NATIONAL NATIVE TITLE TRIBUNAL

WF (Deceased) and Others on behalf of Wiluna v Tropical Resources Pty Ltd and Another **[2014] NNTTA 104 (5 November 2014)**

Application No: **WO2014/0018, WO2014/0019, WO2014/0020**

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 -

Tropical Resources Pty Ltd (grantee party)

- and -

The State of Western Australia (Government party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

DETERMINATION THAT ACTS ARE NOT 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 – expedited procedure not 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:

Andy Campbell & Ors on behalf of the Birriliburu Native Title Holders/Western Australia/Murchison Metals Ltd [2012] NNTTA 48 (‘*Campbell v Murchison Metals*’)

Areva Resources Australia Pty Ltd v Walalakoo Aboriginal Corporation [2014] NNTTA 70 (‘*Areva Resources Australia v Walalakoo Aboriginal Corporation*’)

Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Caldera Resources Pty Ltd [2008] NNTTA 157 (‘*Wurrunmurra v Caldera Resources*’)

Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa [2007] NNTTA 21 (‘*Wurrunmurra v Ling*’)

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 [2013] NNTTA 129 (‘*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*’)

John Walter Graham and Others on behalf of Ngadju v Dunstan Holdings Pty Ltd [2014] NNTTA 84 (‘*Graham v Dunstan Holdings*’)

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*’)

Maggie John and Others on behalf of Malarngowem/Western Australia/Ord Resources Pty Ltd [2007] NNTTA 29 (‘*John v Ord Resources*’)

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

Ronald Crowe & Ors (Gnulli)/Western Australia/Golden Century Mining Limited [2011] NNTTA 89 (‘*Crowe v Golden Century Mining*’)

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*’)

Wanjina-Wunggurr (Native Title) Aboriginal Corporation/Western Australia/Braeburn Resources Pty Ltd [2010] NNTTA 150 (‘*Wanjina-Wunggurr (Native Title) Aboriginal Corporation v Braeburn Resources*’)

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*’)

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

Young v Western Australia (2001) 164 FLR 1; [2001] NNTTA 42 (‘*Young v Western Australia*’)

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 Nicolas Damnjanovic, 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] The Government party gave notice under s 29 of the *Native Title Act 1993* (Cth) ('the Act') of its intention to grant exploration licences E69/3147, E69/3150 and E69/3151 ('the proposed licences') to Tropical Resources Pty Ltd ('the grantee party'). Each notice included a statement that the Government party considers the grant attracts the expedited procedure (that is, the grant is an act 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 'notification day' is specified in the notices as 11 September 2013.

[2] The notices provide the following information with respect to the size and location of the proposed licence areas:

- E69/3147 – 70 graticular blocks (approximately 196 square kilometres), 108 kilometres northerly of Wiluna in the Shire of Wiluna.
- E69/3150 – 13 graticular blocks (approximately 36 square kilometres), 195 kilometres north-easterly of Wiluna in the Shire of Wiluna.
- E69/3150 – 44 graticular blocks (approximately 123 square kilometres), 174 kilometres north-easterly of Wiluna in the Shire of Wiluna.

[3] The proposed licences are situated entirely within the external 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 10 January 2014, the persons comprising the applicant in the Wiluna claim ('the native title party') lodged objections to the inclusion of the expedited procedure statement in respect of the proposed licences. The objection applications were accepted on 23 January 2014.

[6] At a preliminary conference convened by the Tribunal on 25 February 2014, the parties indicated they were negotiating an agreement and the matter was adjourned to 25 June 2014. The Tribunal wrote to the parties by email on 2 May 2014 seeking an update on the negotiations. On 2 May 2014, the representative for the grantee party replied by email saying parties were continuing to negotiate but that 'the matters should proceed through inquiry to have dates set.' Member Shurven issued directions for inquiry on 2 May 2014.

[7] In compliance with the directions, the Government party provided supporting documentary evidence on 16 May 2014. On 13 June 2014, the native title party provided a statement of contentions, accompanied by 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 14 June 2014. As the directions were sought on the basis that the evidence is culturally sensitive and only intended to be viewed by men, I was appointed to hear the matter and determine the objection on 17 June 2014. I issued interim non-disclosure directions on 27 June 2014 and the Tribunal circulated the proposed final non-disclosure directions to parties by email on the same date. No objection was raised and no party requested amendments to the proposed directions. I issued final directions pursuant to s 155 of the Act on 8 July 2014, without a formal hearing.

[8] The grantee party provided a statement of contentions on 27 June 2014 and, following receipt of the restricted affidavit material, provided a further, amended version of the same

on 2 July 2014. The Government party provided a statement of contentions on 11 July 2014. The native title party filed a statement of contentions in reply on 31 July 2014.

[9] I have considered the materials before the Tribunal, and I am satisfied it is appropriate to hear the matter 'on the papers' in accordance with s 151(2) of the Act.

Legal principles

[10] 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.

[11] 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).

[12] 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]).

[13] 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).

[14] 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 NL*).

(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]).

[15] 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].

[16] 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

[17] 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.

[18] I note that the initial documentation provided by the Government party did not include information regarding previous mineral tenure or sites designated by the DAA as 'other heritage places.' This information was subsequently provided with the Government party's contentions.

E69/3147

[19] The Tengraph quick appraisal establishes the underlying tenure of E69/3147 to be as follows:

- Pastoral leases 3114/1049 (Cunyu) and 3114/654 (Granite Peak) overlapping at 49.2 and 15.6 percent respectively.
- Unnumbered Land Act Reserve UNN 1001 overlapping at 35.2 percent (the Government party indicates that this is the Canning Stock Route reserve).
- Proposed Conservation Park PCP/12 at 0.7 percent. This area is centred on Windich Springs.

[20] The quick appraisal also indicates that the area within E69/3147 has previously been subject to eight exploration licences granted between 1989 and 2008, overlapping between 0.1 and 100 percent, with an average lifespan of one year and five months; two mineral claims granted in 1972 and surrendered the following year, each overlapping at less than 0.1 percent; and one temporary reserve granted in 1959 and cancelled in 1964, covering the entire area.

[21] The quick appraisal notes the following features in the area of E69/3147: one geodetic survey station (SSM-NABBERU2); 27 tracks, including Canning Stock Route; two fence lines, four yards; one well/bore (No 4A Government Well); three wells/bores with windmills (Kennedy Bore, Outcamp Well and Elijah Well); and four springs/soaks/rock holes/waterholes (Waterhole, Windich Springs and Little Windich Springs).

[22] The report from the DAA Database establishes the existence of one registered site (Windich Springs: Site ID 2116, artefacts/scatter, man-made structure, mythological) and one ‘other heritage site’ (Windich Rock Wall: Site ID 2862, man-made structure, lodged) within the area affected by E69/3147. The maps produced by the Government party and the Tribunal do not indicate any Aboriginal communities within the vicinity of E69/3147.

E69/3150

[23] The Tengraph quick appraisal establishes the area within E69/3150 is subject to pastoral lease 3114/1070 (Carnegie). The quick appraisal also indicates the area was previously

subject to five exploration licences granted between 1986 and 2009, overlapping between 34.5 and 100 percent, with an average lifespan of two years and one month; and one temporary reserve granted in 1959 and cancelled in 1964, covering the entire area.

[24] The quick appraisal notes the following features in the area of E69/3150: two minor roads; one track; Kaljahr Pinnacle; one cliff/breakaway/rockridge; and eight minor watercourses (non-perennial).

[25] The report from the DAA Database indicates there are no registered sites or 'other heritage places' within E69/3150. The maps produced by the Government party and the Tribunal do not indicate any Aboriginal communities within the vicinity of E69/3150.

E69/3151

[26] The Tengraph quick appraisal establishes the underlying tenure of E69/3151 to be as follows:

- Pastoral leases 3114/1068 (Wongawol) and 3114/1069 (Niminga) overlapping at 56.3 and 22.5 percent respectively.

- Vacant Crown land overlapping at 21.2 percent.

[27] The quick appraisal indicates that the area affected by E69/3151 has previously been subject to 14 exploration licences granted between 1986 and 2008 overlapping between 0.2 and 100 percent, with an average lifespan of two years; and one temporary reserve granted in 1959 and cancelled in 1964, covering the entire area.

[28] The quick appraisal notes the following features in the area of E69/3151: one geodetic survey station (SSM-KINGSTON 5); three minor roads, including Carnegie Road; five tracks; one building (Mingol Camp); one yard; one well/bore with windmill (Cooba Cooba Bore); seven named lakes (not permanent); one spring/soak/rock hole/water hole (Harry Johnstone Waterhole).

[29] The report from the DAA Database indicates there are no registered sites within E69/3151, although there is one 'other heritage place' within the area (Lake Carnegie: Site ID 25671, mythological, lodged).

Conditions and endorsements

[30] 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.

[31] The following further conditions are proposed in relation to E69/3147:

> 7. No exploration activities being carried out on Canning stock Route Reserve UNN 1001 which restrict the use of the reserve.
>
> 8. No interference with Geodetic Survey Station SSM – Nabberu 2 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.
>
> **In respect to DEC – Managed Lands PCP 12 the following conditions apply:**
>
> 9. Prior to lodgement of a Programme of Works (PoW), the Licensee preparing a Conservation Management Plan (CMP) to address the conservation impacts of the proposed activities and submitting the CMP to the relevant Regional Manager of the Department of Environment and Conservation (DEC). This CMP shall be prepared pursuant to DEC-prepared "Guidelines for Conservation Management Plans Relating to Mineral Exploration on Lands Managed by the Department of Environment and Conservation" to meet the requirements of the Minister for Environment for acceptable impacts to conservation estate. A copy of the CMO and of DEC's decision on its acceptability under the guidelines is to accompany the lodgement of the PoW application with the Department of Mines and Petroleum.
>
> 10. At least five working days prior to accessing the reserve or proposed reserve area, unless otherwise agreed with the relevant Regional Management of the Department of the Environment and Conservation (DEC-R), the holder providing the DEC-R with an itinerary and programme of the locations of operations on the Licence area and informed at least give days in advance of any changes to that itinerary. All activities and movements shall comply with reasonable access and travel requirements of the DEC-R regarding seasonal/ground conditions.
>
> 11. The Licensee submitting to the Director of Environment, Department of Mines and Petroleum (DMP), and to the relevant Regional Manager, Department of the Environment and Conservation (DEC'R) a project completion report outlining the project operations and rehabilitation work undertaken in the programme. This report is to be submitted within six months of completion of the exploration activities.

[32] The following further conditions are proposed in relation to E69/3151:

> 7. No interference with Geodetic Survey Station Kingston 5 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.

[33] 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.

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.

[34] A further endorsement is imposed in relation to E69/3147, drawing the licensee's attention to the provisions of the *Conservation and Land Management Act 1984* (WA), the *Bushfires Act 1954* (WA) and the *Wildlife Conservation Act 1950* (WA).

[35] 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 this licence, if the Wiluna People, being the applicants in the Federal Court Application No. WAD 6164 of 1998 send a request by pre-paid post to the licensee's or agent's address, not more than ninety days after the grant of this licence, the licensee shall within thirty days of the request execute in favour of the Wiluna People the Regional Standard Heritage Agreement (RSHA) endorsed by peak industry groups.

[36] 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

[37] 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) (NTP Contentions, paragraphs 1.3 – 1.4).

[38] The native title party relies on the following evidence in support of its objections:

(a) The affidavit of Frankie Wongawol sworn 7 June 2014 ('Wongawol Affidavit').

(b) The affidavit of Teddy Richards sworn 7 June 2014 ('Richards Affidavit').

(c) The affidavit of Timmy Patterson sworn 7 June 2014 ('Patterson Affidavit').

[39] As noted above at [7], these affidavits are subject to non-disclosure directions. Consistent with these directions, I have been careful to ensure these reasons do not disclose the contents of these documents, subject to observing the requirements in s 162(2) of the Act to outline any findings of fact on which the determination is based. Hence, though I have endeavoured to limit references to the affidavit material, I refer to the documents where necessary to explain the factual basis of my decision.

[40] Mr Wongawol, Mr Richards and Mr Patterson depose that they are traditional owners in the Wiluna native title claim area; are senior initiated men, or *wati*; and have cultural authority for the areas where the proposed licences are located. I accept that Mr Wongawol, Mr Richards and Mr Patterson have authority to speak for the areas on behalf of the native title party.

Grantee Party Contentions

[41] The grantee party's statement of contentions outlines its proposed exploration program, the underlying tenure and history of exploration in the proposed licence areas, and its intended approach to heritage protection.

[42] The grantee party states that the proposed licences have been subject to a number of previous mining tenements since the 1950s and a review of exploration reports show that a number of exploration programs have been previously undertaken in the areas affected. In support of this statement, the grantee party relies on a search of the mining tenement register for E47/2268, which overlapped the entire area of E69/3147 between 2008 and 2013. The register extract indicates that around $160,000 was expended on the tenement, including approximately $5,000 for 'Aboriginal survey' in the first two years of grant, though I note that rental payments comprised almost a third of the total expenditure.

[43] The grantee party indicates that the target mineral is uranium. The grantee party states that the efficiency of broad-based techniques for uranium exploration is well established, and the program will focus on field reconnaissance, geological mapping, surface geophysics, collection of samples, soil sampling, aerial surveys and ground-based geosurveys. Although it is noted that reconnaissance drilling may be undertaken at a later stage, the grantee party states it will not be able to justify significant surface disturbances until the completion of broad-based exploration, given the fall in the price of uranium, the remote location and extreme weather conditions. The grantee party states that suitable safety processes in respect of radiation management will be established before any ground-disturbing activities occur and it will notify and consult with the native title party as required with respect to establishing satisfactory safety guidelines.

[44] 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 reiterates its offer to complete surveys in accordance with the RSHA prior to commencing ground-disturbing activities. In respect of the Windich Springs site, the grantee party states that the conditions imposed by the Government party in respect of the proposed conservation park will apply to the site and significantly restrict exploration, and it will seek to exclude the area from the grant of E69/3147.

[45] The grantee party acknowledges there may be sites of particular significance within the proposed licence areas, or 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 detailed information about those works before commencing them; advise the native title party of dates when the grantee party will be on-

ground; liaise with the native title party as required with respect to establishing radiation management policies; take additional care when conducting on-ground activity in respect to the native title party's claim; limit the use of motor vehicles where possible; complete rehabilitation of any disturbances as exploration is conducted; avoid any sites or areas of significance if notice and coordinates are provided by the native title party; register heritage surveys completed in compliance with the AHA; and provide notice to the native title party of any applications under s 18 of the AHA for consent to damage or destroy a site. The grantee party also states that it 'will take additional steps to decrease the footprint of any activity.'

Materials produced by the Tribunal

[46] On 9 September 2014, the Tribunal circulated maps of the proposed licences produced by the Tribunal's Geospatial Services unit, noting its intention to rely on the maps in its deliberations and seeking comment from parties. On 10 September 2014, the native title party advised the Tribunal by email that it did not object to the Tribunal's intention to rely on the maps for the purpose of the inquiry. No response was received from the Government party or the grantee party. Consequently, I propose to refer to the Tribunal maps alongside maps included in the Government party documentation.

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

[47] As noted above at [37], the native title party has not made any contentions in relation to any community or social activities carried on in the proposed licence areas. Notwithstanding the fact the native title party has elected not to address this issue, the Tribunal is nevertheless required to consider whether there is any evidence to support the conclusion that the grant of the proposed licences is likely to interfere with such activities (see *Graham v Dunstan Holdings* at [8]).

[48] The only evidence that touches on the native title party's community or social activities relates to Windich Spring. Specifically, Mr Wongawol deposes that the spring is 'the only spot you can get fresh *kapi* [water] out that way' and '[w]hen we go out hunting for kangaroo or other bush tucker we camp out there in that country and go to that waterhole there for a drink and to cook up a feed.' Mr Wongawol also states that '[t]he ranger boys and me went out there [to Windich Spring] and put up a fence to protect that place … We put up that fence to block it off from camels, but we got to keep an eye on that place to

make sure people don't muck up the drinking water there.' On this basis, I accept that members of the native title party engage in hunting, camping, collecting water and caring for country activities in areas within E69/3147. However, as the evidence does not indicate how frequently the activities are carried on in these areas, it is difficult to conclude that the grant of E69/3147 is likely to interfere with these activities in a substantial way.

[49] On this basis, I accept the Government party's contention that the appropriate conclusion 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)

[50] 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; and

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

[51] The native title party also submits that E69/3147 is located in an area known generally as Windich Springs and is the site of a massacre involving white settlers and the forebears of the native title party.

[52] 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 contends 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.

[53] On the issue of interference, 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 particular, 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.

[54] 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. It is also submitted 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 and where access to, or speaking about, those sites or areas requires a properly constituted group of people.

[55] 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 rocks and waterholes within the proposed licences will interfere with the *jukurrpa* and other sites. The native title party also refers to the existence of artefacts within E69/3147 that were made and left in the area by the forebears of the native title party, including objects for carrying water.

[56] The evidence establishes that there is a 'special water hole' at Windich Springs, which is said to be the site of a massacre of Aboriginal people by white settlers. The evidence also establishes that objects left behind by the ancestors of the members of the native title party are present at the site. The evidence of Mr Wongawol also indicates the existence of law grounds on Kennedy Creek within E69/3147, which are considered *ngulu* or sacred and still used for ceremonial purposes. The evidence also suggests these grounds are associated with a specific *jukurrpa*, which is also connected to nearby creeks (for convenience and to preserve the confidentiality of the evidence, I refer to this as the HK Jukurrpa). I note that Mr Patterson also refers to a place in E69/3147 which is connected with the HK Jukurrpa and surrounding creeks and to which access and information is restricted to initiated men, and although Mr Patterson does not specifically describe the site as law grounds, in my view it is reasonable to infer that he is referring to the same place as Mr Wongawol. Mr Wongawol states that Outcamp Well in E69/3147 is another place that is 'culturally significant.'

[57] The evidence of Mr Wongawol also identifies a cave in E69/3150 and near a particular feature as the home of another *jukurrpa* (I refer to this as the WK Jukurrpa). Mr Wongawol states that places where the WK Jukurrpa lives have to be protected and, 'if people went to that shelter and chipped away at it, or if they dug up the ground there then it would hurt [him], it would make [him] upset and [he] would have to do something about it.' Mr Wongawol does not say what he would do in these circumstances, though the evidence of Mr Richards suggests that 'to do something about it' might mean 'like protest their [the grantee party] going out there.' In relation to E69/3151, Mr Wongawol states there is a place near Mt Moore Creek where the WK Jukurrpa and another *jukurrpa* ('the M Jukurrpa') meet. Mr Wongawol says this story is secret to men and connected to another site at Cooba Cooba Creek near Bullock Well. Mr Wongawol also refers to a place in E69/3151 called Mingol Camp, where he says 'the *jukurrpa*' is strong.

[58] The Government party contends that the evidence provided generally refers to the existence of *jukurrpa* and *ngulu* places within or near the proposed licences without identifying the nature of their significance or their specific location, and so does not provide an adequate basis for finding that sites or areas of particular significance exist within the proposed licences. Specifically, the Government party submits that:

(a) the only reference to the significance of the HK Jukurrpa is that it is connected with a song, and the only evidence concerning its location is that it is associated with Windich Springs and the creeks within E69/3147 (in this regard, I note that it is not clear from the evidence that the HK Jukurrpa is associated with Windich Springs, though there is evidence of its association with the Kennedy Creek law grounds);

(b) despite the fact that Windich Springs is a registered site, the evidence does not specify why it is a site of particular significance other than that it is believed to be the site of a massacre of Indigenous people;

(c) the only location given for the law grounds is Kennedy Creek, which is not located entirely within E69/3147 and in any event runs north-south the entire length of the proposed licence;

(d) the cave associated with the WK Jukurrpa is described as being near a particular feature, which is not located within E69/3150;

(e) although the WK Jukurrpa is described as moving east from Sholl Creek and meeting the M Jukurrpa within E69/3151, the only further location identified within the proposed licence is the rockhole at Cooba Cooba Creek; and

(f) no evidence is given as to why Mingol Camp is a site of particular significance, other than that the *jukurrpa* is strong there.

[59] The Government party submits that, in the event the evidence supports the existence of areas or sites of particular significance with the proposed licence areas, interference is not likely because:

(a) the grantee party is aware of the existence of those areas or sites 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 through the RSHA, which indicates its willingness to consult with the native title party to avoid interference. The Government party argues that the native title party will have the opportunity of enforcing this expression of intention 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 native title party has not provided sufficient evidence to demonstrate how the activities proposed by the grantee party would interfere with any areas or sites of particular significance;

(d) the proposed licence areas have been subject to previous mineral tenure and are currently subject to pastoral leases; and

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

[60] 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?

[61] The evidence of Mr Wongawol, Mr Patterson and Mr Richards supports the view that there is a general belief among members of the native title party that Windich Springs was the site of a massacre. Their evidence also suggests the site has a continuing spiritual dimension. In the circumstances, I consider the evidence supports a finding that the site is one of particular significance to the native title party. This is consistent with previous findings of the Tribunal in relation to massacre sites (see for example *John v Ord Resources* at [27]-[28]; *Wurrunmurra v Caldera Resources* at [41]-[43]; *Crowe v Western Australia* at [75], [100]; *Crowe v Golden Century Mining* at [49], [53], [57]; *Lungunan v Geotech International* at [28]-[29], [39]-[40], [44]).

[62] I also accept that the Kennedy Creek law grounds are a site of particular significance to the native title party. I acknowledge that the evidence does not establish the precise location of the site, though I accept that it is identified as being within the area of E69/3147. In *Young v Western Australia* at [38], Deputy President John Sosso considered there was 'no doubt that an area or site would have to be identified' to support a finding that an area or site of particular significance exists. However, the Tribunal has been prepared to find in certain cases that an area or site of particular significance exists notwithstanding the fact that its precise location has not been established (see for example *Wurrunmurra v Ling* at [25], [34]; *Wanjina-Wunggurr (Native Title) Aboriginal Corporation v Braeburn Resources* at [41]-[43]; *Campbell v Murchison Metals* at [64]).

[63] In *Wurrunmurra v Ling*, Deputy President Sumner found that several old ceremony grounds identified as being within the area subject to the future act in that matter were sites to which s 237(b) applied. This finding was made on the basis that the nature of the sites as former initiation grounds and the evidence of their importance to the deponent and the claim group in general supported the conclusion that the sites were of particular significance to the native title party in accordance with their traditions, despite the fact that the evidence did not establish the precise location of the sites. In the present matter, the evidence indicates that the Kennedy Creek site is not only similar in nature to the sites considered by Deputy President Sumner in *Wurrunmurra v Ling* but is still used for ceremony. The significance of the site is also underscored by its association with HK Jukurrpa and the care shown by the deponents, particularly Mr Wongawol, in discussing the site. In the circumstances, I consider it appropriate to find that the Kennedy Creek site is one of particular significance in accordance with the traditions of the native title party.

[64] While I accept that the other creeks associated with the HK Jukurrpa and the Kennedy Creek site are likely to be of some significance to the native title party, I am not satisfied that the particular significance of the creeks has been established, given the evidence does not indicate the extent of the creeks, the location of the creeks relative to Kennedy Creek and the law grounds, and what distinguishes them from other creeks within E69/3147 and the surrounding areas. In any event, the evidence does not suggest how interference with these creeks might arise from the activities of the grantee party.

[65] Mr Wongawol refers to Outcamp Well in E69/3147 as 'culturally significant' and says it is the 'old peoples [*sic*] *ngurra* [home]' and also the *ngurra* of the Richards family. On the basis of the evidence presented, I am not satisfied that Outcamp Well is a site of particular significance within the meaning of s 237(b).

[66] On the basis of its connection with the WK Jukurrpa, I am satisfied the cave site near the identified feature is a site of particular significance to the native title party. The Government party argues that, because the site is described as being 'near' the identified feature, which is not located within E69/3150, the evidence is not sufficient to locate the site within E69/3150. I note that Tribunal mapping places the identified feature within approximately one to two kilometres from the boundary of E69/3150 and, though Mr Wongawol identifies the cave by reference to the feature, he says the cave is located within E69/3150. As with the Kennedy Creek site, the possibility that the cave is located outside

the proposed licence area cannot be discounted. However, given the evidence of the site's significance and the proximity of the identified feature to E69/3150, I am prepared to find that the cave site is located within, or at very least in close proximity to, the proposed licence area.

[67] In relation to the places in E69/3151 where the WK Jukurrpa and M Jukurrpa are said to meet, I am not satisfied these are areas or sites of the kind contemplated by s 237(b). I accept there are stories associated with these *jukurrpa* concerning areas within the proposed licence and which are of a secret and sacred nature. However, the evidence does not establish whether these stories relate to specific geographical areas or sites. Although Mr Wongawol expresses concern about people 'walking around and mucking up the country by drilling little holes or things like that' and the effect this might have on the *jukurrpa* and the ability of native title holders to sing the songs, these concerns do not appear to relate to any particular area or geographical feature. The only reference to a physical landmark in connection with these stories is the place near Bullock Well; however, it is not clear whether this site is actually located within the proposed licence area. On the other hand, while Mingol Camp is clearly situated within E69/3151, I am not satisfied the evidence supports the conclusion that it is a site of particular significance. In my view, the evidence does not establish the existence of areas or sites of particular significance within E69/3151.

[68] In addition to its contentions concerning specific areas and sites within the proposed licences, the native title party contends that the nature of the country within and surrounding the proposed licences is such that any entry onto these areas would likely result in interference within the meaning of s 237(b). In this respect, the native title party relies on the Tribunal's finding in *Crowe v Western Australia* at [99]. In my view, the evidence in the present matter does not establish the particular significance of the general area and I do not accept that mere entry onto the proposed licences would constitute interference for the purposes of s 237(b). I will return to the issue of access and interference in relation to specific areas and sites later in these reasons.

Is interference likely to occur?

[69] In light of my findings about the particular significance of sites within E69/3147 and E69/3150, the question that must be determined is whether the grant of these licences is

likely to interfere with these sites. 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. 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 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.

[70] I recently considered similar arguments 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 is adequate to ensure that interference is not likely to occur, notwithstanding the existence of a discretion on the part of the Registrar of Aboriginal Sites and the Minister 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]).

[71] 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.

[72] 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. 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.

[73] 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 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 exists.

[74] 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. 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 execution of an RSHA by the grantee party and the protective operation of the AHA. What these decisions demonstrate is that the weight accorded to the RSHA will depend on the evidence presented in each case.

[75] Mr Wongawol states that members of the native title party need to 'keep an eye on' Windich Springs to 'make sure people don't muck up the drinking water there.' Mr Richards also gives evidence which suggests that drilling at Windich Springs could cause upset among that members of the native title party. Nevertheless, I am satisfied there is no real risk of interference with the site. Windich Springs is a registered site and the grantee

party is aware of its existence. Furthermore, as a fence has been erected around the site, it is likely the grantee party would be able to identify and avoid the site. I have also placed significant weight on the fact that the site is located within the area set aside for the proposed conservation park, and will therefore be subject to more restrictive conditions than other places within the proposed licence area.

[76] However, I am not satisfied that the AHA and the RSHA sufficiently mitigate the risk of interference with the Kennedy Creek site. Mr Patterson states that, if the site is damaged, the native title party 'might lose that song there in that tenement which would stop us singing that song in other places, like at Matuwa.' According to Mr Patterson, this could not only occur as a result of drilling but could also happen if people 'went out there without a Martu to help them.' In this context, I note that Mr Patterson states that 'there are places there in that tenement E69/3147 that women can't go to and also where only *wati* should go.' In circumstances where the evidence indicates that the site is currently used for ceremonial purposes and access to the site is restricted to persons of a particular gender and status, I accept there is a risk that the grantee party may interfere with the Kennedy Creek law grounds, at least inadvertently, should it enter the area without consulting the native title party.

[77] I also accept there is a real risk of interference with the cave site resulting from the grant of E69/3150. The evidence of Mr Wongawol indicates that the site could be interfered with 'if people went to the shelter and chipped away at it, or if they dug up the ground there.' This suggests that even activities that would otherwise fall within the definition of non-ground disturbing activities in the RSHA and would not require a heritage survey to be conducted might constitute interference for the purposes of s 237(b). While activities of this kind may also amount to conduct that is prohibited under s 17 of the AHA, the site is not recorded on the Register of Aboriginal Sites and is not associated with an identified landmark. Therefore, while I accept the grantee party intends to comply with its statutory obligations, there is still a risk of interference with the site, notwithstanding the presumption of regularity.

[78] Both the Government party and the grantee party referred to existing and previous use of the areas for pastoral and exploration purposes. The grantee party places particular emphasis on former tenement E69/2268, which overlapped E69/3147 in its entirety and was live between 2008 and 2014. Given the expenditure on the tenement, it can be

presumed that E69/2268 had some effect on the land and waters within the area. However, this does not support the inference that the risk of interference arising from the grant of E69/3147 will be the same as or no more substantial than the activities undertaken in relation to E69/2268. There may well have been an agreement in place between the native title party and the holder of that tenement which dealt with the risk. Furthermore, the fact that exploration has occurred does not necessarily lead to the conclusion that an area or site has lost its traditional significance or that interference would not be likely, as the activity may not have affected the area to such a degree that further activity would not constitute interference (see *Western Desert Lands v Teck Australia* at [123] and the cases cited). Although E69/3147 and E69/3150 are both subject to pastoral leases, the Tribunal has previously found there may still be a risk of inference by way of unauthorised access notwithstanding the existence of pastoral interests (see for example *Crowe v Western Australia*).

[79] The Government party's *Aboriginal Heritage Due Diligence Guidelines* published on 30 April 2013 state, under the heading 'Site Avoidance Strategies', that where an Aboriginal site 'is on or close to an area where a land user proposes an activity which may damage, destroy or alter an Aboriginal site the land user should investigate strategies for avoiding the site or limiting disturbance to the site' (paragraph 2.28). The guidelines also state that the land user should consult with the relevant Aboriginal people to seek advice about managing the activity in a way that will avoid damage to the site and, where necessary, conduct a heritage survey. The parties did not make reference to the guidelines in their submissions, and the grantee party's attitude to the guidelines is unknown. The guidelines might carry more weight were they included in the endorsements on the proposed licence, as this would ensure that the grantee party's attention is drawn to its responsibilities and reasonable steps that could be taken to discharge them. I accept that the grantee party understands its legal obligations with respect to Aboriginal heritage and intends to exercise care in the conduct of its exploration programme. However, the evidence presented in this matter suggests there remains a real risk or chance of interference with sites of particular significance to the native title party if the grantee party does not engage in direct consultation and negotiation with members of the native title party in relation to E69/3147 and E69/3150. In the circumstances, I find that the grant of E69/3147 and E69/3150 are likely to interfere with these sites unless this occurs.

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

[80] As noted above at [37], the native title party has not made any contentions on the issue of major disturbance.

[81] The Government party contends that the grant of the proposed licences is not likely to involve major disturbance to the land or create rights, the exercise of which is likely to involve major disturbance to the land for the following reasons:

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

(b) The exercise of rights conferred by the proposed licences will be regulated by the State's regulatory regimes with respect to mining, Aboriginal heritage and the environment, and it is likely these regimes will together and separately avoid any major disturbance to land and waters.

(c) Any authorised disturbance to land and waters caused by the grantee party may be mitigated pursuant to proposed conditions requiring rehabilitation of the land following completion of exploration.

(d) The proposed licence areas have previously been subject to mining and pastoral interests. The activities contemplated by the grantee party would be the same as, or no more significant than, the previous and continued use of the area.

(e) It does not appear that the proposed licence areas have any particular characteristics that would be likely to result in major disturbance to land and waters arising given the activities being proposed by the grantee party.

[82] Notwithstanding my findings about the likelihood of interference with sites of particular significance to the native title party, in the absence of evidence as to the likely effect of the proposed licences on the land and waters concerned, I accept the Government party's contention that major disturbance is unlikely to occur in the circumstances of the present matter. Although no contentions were made on this point, the Tribunal has previously considered the specific regulatory measures that apply to uranium exploration in Western

Australia and has concluded that, in the context of modern regulatory practice, uranium exploration does not necessarily involve major disturbance to land or waters, (see *Freddie v Western Australia* at [72]-[86]). In this respect, I also note my findings in *Areva Resources Australia v Walalakoo Aboriginal Corporation* at [164]-[166].

[83] In conclusion, I find that the proposed licences are not likely to involve, or create rights whose exercise is likely to involve, major disturbance to the land and waters concerned.

Determination

[84] The determination of the Tribunal is that:

- the grant of exploration licence E69/3151 to Tropical Resources Pty Ltd is an act attracting the expedited procedure; and
- the grant of exploration licences E69/3147 and E69/3150 to Tropical Resources Pty Ltd are not acts attracting the expedited procedure.

James McNamara
Member
5 November 2014