficient knowledge to discuss the cultural values of those sites in relation to the broader landscape (paragraph 25).</li> <li>Mr May describes the Yindjibarndi men informing him, while at site 34, that (a) there may be pools of water at site 46, but there was no spring fed by an underground aquifer and (b) the site had no sacred values (paragraphs 41-42).</li> </ul>
64	<b>Ganyjingarringunha Wurndu (Kanjeenarina Creek)</b>	<ul style="list-style-type: none"> <li>Perimeter, area in hectares and photograph provided in Mr Davies' affidavit</li> <li>Mr Davies stated it has particular aesthetic value and his Yindjibarndi informants said it holds cultural, religious and environmental significance. It is regarded as a source of life as it is a 'permanent</li> </ul>	<ul style="list-style-type: none"> <li>'Ganyjingarringunha Wundu is the Yindjibarndi name for the watercourse that runs through the middle of Ganyjingarringunha Ngurra. In this permanent watercourse, lives Barrimirndi – the Marrga who, in the form of a great Warlu (serpent), created all the Wundu in</li> </ul>	See comment for site 48 in First proposed lease	[Not addressed]	[Not addressed]

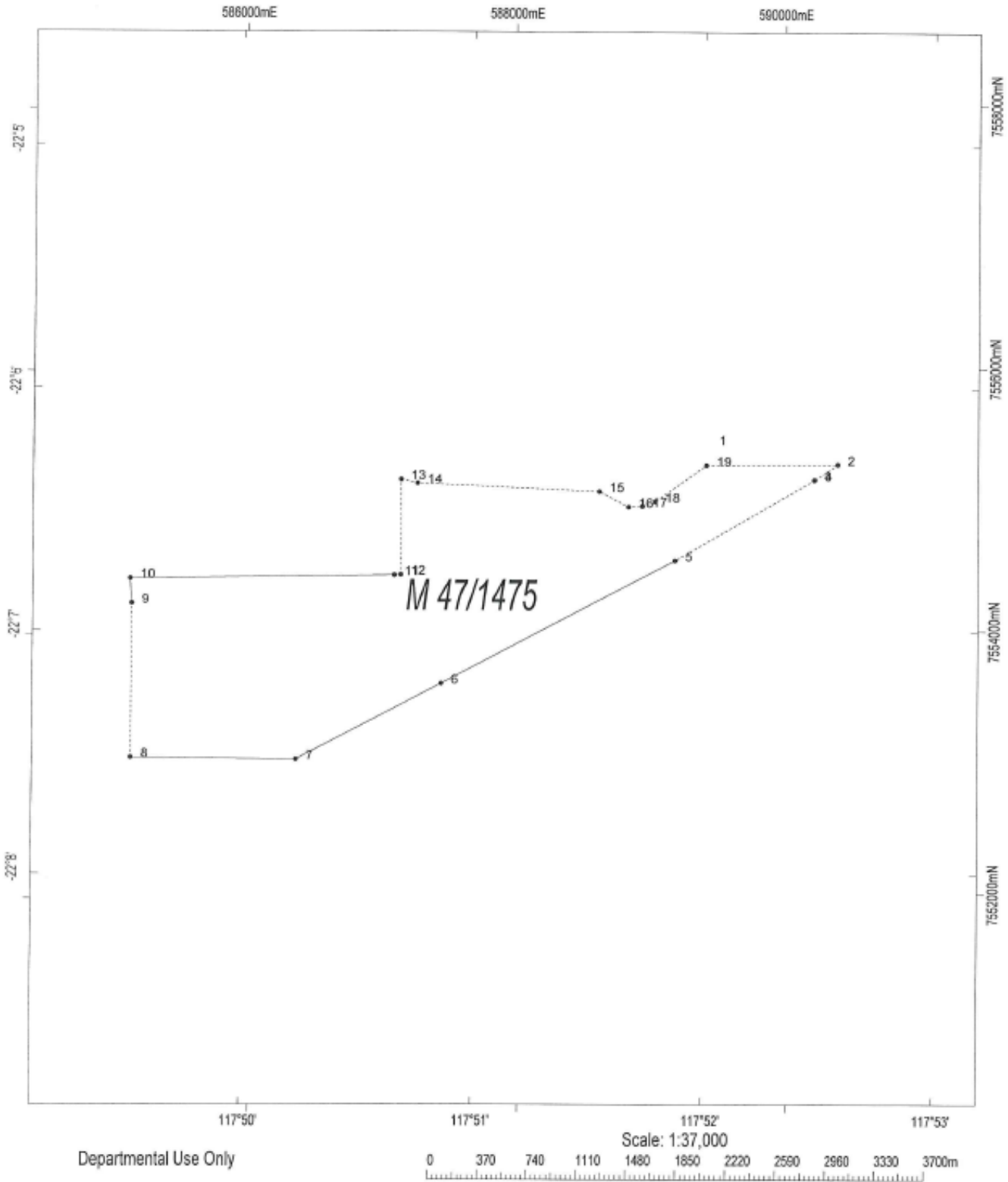
SECOND PROPOSED LEASE (M47/1473)						
Site no	Site of 'particular significance'	Summary of relevant material from NTP contentions of 12 March and supporting evidence (inclusive of Mr Davies' affidavit sworn 4 March 2014 and the NTP Witness Statement dated 4 March 2014)	Summary of relevant material from NTP additional evidence of 14 April 2014 (NTP joint statement and Affidavit of Ned Cheedy sworn 7 April 2010)	Summary of relevant material from the grantee party reply of 19 May 2014	Summary of relevant material from the affidavit of Mr Ken Sandy affirmed 16 May 2014 (provided with grantee party reply)	Summary of relevant material from the affidavit of Mr Luke May affirmed 19 May 2014 (provided with grantee party reply)
		water supply in an arid environment'. Mr Davies describes his own knowledge of a deceased Yindjibarndi elder using the creek to travel between his place of birth, his place of work and a law ground (page 20 Mr Davies' affidavit)	Yindjibarndi Country. Barrimirndi is central to Yindjibarndi religious beliefs and Ganyjingarringuna Wundu is sacred because it is home' (par 19). An extract from the Heritage Submission Form is included. See par 19 NTP Joint Statement.		Mr Sandy is a Heritage Compliance Officer employed by FMG, an initiated Yindjibarndi man and a member of Wirlu-Murra Yindjibarndi Aboriginal Corporation.	Mr May is an anthropologist employed by an independent consultancy company, Terra Rosa Cultural Resource Management Pty Ltd.

# ATTACHMENT G



TENGRAPH System 1992, 1993  
02:12 PM on Tuesday, 15 July 2014  
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Page: 1

Object Description : M 47/1475 : Preliminary Granted; Unsurveyed; Pending  
Estimated area : 525.2705 (Ha)  
Datum: GDA94



Departmental Use Only



The numeric precision shown does not reflect the spatial accuracy of the ground position.

Object Description : M 47/1475 : Preliminary Granted; Unsurveyed; Pending

Estimated area : 525.2705 (Ha)

Datum: GDA94

1 Main Polygon description.

Other details		Geographic coordinates		Grid coordinates			Azimuths and distances	
Id	Notes	Latitude (South)	Longitude (East)	Zone	Northing(m)	Easting(m)	Mid Azimuth	Spheroidal dist.(m)
1		22° 06' 18.8839"	117° 52' 00.5999"	50	7555269.227	589411.557		
2		22° 06' 18.5600"	117° 52' 34.7374"	50	7555273.588	590389.778	89° 24' 59.63" (269° 24' 59.63")	978.524
3		22° 06' 22.3755"	117° 52' 28.5883"	50	7555157.279	590212.910	236° 20' 28.29" (56° 20' 28.29")	211.747
4		22° 06' 22.3992"	117° 52' 28.5459"	50	7555156.555	590211.690	239° 01' 07.89" (59° 01' 07.89")	1.419
5		22° 06' 42.4663"	117° 51' 52.6195"	50	7554545.391	589178.772	239° 03' 37.60" (59° 03' 37.60")	1200.545
6		22° 07' 13.0037"	117° 50' 51.7382"	50	7553616.212	587429.156	241° 42' 21.33" (61° 42' 21.33")	1981.645
7		22° 07' 31.7747"	117° 50' 14.3055"	50	7553044.963	586353.516	241° 42' 39.27" (61° 42' 39.27")	1218.293
8		22° 07' 31.3851"	117° 49' 31.2440"	50	7553063.683	585119.895	270° 33' 22.58" (90° 33' 22.58")	1234.144
9		22° 06' 53.2786"	117° 49' 31.2933"	50	7554235.406	585127.666	0° 04' 08.93" (180° 04' 08.93")	1172.113
10		22° 06' 47.0852"	117° 49' 30.8987"	50	7554425.908	585117.390	356° 36' 06.67" (176° 36' 06.67")	190.838
11		22° 06' 46.1900"	117° 50' 39.4544"	50	7554442.663	587081.793	89° 11' 49.50" (269° 11' 49.50")	1965.080
12		22° 06' 46.1079"	117° 50' 41.0938"	50	7554444.924	587128.778	86° 55' 34.66" (266° 55' 34.66")	47.054
13		22° 06' 22.5545"	117° 50' 41.0940"	50	7555169.168	587132.804	0° 00' 02.00" (180° 00' 02.00")	724.477
14		22° 06' 23.4987"	117° 50' 45.3839"	50	7555139.452	587255.561	103° 17' 23.41" (283° 17' 23.41")	126.341
15		22° 06' 25.4417"	117° 51' 32.9218"	50	7555072.079	588617.342	92° 30' 41.30" (272° 30' 41.30")	1363.862
16		22° 06' 29.2445"	117° 51' 40.5079"	50	7554953.919	588834.047	118° 16' 40.66" (298° 16' 40.66")	246.900
17		22° 06' 29.0399"	117° 51' 44.0928"	50	7554959.627	588936.799	86° 29' 46.66" (266° 29' 46.66")	102.941
18		22° 06' 27.9201"	117° 51' 47.3535"	50	7554993.531	589030.424	69° 46' 06.96" (249° 46' 06.96")	99.604
19		22° 06' 18.8839"	117° 52' 00.5999"	50	7555269.227	589411.557	53° 47' 38.34" (233° 47' 38.34")	470.536