NATIONAL NATIVE TITLE TRIBUNAL

***WF (Deceased) and Others on behalf of Wiluna v Great Western Exploration Ltd and Another* [2014] NNTTA 107 (5 November 2014)**

Application No: WO2013/1056, WO2013/1057, WO2013/1058, WO2013/1059

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

- and -

IN THE MATTER of an inquiry into expedited procedure objection applications

WF (deceased) and Others on behalf of Wiluna (WC1999/024) (native title party)

- and -

Great Western Exploration Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACTS ARE ACTS ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: James McNamara, Member
Place: Brisbane
Date: 5 November 2014

Catchwords: Native title – future acts – proposed grant of exploration licences – expedited procedure objection applications – whether acts are likely to interfere directly with the carrying on of community or social activities – whether acts are likely to interfere with sites of particular significance – whether acts are likely to involve major disturbance to land or waters – expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 30(1), 31, 32(3), 151(2), 155, 162(2), 237

Mining Act 1978 (WA)

Aboriginal Heritage Act 1972 (WA), ss 5, 17, 18

Cases: *Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Faustus Nominees Pty Ltd* [2007] NNTTA 15 (‘*Cherel v Faustus Nominees*’)

Champion v Western Australia (2005) 190 FLR 362; [2005] NNTTA 1 (‘*Champion v Western Australia*’)

Cheinmora v Striker Resources NL & Ors; Dann v Western Australia (1996) ALR 21; [1997] FCA 1147 (‘*Cheinmora v Striker Resources*’)

Crowe v Western Australia (2008) 218 FLR 429; [2008] NNTTA 71 (‘*Crowe v Western Australia*’)

Daisy Lungunan and Others on behalf of Nyikina and Mangala/Western Australia/Geotech International Pty Ltd [2012] NNTTA 24 (‘*Lungunan v Geotech International*’)

Dann v Western Australia (1997) 74 FCR 391; (1997) FCA 332 (‘*Dann v Western Australia*’)

Freddie v Western Australia (2007) 213 FLR 247; [2007] NNTTA 37 (‘*Freddie v Western Australia*’)

Harvey Murray on behalf of the Yilka Native Title Claimants/Western Australia/Drew Griffin Money [2011] NNTTA 91 (‘*Murray v Money*’)

Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia/ASJ Resources Pty Ltd [2012] NNTTA 18 (‘*Karajarri Traditional Lands Association v ASJ Resources*’)

Les Tullock and Others on behalf of Tarlpa/Western Australia/Allarrow Pty Ltd [2011] NNTTA 118 (‘*Tullock v Allarrow*’)

Little v Oriole Resources Pty Ltd (2005) 146 FCR 576; [2005] FCAFC 243 (‘*Little v Oriole Resources*’)

Little v Western Australia [2001] FCA 1706 (‘*Little v Western Australia*’)

Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon [2006] NNTTA 65 (‘*Parker v Ammon*’)

Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation)/Western Australia/Zenith Minerals Ltd [2012] NNTTA 77 (‘*Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) v Zenith Minerals*’)

Silver v Northern Territory (2002) 169 FLR 1; [2002] NNNTA 18 (‘*Silver v Northern Territory*’)

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

Tullock v Western Australia (2011) 257 FLR 320; [2011] NNTTA 22 (‘*Tullock v Western Australia*’)

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

Ward v Western Australia (1996) 69 FCR 208; [1996] FCA 1452 (‘*Ward v Western Australia*’)

Weld Range Metals Ltd v Western Australia (2011) 258 FLR 9; [2011] NNTTA 172 (‘*Weld Range Metals v Western Australia*’)

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

Western Desert Lands Aboriginal Corporation (Jamukurnu Yapalinkunu) RNTBC v Teck Australia Pty Ltd [2014] NNTTA 56 (‘*Western Desert Lands v Teck Australia*’)

WF (Deceased) and Others on behalf of the Wiluna Native Title Claimants v Formula Resources Pty Ltd [2014] NNTTA 37 (‘*WF v Formula Resources*’)

WF (Deceased) & Ors on behalf of the Wiluna Native Title Claimants/Western Australia/JML Resources Pty Ltd [2013] NNTTA 8 (‘*WF v JML Resources*’)

WF (Deceased) on behalf of the Wiluna People v Western Australia [2013] FCA 755 (‘*WF v Western Australia*’)

Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another [2014] NNTTA 8 (‘*Yindjibarndi v FMG Pilbara*’)

Representatives of the native title party:	Mr Michael Allbrook, Central Desert Native Title Services Ms Irene Assumpter Akumu, Central Desert Native Title Services
Representatives of the Government party:	Mr Warren Fitt, State Solicitor’s Office Ms Bethany Conway, Department of Mines and Petroleum
Representative of the grantee party:	Mr Hong-Jim Saw, Hetherington Exploration & Mining Title Services

REASONS FOR DETERMINATION

[1] On 17 June 2013, the Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licences E53/1740, E53/1774, E53/1775 and E53/1776 ('the proposed licences') to Great Western Exploration Ltd ('the grantee party'). The notice included a statement that the Government party considers the grants attract the expedited procedure (that is, the grants are acts that can be done without the normal negotiations required by s 31 of the Act). In accordance with s 29(4)(a) of the Act, the notice specifies the 'notification day' as 19 June 2013.

[2] The notice provides the following information in relation to the size and location of the proposed licence areas:

- E53/1740 – 25 graticular blocks (approximately 70 square kilometres), 94 kilometres north-westerly of Wiluna in the Shire of Wiluna.
- E53/1774 – 11 graticular blocks (approximately 31 square kilometres), 74 kilometres westerly of Wiluna in the Shire of Wiluna.
- E53/1775 – 12 graticular blocks (approximately 34 square kilometres), 78 kilometres westerly of Wiluna in the Shire of Wiluna.
- E53/1776 – 28 graticular blocks (approximately 78 square kilometres), 74 kilometres westerly of Wiluna in the Shire of Wiluna.

[3] The proposed licences are situated entirely within the boundaries of the Wiluna native title claim (WC1999/024 – registered from 24 September 1999). A conditional determination of native title was made in the Federal Court on 29 July 2013 (see *WF v Western Australia*). As the determination does not come into effect until the nomination of a prescribed body corporate, the claim remains on the Register of Native Title Claims.

[4] An objection to the inclusion of the expedited procedure statement may be made to the National Native Title Tribunal ('the Tribunal') within four months of the notification day (see s 32(3) of the Act). As explained by s 32(3) and ss 30(1)(a) and (b), an objection may be made by:

(a) any registered native title body corporate ('RNTBC') in respect of the relevant land or waters who is either:

(i) registered as an RNTBC at three months after the notification day; or

(ii) if the RNTBC is registered after that three-month period, the RNTBC has resulted from a claim that was registered before the end of three months from the notification day; or

(b) any registered native title claimant in respect of the relevant land or waters who is registered at four months from the notification day, provided the claim was filed before the end of three months from the notification day.

[5] On 18 October 2013, the persons comprising the applicant in the Wiluna claim ('the native title party') lodged an objection to the inclusion of the expedited procedure statement in respect of the proposed licences.

[6] At a preliminary conference convened on 13 November 2013, parties informed the Tribunal that they wished to negotiate an agreement that would dispose of the objections. At a status conference held on 12 March 2014, the native title party indicated it would be seeking instructions on amendments proposed by the grantee party and the matter was adjourned to another status conference on 2 April 2014. At the subsequent conference, the native title party informed the Tribunal that it had yet to receive a response from the grantee party, and the Tribunal issued directions for inquiry the following day.

[7] In compliance with the directions, the Government party provided supporting documentary evidence on 4 June 2014. On 24 June 2014, the native title party informed the Tribunal that it was unable to obtain evidence in support of its contentions due to the involvement of relevant witnesses in sorry business, and requested an extension to the current directions. This extension was granted on 4 July 2014, with a springing order attaching to the native title party's compliance with the directions.

[8] The native title party subsequently filed a statement of contentions on 30 July 2014, together with a draft minute of proposed non-disclosure directions. The proposed directions were aimed at restricting the use and disclosure of affidavit evidence which the native title party intended to file in support of the objections. The affidavit material was subsequently filed on 11 August 2014. As the directions were sought on the basis that the evidence is culturally sensitive and only meant to be viewed by men, I was appointed to hear the matter and determine the objection on 1 August 2014. Interim directions were issued on 15

August 2014 to enable parties to view the material and make submissions on the proposed non-disclosure directions and, as no party raised any issues, I issued directions pursuant to s 155 of the Act on 9 October 2014.

[9] The grantee party provided separate statements of contention in relation to E53/1740 and in relation to E53/1774, E53/1775 and E53/1776 on 13 August 2014. The Government party filed a statement of contentions on 26 August 2014. On 10 September 2014, the native title party filed a reply to the contentions of the grantee party and the Government party.

[10] In lieu of a listing hearing, the Tribunal sent an email to parties on 12 September 2014 seeking their views on whether the matter should proceed 'on the papers' in accordance with s 151(2) of the Act (that is, without a formal hearing') and enquiring as to whether they intended to make any further submissions. All parties indicated they had no further submissions and did not object to having the matter heard on the papers. Having reviewed the materials before the Tribunal, I am satisfied it is appropriate to determine the objections without a formal hearing.

Legal principles

[11] Section 237 of the Act provides:

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

[12] In determining whether a proposed future act attracts the expedited procedure, the Tribunal is required to make a predictive assessment of the effect the proposed future act is likely to have on the matters identified in s 237. Specifically, the Tribunal must assess the likelihood of the proposed future act giving rise to interference or disturbance of the kind referred to in that section. That assessment is not made on the balance of probabilities, but requires the Tribunal to consider whether there is a real risk or chance of interference or major

disturbance arising from the future act (see *Smith v Western Australia* at [23]; *Walley v Western Australia* at [8]; *Little v Western Australia* at [68]-[72]). Though the Act does not impose an onus of proof on any party, the Tribunal is required to adopt a commonsense approach to the evidence (see *Ward v Western Australia* at 215-218).

[13] In *Walley v Western Australia*, the Hon C J Sumner, then Deputy President, considered the nature of exploration and prospecting licences, including the activities permitted by such licences, the limits placed on those activities and the standard conditions imposed by the Government party (at [24]-[35]). I adopt Deputy President Sumner's findings for the purpose of this inquiry, while noting that the *Mining Act 1978* (WA) ('*Mining Act*') has since been amended and the standard conditions imposed on exploration licences have been strengthened (see *Tullock v Western Australia* at [10]-[12]).

[14] In relation to s 237(a), the following observations can be made:

(a) The term 'community and social activities' is concerned with physical activities. The Tribunal may consider the non-physical or spiritual aspects of the native title party's community or social activities, but only to the extent those aspects are rooted in physical activities (see *Silver v Northern Territory* at [50]-[62]; *Tullock v Western Australia* at [65]-[77]).

(b) The community and social activities must arise from registered native title rights and interests (see *Tullock v Western Australia* at [93]-[102]).

(c) The term 'community activities' is not necessarily limited to the activities of a particular localised community. However, if evidence is not derived from the collective experiences of a localised group of persons, then specific evidence must be provided to identify the individuals as a community (see *Silver v Northern Territory* at [59]).

(d) The term 'social activities' can encompass activities carried on by an individual or small group in certain circumstances, such as where the activities have a wider social dimension (see *Silver v Northern Territory* at [60]).

(e) The Tribunal must determine whether the proposed future act is likely to be the proximate cause of interference (see *Smith v Western Australia* at 451).

(f) The level of interference with community and social activities must be substantial rather than trivial (see *Smith v Western Australia* at 451).

(g) The inquiry under s 237(a) is contextual, and the Tribunal may have regard to other factors that might constrain the native title party's community or social activities (see *Smith v Western Australia* at 451).

[15] With respect to issues arising under s 237(b), I note the following principles:

(a) A site or area of particular significance is one which is of special or more than ordinary significance to the native title holders (see *Cheinmora v Striker Resources*).

(b) The interference contemplated by s 237(b) must involve actual physical intervention. When evaluating the degree of interference, the Tribunal must consider the nature of the site, the nature of the potential interference and the laws and traditions of the native title holders (see *Silver v Northern Territory* at [88]).

(c) The Tribunal may take into account activities that are likely to interfere with sites or areas outside the boundaries of the proposed future act or claim area, so long as there is a clear nexus between the activities and the issues being considered under s 237 (see *Silver v Northern Territory* at [35]).

[16] On the interaction between s 237(b) and the site protection regime established under the *Aboriginal Heritage Act 1972* (WA) ('AHA'), I adopt the findings made by the Deputy President Sumner in *Parker v Ammon* at [31]–[38] and [40]-[41] and those of Member Helen Shurven in *Karajarri Traditional Lands Association v ASJ Resources* at [48]-[53], [84]-[87] and [91]. I also adopt the findings of Member Daniel O'Dea in *Cherel v Faustus Nominees* at [81]-[91].

[17] With respect to s 237(c), I make the following observations:

(a) Section 237(c) requires a consideration of the effect of the future act and any rights created by the future act (see *Little v Oriole Resources* at [41]).

(b) The assessment of whether the future act is likely to involve, or create rights whose exercise are likely to involve, major disturbance to the land and waters must be

evaluated by reference to what is likely to be done, rather than what could be done (see *Little v Oriole Resources* at [51]).

(c) The term 'major disturbance' is to be given its ordinary meaning as understood by the whole Australian community, including Aboriginal people. The concerns of the Aboriginal community, including matters such as community life, customs, traditions and cultural concerns are relevant matters for consideration in evaluating the disturbance (see *Little v Oriole Resources* at [52]-[54]; *Dann v Western Australia* at 395, 401 and 413).

(d) The Tribunal is entitled to have regard to the context of the proposed grant, including the history of mining and exploration in the area, the characteristics of the land and waters concerned and any relevant regulatory regime (see *Little v Oriole Resources* at [39]).

Government party Contentions and Evidence

[18] The Government party provided the following documents in relation to each of the proposed licences:

(a) A Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence.

(b) A report and plan from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database'), including sites listed on the Register of Aboriginal Sites.

(c) A copy of the tenement application and Draft Tenement Endorsements and Conditions Extract.

(d) The instrument of licence and first schedule listing land included and excluded from the grant.

(e) A Tengraph quick appraisal detailing the land tenure, current and historical mining tenements, native title areas, and relevant services and other features within the proposed licence area.

E53/1740

[19] The Tengraph quick appraisal establishes that the area within E53/1740 is covered by pastoral lease 3114/1131 (Paroo). The quick appraisal indicates the area has previously been subject to 10 exploration licences granted between 1997 and 2010, overlapping between 6.7 percent and 92 percent, with an average lifespan of two years and seven months, and one temporary reserve granted in 1959 and cancelled in 1964, covering the entire area.

[20] The quick appraisal notes the following features in the area of E53/1740: one track; one fence line; one well/bore with windmill (George Well); one cliff/breakaway/rockridge; and 170 minor, non-perennial watercourses.

[21] The report from the DAA Database does not indicate the existence of any sites registered under the AHA or any 'other heritage places' within E53/1740. Tribunal and Tengraph mapping does not indicate any Aboriginal communities within E53/1740 or the surrounding areas

E53/1774

[22] The Tengraph quick appraisal establishes that the area within E53/1774 is subject to pastoral leases 3114/1131 (Paroo; overlapping at 5.1 percent) and 3114/1260 (Millbillillie; overlapping at 94.9 per cent). The quick appraisal indicates that the area has previously been subject to eight exploration licences granted between 1991 and 2006, overlapping between 0.7 percent and 100 percent, with an average lifespan of four years and four months; 16 mineral claims granted between 1971 and 1977, overlapping between 0.3 percent to 5.5 per cent, with an average lifespan of two years; and two temporary reserves, the first of which was granted in 1959 and cancelled in 1964, covering the entire area, and the second granted in 1981 and cancelled in 1982, overlapping at 26.8 per cent.

[23] The quick appraisal notes the following features in the area of E53/1774: three minor roads; three fence lines and 126 minor, non-perennial watercourses. Tribunal and Tengraph mapping does not indicate any Aboriginal communities within E53/1740 or the surrounding areas.

[24] The report from the DAA Database indicates the existence of two registered sites within E53/1774. These are:

- Site ID 2023: Bilyuwal (Chantra Billie) – mythological.
- Site ID 2178: Urnawalpunku – mythological.

E53/1775

[25] The Tengraph quick appraisal establishes that the area within E53/1775 is subject to pastoral leases 3114/1131 (Paroo; overlapping at 75.9 percent) and 3114/1260 (Millbillillie; overlapping at 24.1 per cent). The quick appraisal indicates that the area has previously been subject to six exploration licences granted between 1991 and 2006, overlapping between 32 percent and 100 percent, with an average lifespan of six years and two months; and two temporary reserves, the first of which was granted in 1959 and cancelled in 1964, covering the entire area, and the second granted in 1981 and cancelled in 1982, overlapping at 4.1 per cent.

[26] The quick appraisal notes the following features in the area of E53/1775: three minor roads; two fence lines; one well/bore with windmill (B Bore); 152 minor, non-perennial watercourses, including Gum Creek; and one soak. Tribunal and Tengraph mapping does not indicate any Aboriginal communities within E53/1775 or the surrounding areas.

[27] The report from the DAA Database indicates the existence of two registered sites within E53/1775. These are:

- Site ID 2023: Bilyuwal (Chantra Billie) – mythological.
- Site ID 2178: Urnawalpunku – mythological.

E53/1776

[28] The Tengraph quick appraisal establishes the underlying tenure within E53/1776 as follows:

- Pastoral lease 3114/1131 (Paroo) and 3114/1260 (Millbillillie), overlapping at seven per cent and 21.1 per cent respectively.

- Unnumbered Land Act Reserve 1001, overlapping at 71.8 per cent.

- Crown Reserve 42666 (Repeater Station Site), overlapping at less than 0.1 per cent.

[29] The Tengraph quick appraisal and map also indicates that the north-eastern corner of E53/1776 intersects with an area designated for the Great Northern Highway and a gas pipeline that runs parallel with the highway.

[30] The quick appraisal indicates that the area within E53/1776 has previously been subject to 11 exploration licences granted between 1992 and 2010, overlapping between 0.3 percent and 82.1 percent, with an average lifespan of six years; and one temporary reserve granted in 1959 and cancelled in 1964, covering the entire area.

[31] The quick appraisal notes the following features in the area of E53/1776: six minor roads; four fence lines; one 'pipeline below ground NOT-WAT'; 295 cliffs/breakaways/rockridges; and 320 minor, non-perennial watercourses. Tribunal and Tengraph mapping does not indicate any Aboriginal communities within E53/1776, although the Tribunal's map indicates that the Aboriginal community of Kutkabubba is situated approximately three kilometres east of E53/1776.

[32] The report from the DAA Database indicates the existence of three registered sites within E53/1776. These are:

- Site ID 2176: Ngangkarli – mythological.

- Site ID 2177: Winytjupula – mythological.

- Site ID 2178: Urnawalpunku – mythological.

Conditions and endorsements

[33] The Draft Tenement Endorsement and Conditions Extracts indicate the proposed licences will be subject to the standard four conditions imposed on the grant of all exploration and prospecting licences in Western Australia (se*e Tullock v Western Australia* at [11]-[12]). According to the extracts, the proposed licences will also be subject to conditions requiring notice to be given to the holder of any underlying pastoral or grazing lease prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising

mechanised equipment, as well as written notice of the grant or transfer of the proposed licences.

[34] The following further conditions are proposed in relation to E53/1776:

7. No excavation, excepting shafts, approaching closer to the Great Northern Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the Great Northern Highway or Highway verge being confined to below a depth of 30 metres from the natural surface, and on any other road or road verge, to below a depth of 15 metres from the natural surface.
8. The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Repeater Station Site Reserve 42666.
9. No mining within 25 metres of either side of the Gas Pipeline
10. No surface excavation approaching closer to the boundary of the Safety Zone established by condition 9 hereof than a distance equal to three times the depth of the excavation without the prior written approval of the State Mining Engineer DMP.
11. No interference with the drainage pattern, and no parking, storage or movement of equipment or vehicles used in the course of mining within the Safety Zone established by Condition 9 hereof without the prior approval of the operators of the Gas pipeline.
12. The Licensee shall not excavate, drill, install, erect, deposit or permit to be excavated, drilled, installed, erected or deposited within the Safety Zone established in Condition 9 hereof, any pit, well, pavement, foundation, building, or other structure or installation, or material of any nature whatsoever without the prior written consent of the State Mining Engineer DMP.
13. No explosives being used or stored within one hundred and fifty (150 metres) of the Gas pipeline without the prior written consent of the State Mining Engineer DMP.
14. Mining on the Safety Zone established in Condition 9 hereof being confined to below a depth of 50 metres from the natural surface unless otherwise approved by the State Mining Engineer DMP.
15. The rights of ingress to and egress from the pipeline easement established in Condition 9 hereof being at all times preserved for employees, contractors and agents of the operators of the Gas pipeline.
16. Such further conditions as many from time to time be imposed by the Minister responsible for the Mining Act 1978 for the purpose of protecting the Gas pipeline.

Consent to conduct exploration activities on the Canning Stock Route Reserve granted, subject to:

17. No exploration activities being carried out on the Canning Stock Route Reserve which restrict the use of the reserve.

[35] The following endorsements (which differ from conditions in that the breach of an endorsement does not make the licensee liable to forfeiture of the licence) will also be imposed on the proposed licences:

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

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

3. The Licensee [*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 DoW's relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.

In respect to Artesian (confined) Aquifers and Wells the following endorsement applies:

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

In respect to Waterways the following endorsement applies:

7. Advice shall be sought from the DoW if proposing any exploration 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.

[36] The following endorsement also applies in respect of E53/1774, E53/1775 and E53/1776:

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

8. 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.

[37] The Government party has indicated that it also intends to impose a condition requiring the grantee party to offer a regional standard heritage agreement ('RSHA') at the request of the native title party ('RSHA Condition'). The condition is proposed in the following terms:

> In respect of the area covered by the licence the Licensee, if so requested in writing by Wiluna People, the applicants in Federal Court application no. WAD 6164 of 1998 (WC 1999/24), such request being sent by pre-paid post to reach the Licensee's address, not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of Wiluna the Regional Standard Heritage Agreement endorsed by peak industry groups and Central Desert Native Title Services.

[38] The Government party states that, while it understands the representatives of the native title party no longer recognise the RSHA for the Central Desert region, it will be open for the native title party to obtain the benefit of the agreement pursuant to the proposed condition.

Native Title Party Contentions and Evidence

[39] Although the native title party's applications addressed each of the criteria in s 237 of the Act, the native title party states in its contentions that the objections are only pursued in relation to s 237(b).

[40] In support of its objections, the native title party relies on the affidavit of Timmy Patterson sworn 22 July 2014 ('Patterson Affidavit'). As noted above at [8], Mr Patterson's affidavit is subject to non-disclosure directions. Consistent with these directions, I have been careful to ensure these reasons do not disclose the contents of the affidavit, subject to observing the requirement in s 162(2) of the Act to outline any findings of fact on which this determination is based. Hence, though I have endeavoured to limit references to the affidavit, I refer to its contents where necessary to explain the factual basis of my decision.

[41] Mr Patterson deposes that he is a traditional owner in the Wiluna native title claim area and a senior initiated man, or *wati*, and has cultural authority for the areas where the proposed licences are located. I accept that Mr Patterson has authority to speak for the areas on behalf of the native title party.

Grantee Party Contentions

[42] The grantee party filed statements of contentions in relation to E53/1740 and in relation to E53/1774, E53/1775 and E53/1776. Although the documents vary insofar as they relate to details of tenure and previous exploration in these areas, similar contentions are made in relation to the grantee party's proposed exploration program and its intended approach to heritage protection.

[43] The grantee party indicates that initial stages of exploration will include activities such as prospecting, field reconnaissance, geological mapping, surface geophysics, collection of samples, soil sampling, aerial surveys and ground based surveys. The grantee party states that reconnaissance drilling may be undertaken following an initial assessment via surface or aerial surveys, though it states that it is not economically feasible to conduct ground-disturbing activities without significant due diligence by way of low impact exploration. The grantee party notes that the number of roads and tracks recorded in the Tengraph documentation suggests the areas will be 'manageably accessible.'

[44] The grantee party contends that the proposed licences have been subject to a number of previous mining tenements through the 1990s with no significant breaks in mining-related tenure. The grantee party includes information relating to expenditure on recent significant tenure and, in particular, notes that over $400,000 was expended on exploration activities over E53/744, which entirely overlapped the areas within E53/1774 and E53/1775 between 2006 and 2013.

[45] The grantee party states that it will comply with all conditions and legislative requirements including the AHA, the *Mining Act* and subsidiary legislation. The grantee party states that it will conduct exploration on a site avoidance basis with respect to any identified heritage site and reiterates its offer to complete surveys in accordance with the RSHA prior to commencing ground-disturbing activities. The grantee party acknowledges there may be sites of particular significance within the proposed licence areas and that 'sites affected may extend away from particular site in ways recognizable only by the Native Title Party.' With respect to this, the grantee party undertakes to: notify the native title party about proposed on-ground works (whether ground-disturbing or otherwise) and provide details information about those works before commencing them; advise the native title party of dates when the grantee party will be on-ground; take additional care when conducting on-ground activity with respect to the native title party's requests; limit the use of motor vehicles where possible; where possible, complete rehabilitation of any disturbances as exploration occurs; avoid any sites or areas of significance if the native title party provides notice and coordinates; and register heritage surveys completed in compliance with the AHA.

Materials produced by the Tribunal

[46] On 2 October 2014, the Tribunal circulated a map of the proposed licences produced by the Tribunal's Geospatial Services unit, noting its intention to rely on the map in its deliberations and seeking comment from parties. No party objected to the Tribunal using the map in this manner. Consequently, I propose to refer to the Tribunal maps alongside the maps included in the Government party documentation and the map annexed to the Patterson Affidavit.

Interference with community or social activities – s 237(a)

[47] As noted above at [39], the native title party has not made any contentions in relation to any community or social activities carried on in the proposed licence areas. There is no evidence as to the carrying on of any community or social activities by members of the native title party. I accept the Government party's contention that, in the circumstances, the only conclusion open to the Tribunal is that the grant of the proposed licences is not likely to interfere with any community or social activities of the native title party.

Interference with sites or areas of particular significance - s 237(b)

Contentions and evidence in relation to s 237(b)

[48] The native title party contends that the proposed licences contain sites and areas of particular significance to the male members of the native title party, in accordance with their traditions. In particular, the native title party submits that:

(a) there are *jukurrpa* (dreaming tracks or songlines) which travel through and transform the landscape within the proposed licence areas in ways that are not immediately apparent to people without the requisite cultural knowledge;

(b) there are instances in E53/1740, E53/1775 and E53/1776 where two *jukurrpa* meet, and these meeting sites are of immense cultural significance to the native title party;

(c) sites located within the proposed licence areas are considered *ngulu* (secret, dangerous) and should not be known by women or uninitiated men.

[49] The native title party contends that the proposed licence areas are of particular significance not only to the native title party, but to people of the western desert generally. The native title party submits that its members have an obligation, according to their traditional laws and customs, to maintain and protect sites of particular significance located within the proposed licences and teach *jukurrpa* stories to the younger generation in order to pass on their cultural knowledge.

[50] The native title party contends that the nature of the country on, and surrounding, the proposed licence areas is such that any entry onto parts of the proposed licences or the

surrounding country which has not been agreed with the native title party would likely result in interference within the meaning of s 237(b). In this respect, the native title party relies on the finding of Member O'Dea in *Tullock v Allarrow* and other matters that *jukurrpa* are:

> not sites which might be readily identifiable by persons other than those instilled in the mysteries of the jukurrpa. Therefore, notwithstanding the best of intentions, inadvertent interference is distinctly possible if the grantee party enters the area without the guidance of the native title party.

[51] The native title party submits that the nature of the *jukurrpa* is such that one part of the songline may cause interference to sites or areas located at other points along the songline.

[52] The native title party also submits that there are sites and areas within the proposed licence areas and the surrounding country that are considered secret and which should not be known by women or uninitiated men. In the native title party's submission, these sites and areas cannot be accessed or spoken about without a properly constituted group of people.

[53] The native title party further contends that the removal of objects found in the natural environment would constitute interference for the purposes of s 237(b). In this regard, the native title party submits that physical interference with soaks and creek systems within the proposed licence areas will interfere with the *jukurrpa* and sites of particular significance to initiated men.

[54] The evidence of Mr Patterson establishes the following:

- The proposed licences are located on a creek system connected with a particular *jukurrpa*.
- There are places within the proposed licence areas where two *jukurrpa* meet and which are considered to be special by members of the native title party. According to Mr Patterson, there is one site of this kind at Finlayson Range in E53/1775 and another two in E53/1776. Mr Patterson states that the sites in E53/1776 are connected to the same story, which is *ngulu*, and he says that women might get sick if they were to visit these sites.
- There are hills in E53/1740 that are associated with one of the *jukurrpa*.
- One of the *jukurrpa* is associated with Gum Creek and a nearby site in E53/1775.

[55] In its reply, the native title party further submits that the DAA Database identifies Site 2023 as a site to which access is restricted to men.

[56] The Government party does not accept that the general area within which the proposed licences are located is of particular significance to the native title party. Furthermore, the Government party contends that Mr Patterson's description of areas associated with songs, stories and mythical beings as 'important' is not determinative of whether they constitute areas or sites of particular significance within the meaning of s 237(b). Rather, the Government party submits that the only evidence which might be said to go as far as establishing the particular significance of any of these areas is Mr Patterson's evidence about the creek system and the evidence relating to the two sites in E53/1776. The Government party does not accept the native title party's contention that mere presence in an area may cause direct interference, and submit that Mr Patterson's evidence that people may get sick or die if they are present at a particular site should not be construed as evidence that the mere presence of these persons amounts to physical interference with that site.

[57] The Government party submits that, in the event there are any areas or sites of particular significance in the proposed licence areas, interference with those areas or sites is not likely for the following reasons:

(a) The grantee party is aware of the existence of the areas and sites referred to in the Patterson Affidavit and its legal obligations in respect of them. The Government party notes that the grantee party has agreed to work with the native title party, including through an RSHA, to avoid interference with such sites. The Government party argues that the offer of an RSHA indicates the grantee party's willingness to consult with the native title party and avoid activities likely to interfere with any sites or areas of particular significance, and the native title party has the opportunity of enforcing this by invoking the proposed RSHA Condition.

(b) The grantee party has stated that most of the proposed exploration activities will be low-impact and non-intrusive, and any ground disturbing activities such as exploratory drilling are intended to be conduct in a way which will not adversely impact on heritage sites and will respect local Aboriginal cultural concerns.

(c) The concerns expressed by Mr Patterson in relation to the creek system reflect an overestimate of the activities of the grantee party in the event the proposed licences are granted. The Government party submits that there is no evidence the grantee party is going to conduct activities which will have those effects and the proposed endorsements and conditions are intended to prevent such concerns arising.

(d) Mr Patterson's concerns are largely spiritual in nature. If Mr Patterson's belief is that any level of ground-disturbing activity will disturb the songs, stories and mythical beings in question and this were sufficient to disapply the expedited procedure, then the expedited procedure would be disapplied to the grant of almost all exploration tenure in the vast majority of Australia, which in the Government party's submission would be incongruent with parliamentary intention.

(e) The proposed licence areas have been subject to previous mineral exploration and possibly mining activity and are almost entirely covered by pastoral leases and reserves. The Government party submits that the activities contemplated by the grantee party in the proposed licence areas would be the same as, or no more significant than, the previous and continuing use of those areas. The Government party argues that, if the past or present use of the land had resulted in interference with an area of particular significance, then one would expect the native title party to have provided evidence to that effect.

(f) the AHA and its associated processes are likely to prevent interference with any areas or sites of particular significance.

[58] In reply, the native title party contends that the Government party has not provided evidence as to which provisions of the RSHA it considers have a sufficiently protective effect, so the contention should be given little weight. The native title party states that it does not accept the RSHA as an adequate means of dealing with issues arising under s 237 and argues that provisions of the RSHA requiring the grantee party to consult with the native title party prior to making an application under s 18 of the AHA will not prevent interference and arguably enable it. The native title party contends that surveys performed under the RSHA make it easier for a grantee party to make a s 18 application by requiring the native title party to identify the precise nature, location and physical extent of sites. Furthermore, the native title party submits that the RSHA does not address circumstances

where the disclosure of certain cultural information would be inappropriate and contrary to traditional law and custom, and fails to deal with situations where 'non ground disturbing activity' as defined in the RSHA could lead to interference within the meaning of s 237(b), especially in cases where access to or dealings with a particular area or site is restricted on the basis of gender.

Does the evidence establish the existence of areas or sites of particular significance?

[59] I accept there are places within the proposed licence areas that are associated with particular *jukurrpa*. I also accept there are features of the landscape, such as the creek system, that are said to be created by the *jukurrpa*. However, I am not satisfied the evidence establishes the particular significance of the area in general. In this respect, the facts of this case are distinguishable from those in *Tullock v Allarrow*. In that matter, Member O'Dea concluded (at [39]) that the area in question 'compris[ed] a series of inextricably interconnected sites or areas associated with a number of jukurrpa dreaming stories which are central to Martu religion.' Though I accept that some of the sites mentioned in Mr Patterson's affidavit are connected by one or more of the *jukurrpa* that travel through the area, in my view the relationship between the sites and features described by Mr Patterson is not such that the area as a whole can be considered a discrete and identifiable area as distinct from the specific sites and features identified (cf *Weld Range Metals v Western Australia* at [293]-[296]; *WF v JML Resources* at [43]; *Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) v Zenith Minerals* at [61]).

[60] One of the features identified by Mr Patterson is the creek system, which extends throughout the area in which the proposed licences are located. According to Mr Patterson, these creeks were created by one of the *jukurrpa*, and he says it is important that people talk to the native title party before they do anything that might interfere with the story. In particular, Mr Patterson says that, if people 'drilled holes out there and messed up the creek system we would get in trouble from other Martu people' and the song associated with the *jukurrpa* might be lost.

[61] The Tribunal considered similar evidence in *WF v JML Resources*. In that matter, there was evidence that 'all the big creeks' in a particular area of country had been created by a certain *jukurrpa*. Evidence had also been led about two particularly important bodies of water associated with the *jukurrpa* which were not in the tenement area but were connected

to other bodies of water that were in the tenement area. The Tribunal observed (at [36]-[39]) that, given the uncertainty about the precise location of creeks and other bodies of water within the tenement area that were said to be associated with the *jukurrpa*, it could not conclude that there were any sites of particular significance.

[62] Again, the facts in this matter are distinguishable from those in *WF v JML Resources*. Here, the evidence of Mr Patterson is that all the creeks in the area, including those in the proposed licences, are associated with the *jukurrpa*. The documentation provided by the Government party and the mapping produced by the Tribunal show the extent of the creek system throughout the areas covered by the proposed licences. While it appears the system is made up of possibly hundreds of minor watercourses, the evidence of Mr Patterson suggests these features should be treated as part of a single site or story. On balance, I find that the evidence of Mr Patterson supports the finding that the creek system, or at least the watercourses that make up the system, are sites of particular significance to the native title party.

[63] In relation to the other two *jukurrpa* that are said to traverse areas within the proposed licences, I note that, depending on the evidence presented in a given matter, *jukurrpa* may be regarded as sites or areas of particular significance (see *Freddie v Western Australia* at [44]-[47]; *Lungunan v Geotech International* at [41]). I also note the distinction identified by Member O'Dea in *WF v Emergent* at [39] (and later endorsed by President Raelene Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* at [130]) between the significance of country understood as generally formed by the movement of mythic beings in the creative epoch and areas or locations associated with the specific activities of these mythic beings.

[64] In the present matter, I am not satisfied that areas within the proposed licences said to be traversed by specific *jukurrpa* are necessarily sites of particular significance to the native title party. For example, the hills in E53/1740 are only identified in terms of illustrating the path taken by the particular *jukurrpa*, and in my view the evidence does not establish the particular significance of the area. A similar observation can be made in relation to Gum Creek. However, I do accept that the sites identified by Mr Patterson as being associated with the specific activities of the *jukurrpa*, especially where the two stories meet and intertwine, are capable of being considered sites of particular significance. In this respect, I

am satisfied the site identified at Finlayson Range, the site near Gum Creek and the two sites in E53/1776 are sites of particular significance to the native title party.

[65] With respect to the native title party's submission regarding Site 2023, I accept the Government party's contention that registration is not determinative of whether a site is one of particular significance in accordance with the traditions of the native title party (see *Western Australia v Thomas* at 174). I also accept the grantee party's contention that, because the site is designated as a closed site, the boundaries depicted on the DAA Database do not accurately reflect the true location of the site. In the absence of evidence from Mr Patterson or other members of the native title party, I am unable to conclude that the site is one of particular significance to the native title party, or that it is located in an area likely to be affected by one of the proposed licences. In any event, I note that the site's designation as 'male access only' refers to restrictions on who may view the file held by the DAA and does not necessarily indicate whether physical access to the site will interfere with it.

[66] No evidence has been presented in relation to the other sites recorded on the DAA Database other than the fact of their registration, and there is no basis on which to conclude that they are sites of particular significance to the native title party.

Is interference likely to occur?

[67] As I have found that sites of particular significance to the native title party exist within the proposed licence areas, it is necessary to consider whether the grant of the licences is likely to cause interference of the kind contemplated by s 237(b). The Government party submits that, among other things, the AHA and its associated processes are likely to prevent interference with any area or site of particular significance. However, the native title party contends that the definition of places or sites in s 5 of the AHA is more restrictive than the terms of s 237(b) and, furthermore, the concept of interference is broader than the activities proscribed under s 17 of the AHA, so that a grantee party may 'interfere' with a site without being in breach of the AHA. The native title party also notes that the AHA provides a mechanism by which sites may be destroyed, referring to the ministerial discretion to permit activities that would otherwise contravene s 17 of the AHA.

[68] I recently considered arguments to this effect in *Western Desert Lands v Teck Australia*, and I refer to my comments at [113]-[116] of my reasons in that matter. The Tribunal has

generally found that the site protection regime established under the AHA will ensure that interference is not likely to occur, notwithstanding the existence of the ministerial discretion to authorise interference with Aboriginal sites (see *Parker v Ammon* at [33]-[38], [40]-[41]). However, the Tribunal has recognised that the protective effect of the AHA is not absolute, and each case must be considered on its own facts (see *Cherel v Faustus Nominees* at [81]-[91]).

[69] The native title party draws attention to reports and press releases concerning the efficacy of the site protection regime and submits that, in light of supposed regulatory failures and the evidence presented in this matter, there is likely to be interference with areas or sites of particular significance in the present case. As I noted in *Western Desert Lands v Teck Australia* at [118], the Tribunal has already considered these issues and I adopt the comments made there and in the cases cited. For the present purposes, it will suffice to note that there is no evidence that the grantee party will not comply with its legal obligations and, in the circumstances, I am entitled to presume that it will act according to law (see *Western Australia v Smith* at 51-52; *Murray v Money* at [53]-[58]).

[70] The Government party contends that the Tribunal may also have regard to the grantee party's attitude to entering an RSHA and other evidence of the grantee party directed toward Aboriginal heritage. However, the native title party contends that the Government party has not provided evidence as to which provisions of the RSHA it considers have a sufficiently protective effect, and submits that the Government party's contention should be given little weight. The native title party states that it does not accept the RSHA as an adequate means of dealing with the issues under s 237 of the Act and has never endorsed the use of or agreed to enter into the RSHA, nor will it do so in this matter.

[71] The grantee party's attitude towards the RSHA is a relevant factor to which the Tribunal can have regard in assessing the likelihood of interference with areas or sites of particular significance (see *Champion v Western Australia* at [32], [34]). The Tribunal may also take into account the existence of the proposed RSHA Condition as a minimum standard available to the native title party, even though this standard may not represent the native title party's ideal or preferred position (see *Champion v Western Australia* at [33]). The native title party argues that the requirement for consultation with, rather than the consent of, the native title party prior to making an application for ministerial consent under s 18 of the AHA will not prevent interference. In the native title party's submission, the RSHA

enables such an application to be made, as it requires the native title party to identify the precise nature, location and physical extent of a site. As I observed in *Western Desert Lands v Teck Australia* at [110], it is difficult to see how the requirement for consultation is inconsistent with the notion of site protection and, though the RSHA does not prevent the grantee party from making a s 18 application, the requirement to complete a survey prior to undertaking ground-disturbing works will no doubt reduce the risk of interference. The Tribunal is entitled to give weight to this, notwithstanding that the possibility of interference still remains.

[72] That is not to say the 'minimum standard' provided by the RSHA will ensure adequate protection in every case. This is particularly so where the evidence suggests that interference may result from activities that might otherwise be considered low impact and would not require a heritage survey to be completed. In *WF v Formula Resources*, for example, the Tribunal considered there was little evidence as to how the RSHA would operate to mitigate the risk of interference where the evidence established that rock chip sampling could amount to interference for the purposes of s 237(b). Similarly, in *Crowe v Western Australia*, the Tribunal found there was a real risk or chance of interference should the grantee party enter onto parts of the area subject to the future act without prior authorisation from an initiated man, despite the protective effect of the AHA and the execution by the grantee party of an RSHA. What these decisions demonstrate is that the weight accorded to the RSHA will depend on the evidence presented in each case.

[73] Mr Patterson states that 'it is important that people talk to us before they do anything that might interfere with the story' associated with the creek system. In particular, Mr Patterson states that drilling could 'mess up' the creek system and have an adverse effect on members of the native title party and the integrity of the *jukurrpa*. However, the evidence before the Tribunal suggests there has been an extensive history of mineral exploration in the area, and there is no evidence this activity has had any effect on the integrity of the creek system or resulted in any breach of the native title party's traditional laws and customs.

[74] In its reply, the native title party contends that the most recent of these historical tenements were subject to an agreement between the native title party and the holder of those tenements. This agreement required heritage surveys to be conducted on a 'work clearance' model, whereby certain limited activities were cleared to proceed by the native title party. I

accept that it cannot be automatically presumed that the rights conferred by these and other historical tenements were exercised to their full extent. Nevertheless, the history of exploration in these areas and the evidence of expenditure provided by the grantee party suggest that exploration has occurred in these areas without causing interference with the creek system, even though the precise nature of these activities has not been established.

[75] Though I accept that drilling is likely to have an effect on the creek system, the RSHA will require the grantee party to undertake heritage surveys in respect of any exploratory drilling and other ground-disturbing activities. The evidence of Mr Patterson does not suggest that activities that would not otherwise trigger the survey provisions under the RSHA would 'mess up' the creek system, and I am satisfied the AHA, in combination with the RSHA, will provide sufficient protection in this instance. I have also given weight to the likely protective effect of the proposed conditions of grant, which require the grantee party to seek the approval of the relevant government department before operating any mechanised equipment for the purpose of surface disturbance or excavating costeans, as well as endorsements directing the grantee party to seek the advice of the Department of Water in relation to any proposal to explore on or within a certain distance from defined waterways.

[76] I have reached a similar finding in relation to the Finlayson Range and Gum Creek sites. While Mr Patterson does not outline the kind of activities that might interfere with these sites, it is reasonable to infer that ground-disturbing activities such as drilling might amount to interference within the meaning of s 237(b). Nevertheless, I accept that the AHA and RSHA will be sufficient to ensure there is no real risk of such interference.

[77] In its reply, the native title party contends that the clearing of areas for drilling will involve the removal of vegetation, which will interfere with the sites identified by Mr Patterson. However, it is not apparent from the evidence of Mr Patterson that vegetation clearance will necessarily have that effect. In any event, vegetation clearance is included in the definition of 'Ground Disturbing Activity' in the relevant RSHA, so a survey is likely to be required before any such activities are undertaken.

[78] The evidence of Mr Patterson indicates that the two sites in E53/1776 are associated with a story that is *ngulu*. Mr Patterson states that he can only tell this story to other men, and he indicates that women might get sick or die if they were to visit these sites. He also states a

survey would need to be undertaken over one of the sites to make sure it is protected, and that *wati* would need to attend the survey.

[79] The Government party submits that, while the effect of Mr Patterson's evidence is that people may get sick or die if they were to visit these areas, it does not establish that mere presence in these areas would interfere with the sites within the meaning of s 237(b). I accept this submission. Mr Patterson states that *wati* 'have a responsibility to look after country and also to look after the *jukurrpa* but also to look after the people passing through.' He also states that '[a] lot of people have been dying because they are not in the law and they go places that they shouldn't go.' However, there is nothing in Mr Patterson's affidavit to suggest that access to these sites by the grantee party will necessarily involve some kind of interference with the sites.

[80] The only requirement that Mr Patterson specifies in relation to the sites is the need for a survey. Although Mr Patterson states that *wati* should be present at the survey, the best interpretation of his evidence is that their presence is required to ensure the site is protected, rather than any requirement under traditional law and custom concerning conditions of access. Furthermore, Mr Patterson's evidence suggests that these sites are situated on land reserved for the Canning Stock Route, and it is reasonable to infer on this basis that other land users would have access to these sites, particularly given the proximity of the highway. In the circumstances, I am satisfied that the AHA and RSHA will provide sufficient protection against any risk of interference associated with the grant of the exploration licence, especially once the grantee party's intentions are taken into account.

[81] In its reply, the native title party contends that the grantee party's undertaking to conduct surface disturbance only after discussion with the native title party is impossible in the absence of an agreement between the parties that governs the relationship between them and which is enforceable by the native title party, as it will simply be notifying the native title party of how it will be interfering with areas of particular significance without giving the native title party the opportunity to address them. I do not accept this contention. As I have already discussed, the grantee party has offered to enter into an RSHA and the native title party has the opportunity of enforcing this offer through the RSHA Condition. The RSHA provides a framework for consultation and creates enforceable obligations on the part of the native title party and the grantee party.

[82] Both the grantee party and the native title party acknowledge that they have previously entered into agreements with respect to heritage protection. The native title party states that these agreements were in a form favoured by the native title party. It is not clear in what way these agreements differ from the RSHA or why an agreement was not reached in this matter. The role of the Tribunal in these proceedings is not to endorse one agreement over another, but to conduct an inquiry and make a determination as to whether the expedited procedure is or is not attracted after consideration of the matters in s 237 (see *Champion v Western Australia* at [46]). As I have noted above, the existence of the RSHA is relevant to this task and, though I acknowledge its terms are not necessarily preferred by the native title party, I accept that the RSHA imposes an acceptable standard in the context of the evidence presented in this matter.

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

[83] As noted above at [39], the native title party has not made any contentions on the issue of major disturbance. The Government party contends that there is no evidence before the Tribunal capable of supporting a finding that the grant of the proposed licences is likely to involve major disturbance to any land or waters, and I accept the Government party's submission that the only conclusion open to the Tribunal is that the proposed licences are not likely to involve, or create rights whose exercise is likely to involve, major disturbance to any land or waters.

Determination

[84] The determination of the Tribunal is that the grant of exploration licences E53/1740, E53/1774, E53/1775 and E53/1776 to Great Western Exploration Ltd are acts attracting the expedited procedure.

James McNamara
Member
5 November 2014