NATIONAL NATIVE TITLE TRIBUNAL

***Leedham Papertalk and Others on behalf of Mullewa Wadjari v FMG Pilbara Pty Ltd and Another,* [2014] NNTTA 98 (9 October 2014)**

Application No: **WO2013/0460**

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

- and -

IN THE MATTER of an inquiry into an expedited procedure objection application

Leedham Papertalk and Others on behalf of Mullewa Wadjari (WC1996/093) (native title party)

- and -

The State of Western Australia (Government party)

- and -

FMG Pilbara Pty Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Helen Shurven, Member
Place: Perth
Date: 9 October 2014

Catchwords: Native title – future act – proposed grant of exploration licence – expedited procedure objection application – whether act likely to interfere directly with the carrying on of community or social activities – whether act likely to interfere with sites of particular significance – whether act likely to cause major disturbance to land or waters – expedited procedure attracted

Legislation: *Native Title Act 1993* (Cth), ss 29, 31, 151(2), 237

Aboriginal Heritage Act 1972 (WA)

Mining Act 1978 (WA), ss 61(2), 66

Environmental Protection Act 1986 (WA)

Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA)

Waterways Conservation Act 1976 (WA)

Rights in Water and Irrigation Act 1914 (WA)

Metropolitan Water Supply, Sewerage and Drainage Act 1909 (WA)

Country Areas Water Supply Act 1947 (WA)

Water Agencies (Powers) Act 1984 (WA)

Water Resources Legislation Amendment Act 2007 (WA)

Cases:

Butcher Cherel and Others/Western Australia/Faustus Nominees Pty Ltd [2007] NNTTA 15, (‘*Cherel v Faustas Nominees*’)

Cheinmora and Others v Heron Resources Ltd and Another (2005) 196 FLR 250 [2005] NNTTA 99, (‘*Cheinmora v Heron Resources*’)

Cheinmora & Ors v Striker Resources & Ors [1996] FCA 1147; (1996) 142 ALR 21 (‘*Cheinmora v Striker Resources*’)

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

Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd [2011] NNTTA 22, (‘*Tullock v Bushwin*’)

Little and Others v Oriole Resources Pty Ltd [2005] FCA 506, (‘*Little v Oriole Resources*’)

Maitland Parker and Others/Western Australia/Derek Noel Ammon [2006] NNTTA 65, (‘*Parker v Ammon*’)

Maitland Parker and Others /Western Australia/Iron Duyfken Pty Ltd [2010] NNTTA 60, (‘*Parker v Iron Duyfken*’)

Nicholas Cooke & Others on behalf of the Innawonga People/Western Australia/Dioro Exploration NL [2008] NNTTA 108 (‘*Cooke v Dioro Exploration*’)

Rosas v Northern Territory and Another (2002) 169 FLR 330; (2002) NNTTA 113, (‘*Rosas v Northern Territory*’)

Silver and Others v Northern Territory of Australia and Others (2002) 169 FLR 1; [2002] NNTTA 18, (‘*Silver v Northern Territory*’)

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

Terry Cornwall & Ors v Western Australia & Ors [1997] NNTTA 47 (‘*Cornwall v Western Australia*’)

Ward & Ors v Western Australia & Ors [1996] FCA 1452; (1996) 69 FCR 208; 136 ALR 557, (‘*Ward v Western Australia*’)

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

Representatives of the native title party:	Ms Lesleigh Bower, Corser & Corser
Representatives of the Government party:	Mr Rod Wahl, State Solicitor's Office Ms Bethany Conway, Department of Mines and Petroleum
Representatives of the grantee party:	Ms Nerolie Nikolic, Fortescue Metals Group Ltd

REASONS FOR DETERMINATION

[1] On 27 February 2013, the Government party gave notice under s 29 of the Native Title Act 1993 (Cth) ('the Act') of its intention to grant exploration licence E59/1934 ('the proposed licence') to FMG Pilbara Pty Ltd ('the grantee party'). The Government party included in the notice a statement that it considered the grant attracted the expedited procedure (that is, one which can be done without the normal negotiations required by s 31 of the Act).

[2] The s 29 notice describes the proposed licence as comprising 25 graticular blocks (approximately 75.6913 square kilometres), located 63 kilometres north of Mullewa, in the City of Geraldton.

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

[4] The notification date for this matter was 27 February 2013. The three month period for filing a native title claim was 27 May 2013. The four month period for lodgement of objections was 27 June 2013.

[5] The proposed licence is wholly overlapped by the Mullewa Wadjari native title claim (WC1996/093 – registered from 19 August 1996). On 23 April 2013, Mullewa Wadjari ('native title party') made an expedited procedure objection application to the Tribunal in relation to the proposed licence. The proposed licence is also wholly overlapped by the native title claims of the Widi Mob (WC1997/072 – registered from 12 December 2011) and Wajarri Yamatji (WC2004/010 – registered from 5 December 2005). Neither the Widi Mob or Wajarri Yamatji native title claim groups made an expedited procedure objection application to the Tribunal. No other native title claim was filed in respect of this proposed licence.

Background

[6] A preliminary conference was convened on 16 July 2013. The parties indicated they wished to negotiate an agreement.

[7] On 24 October 2013, I was appointed to be the Member for the purposes of determining an inquiry, should such be required.

[8] At status conferences held on 20 November 2013, 4 December 2013 and 15 January 2014, parties advised they were in the process of negotiating an agreement. At the adjourned status conference on 19 February 2014, the grantee party requested the Tribunal make a determination in relation to the matter. On the same day, I set directions for the matter to proceed to an inquiry. The native title party evidence was in the form of Mr Papertalk's affidavit, sworn on 4 April 2014.

[9] In compliance with the directions (as amended by party request on 15 April 2014), parties provided the following submissions and evidence: the Government party's initial evidence on 10 March 2014 through the Department of Mines and Petroleum ('DMP'); the native title party contentions and evidence on 7 April 2014 ('NTP Contentions'); the grantee party's contentions and evidence on 5 May 2014 ('GP Contentions'); the Government party's contentions (through the State Solicitor's Office, 'SSO') on 24 June 2014 ('SSO Contentions'); and the native title party reply on 14 July 2014.

[10] On 10 July 2014, the Tribunal sought parties' views as to whether the matter could be determined 'on the papers' pursuant to s 151(2) of the Act. All parties agreed to the matter proceeding 'on the papers'. I have considered the matter and I believe it can be adequately determined 'on the papers' in accordance with s 151(2) of the Act.

[11] A map was generated by Tribunal Geospatial Services for use in these proceedings and circulated to parties on 11 August 2014 for comment. No party objected to the Tribunal's use of the map.

Legal principles

[12] Section 237 of the Act provides:

> 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.

[13] In relation to the legal principles to be applied in this matter, I adopt those outlined by President Raelene Webb QC in *Yindjibarndi Aboriginal Corporation v FMG Pilbara* (at [15]-[21]).

Evidence in relation to the proposed act

[14] The Government party provided the following documents relating to the proposed licence:

- A DMP Tengraph plan with topographical detail, tenement boundaries, historical land tenure and Aboriginal communities within and in the vicinity of the proposed licence;
- Reports and plans from the Aboriginal Sites Database maintained by the Department of Aboriginal Affairs ('DAA Database');
- A copy of the proposed licence application;
- A Draft Tenement Endorsements and Conditions Extract; and
- A DMP Tengraph Quick Appraisal detailing the land tenure, current and historical mining tenements, native title areas, relevant services, and other features within the proposed licence ('Quick Appraisal').

[15] The Quick Appraisal establishes the underlying land tenure of the proposed licence to be Pastoral Lease 3114/434 (Tallering) at 100 per cent, and shows the proposed licence has previously been subject to the following mineral tenure:

- ten expired, forfeited or surrendered exploration licences in operation between 1982 and 2006, overlapping the proposed licence between 2.5 per cent and 100 per cent; and
- one surrendered mining lease in operation between 1995 and 1998, overlapping the proposed licence by 10.8 per cent.

[16] The Quick Appraisal outlines the following services located on the proposed licence:

- five tracks
- one fence line
- one yard
- one well/bore with a windmill
- two cliffs/breakaways/rockridges
- five non-perennial minor watercourses

[17] The report from the DAA Database shows there are no registered Aboriginal sites or 'other heritage places' located on the proposed licence.

[18] There do not appear to be any Aboriginal communities within the proposed licence; however, the Aboriginal community of Wandanooka is approximately 33 kilometres south-southwesterly of the proposed licence.

[19] The Draft Tenement Endorsement and Conditions Extract indicates the proposed licence will be subject to the standard four conditions (1-4) imposed on the grant of all exploration and prospecting licences in Western Australia (see *Tullock v Bushwin* [11]-[12]), and a further three conditions (5-7). These are:

1. All surface holes drilled for the purpose of exploration are to be capped, filled or otherwise made safe immediately after completion.

2. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP.

3. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.

4. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.

5. The Licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made; prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.

6. The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:-
   - the grant of the licence; or
   - registration of a transfer introducing a new licensee;

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

7. No activities being carried out within the proposed railway corridor (designated FNA 9031) that interfere with or restrict any rail route investigation activities being undertaken by the rail line proponent.

[20] The following draft endorsements (which differ from conditions in that the licensee will not be liable to forfeit if breached) are also noted:

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's attention is drawn to the provisions of the:
   - Water 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 in accordance with the current published version of the DoWs 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 abstraction of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless a current licence for 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.

8. The Licencee pursuant to the approval of the Minister responsible for the Mining Act 1978 under Section 111 of the Mining Act 1978 is authorised to explore for iron.

In respect to Proclaimed Surface Water and Irrigation District Areas the following endorsements apply:

9. The abstraction of surface water from any watercourse is prohibited unless a current licence to take surface water has been issued by the DoW.

10. All activities to be undertaken with minimal disturbance to riparian vegetation.

11. No exploration being carried out that may disrupt the natural flow of any waterway unless in accordance with a current licence take surface water or permit to obstruct or interfere with beds or banks issued by the DoW.

12. Advice shall be sought from the DoW and the relevant service provider if proposing exploration being carried out in an existing or future irrigation area, or within 50 metres of an irrigation channel, drain or waterway.

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

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

Native title party contentions and evidence

s 237 (a)

[21] The native title party's contentions (at 9-23) address community or social activities. They refer (at 9) to the native title party's regular four-day 'hunting weekends' within the proposed licence, as well as on the lands bounded by Geraldton, Nerramyne, Yuin Station and Yalgoo.

[22] The contentions are supported by the affidavit of Mr Leedham Papertalk sworn on 4 April 2014. Mr Papertalk deposes (at 3) that he is a senior initiated man and has the right to speak on behalf of the native title party. He attests he is familiar with the proposed licence and visits the area on a regular basis (at 4-5). Mr Papertalk is a named applicant of the native title party and I accept that he has authority to give evidence in this matter. At paragraph 27 he refers to E59/1956 rather than the current proposed licence, but I accept that is a typographical error as in all other respects the affidavit refers to the current matter.

[23] The contentions note the following details regarding the native title party's community and social activities during the course of 'hunting weekends':

- 'The hunting weekends involve activities such as foraging, hunting and gathering, fishing, trading, camping, attending law ceremonies and the teaching of laws and customs to children' (at 11, also at 12 of Mr Papertalk's affidavit);

- 'The hunting weekends occur on an almost weekly basis (if weather permits). Although known as "hunting weekends" amongst the Mullewa Wadjari community, the hunting trips do not always occur on the same days of the week nor do they always include Saturday and Sunday' (at 12, also at 13 of Mr Papertalk's affidavit);

- 'Generally around 90% of the Mullewa Wadjari community members attend the weekly hunting weekends, which usually amount to more than 100 people travelling on country in more than twenty 4WD vehicles. The Native Title Party encourages a high child to adult ratio on these hunting weekends because one of the important objectives is to educate the children about the Native Title Party's customs and traditions' (at 13, also at 14-16 of Mr Papertalk's affidavit);

- 'In addition to the community-wide hunting weekends, individual members and families of the Native Title Party also regularly travel within and across the tenement area for hunting and gathering, foraging, fishing and camping purposes' (at 14, also at 17 of Mr Papertalk's affidavit);

- 'During the hunting weekends, the community members hunt for native fauna such as kangaroos, emus, wild turkeys, goannas, porcupines, blue tongue lizards and snakes. Occasionally, the members also hunt non-native species such as goats and rabbits' (at 15, also at 18 of Mr Papertalk's affidavit);

- 'A large proportion of the meats and foods gained from the hunting weekend are brought back to the Mullewa Wadjari community where they are shared amongst the members, including those who could not attend the hunting trip' (at 16, also at 19 of Mr Papertalk's affidavit);

- ‘Hunted meats are also used to trade for commodities such as petrol and diesel which is used by members of the community’ (at 17, also at 22 of Mr Papertalk’s affidavit);

- The tenement area is also known to the Mullewa Wadjari People as being 'rich in bush tucker', including:

  - *gogola* (small, green pod shaped fruit, which is very sweet);

  - *jalga* (bean like vegetable which can be eaten raw or cooked); and

  - the sweet sap from the *Bimba* trees ‘which are especially prevalent in the tenement area’.

Contentions outline that ‘the seeds of the *jalga* are high in nutrients and the Mullewa Wadjari People collect them by the bag-full from within the tenement area. If the bush tucker is in season, then members of Mullewa Wadjari will visit the tenement area ‘on almost a weekly basis’ to collect it’ (at 18-20, also at 23-25 of Mr Papertalk’s affidavit).

[24] Contentions also state that ‘During the hunting weekends, adults within the Native Title Party will teach the children traditional knowledge’ (including travelling to significant sites, boundaries of culturally restricted areas, location of bush medicine, food and water, cooking techniques, use of tools, reading the sky, traditional language and culture, dreamtime stories, the proper use of tools for hunting and cooking, and maintaining a balance between traditional and western lifestyles) (at 21, also at 26 of Mr Papertalk’s affidavit).

[25] The native title party contends (at 23, also at 27 of Mr Papertalk’s affidavit) that if exploration activities such as those contemplated by s 66 of the *Mining Act* are carried out on the proposed licence, there is a real chance or risk that such activities will interfere directly with the carrying on of the native title party’s community and social activities, in particular:

- hunting, gathering, fishing, camping and the teaching of laws and customs to children;

- the balance of wildlife and food sources around the proposed licence which will directly interfere with hunting, foraging and fishing activities; and

- if land on the proposed licence is damaged, the native title party will have to travel further out in order to hunt and gather food and resources.

s 237(b)

[26] The contentions addressing sites or areas of particular significance (outlined at 24-35), in summary state:

- The fact that the DAA Register does not record any sites does not mean that sites do not exist on the proposed licence (at 24);

- A series of caves located in the south of the proposed licence have black smudges on their ceilings which indicate they once housed campfires, and are visited by the native title party. The native title party believe that their ancestors once lived there and consider them a site of significance as the caves provide a valuable link to their ancestral history (at 25-27, also at 28-31 of Mr Papertalk's affidavit);

- The five watercourses that flow through the tenement are particularly significant to the native title party, who have a very strong cultural connection to them as the fresh water flowing in them attracts many types of wildlife which the native title party hunt. The watercourses also make the surrounding land fertile, and growing and changing seasonal vegetation is also a varied food source for the native title party (at 28-30, also at 32-33 of Mr Papertalk's affidavit);

- The native title party believes that after death, 'the spirits of the deceased travel into such watercourses and eventually settle in the land itself', so it is important 'that these water bodies are not disturbed or damaged' (at 31, also at 33-34 of Mr Papertalk's affidavit);

- The watercourses 'form a vital part of the Native Title Party's dreamtime stories', including the depiction of a man-like spirit snake named *Bimbara* who can do good things for the native title party such as provide water, fill the land with plants and animals, and encourage the growth of flora and fauna. 'The native title party's belief system teaches that the descendants of these spirits will experience

misfortune, ill health and possibly death' if a watercourse or waterhole housing the *Bimbara* is disturbed (at 32, also at 33 of Mr Papertalk's affidavit);

- The nature of some sites within the proposed licence area are such that even non ground disturbing work may cause interference with sites to a level that is distressing to the native title party, and culturally inappropriate to a degree that would constitute interference for the purposes of s 237(b) of the Act (at 33);

- Despite the protections afforded by the *Aboriginal Heritage Act*, 'suspected damage as a result of mining activities has already materialised at the Tallering Peak site', which falls within the native title party's claim area [but which I note is some 10 kilometres south west of the proposed licence]. The Native Title Party believes in that situation, 'since it failed to fulfil its duty to protect the sacred site, that the death of several members of the Native Title Party was the result of that failure' (at 34); and

- The significant sites existing within the proposed licence cannot be adequately protected by the *Aboriginal Heritage Act* because their locations are unknown to the grantee party (at 35).

s 237(c)

[27] In addressing the issue of major disturbance of land or waters, the native title party contentions state (at 36) that regard should be had to:

- the importance of the watercourses in the proposed licence and their significance in Dreamtime stories;

- the frequent use of the proposed licence and surrounding areas for travel, hunting and gathering of bush tucker by the native title party;

- the use of the proposed licence area for the education of younger members of the native title party; and

- the existence of unregistered sites in the proposed licence area that are unknown to the grantee party.

Grantee party contentions and evidence

[28] The grantee party provided a statement of contentions, dated 5 May 2014, as well as the affidavit of Mr Thomas Weaver, the Native Title Manager for Fortescue Metals Group Ltd ('FMG'), affirmed on 5 May 2014. The grantee party is a wholly-owned subsidiary of FMG and it appears that FMG determines the overarching policies and procedures under which its subsidiaries operate.

[29] Mr Weaver attests the grantee party is cognisant of its obligations under the AHA (at 10) and FMG has an Aboriginal Heritage Department, which is responsible for ensuring that it meets its obligations under: the AHA; any agreements between FMG and third parties; and any other areas that FMG accepts are of particular importance to Aboriginal people (at 11).

[30] Mr Weaver goes on to outline the process FMG uses to minimise the risk of damage to heritage sites. The process utilised by FMG and its subsidiaries involves the requirement for the internal issue of 'ground disturbance permits' ('GDPs') before employees or contractors can undertake any ground disturbing work (at 12). According to Mr Weaver's affidavit, various matters must be satisfied before a GDP is issued, including Aboriginal heritage (at 12). Mr Weaver deposes (at 12) that the following must be addressed before a GDP can be issued:

- all heritage approvals and compliance conditions under relevant legislation, heritage agreements and land access agreements must be in place;
- ensure the GDP application is wholly within areas that have been heritage surveyed for the specific purpose;
- identify whether a heritage survey is required;
- ensure that access to the GDP area is defined;
- evaluate the proximity and scope of works and assess the potential direct or indirect impact on in situ heritage sites or exclusion zones;
- check that all approvals such as those relating to s18 of the AHA are in place; and
- any other applicable items.

[31] According to Mr Weaver's affidavit, FMG is aware of the Register of Aboriginal Sites maintained under the AHA and also maintains its own record of Aboriginal heritage sites through the various heritage surveys that FMG has carried out (at 16 and 17). FMG maintains its own geographic information system, which uploads the information from the Register of Aboriginal Sites on a monthly basis, and also includes all the information gathered from the various heritage surveys undertaken by FMG (at 17).

[32] Mr Weaver states that FMG welcomes the opportunity to enter into a Regional Standard Heritage Agreement ('RSHA') with the native title party for the proposed licence (at 18). He also states that FMG endorses the principles set out in the Guidelines for Consultation with Indigenous Peoples by Mineral Explorers, published by DMP (at 19). I do note that the Government party have not stated they intend to impose an RSHA condition on the grant of the proposed licence, and there is no evidence that the grantee party have sent an executed RSHA to the native title party in this matter. However, the grantee party has outlined their own approach to heritage matters in some detail.

[33] Mr Weaver has attached to his affidavit at TJW1, a copy of the grantee party's outline of proposed works, which was part of the grantee party's application for the proposed licence. It states that the initial phase of exploration work will comprise:

- a literature search and analysis of previous publicly available data;
- the acquisition of aerial photography, satellite imagery, aeromagnetic or other geophysical data sets to be ortho-rectified and imported into its data management system;
- geological mapping and rock chip sampling;
- interpretation of historical, geophysical and geochemical data sets and target selection;
- administration, management and supervision; and
- gridding, access and Aboriginal heritage clearance.

[34] Further work, depending on the results from the first phase of work, may include:

- reverse circulation and diamond drilling;
- interpretation, resource estimation and technical reporting; and
- metallurgical testing.

[35] Mr Weaver deposes (at 8-9) that the grantee party's plan of work for the proposed licence primarily involves low impact non-ground disturbing work. It is said that any ground disturbing activities in the plan of work will only occur if the non-ground disturbing work in the first year identifies targets that warrant further investigation.

Government party contentions and evidence

[36] The Government party states it proposes to impose the endorsements and conditions set out in the Draft Tenement Endorsement and Conditions Extract (as noted at [19]-[20] of this decision).

[37] The Government party states, in the absence of evidence to the contrary, the Tribunal must assume that a grantee party will not act in breach of the relevant statute law, regulations or conditions imposed upon them (at 20). Rather, the Government party contends the grantee party's contentions provide a firm basis for concluding that the criteria of s 237 of the Act will not be breached (at 23).

s 237(a)

[38] The Government party accepts (at 43), based upon the native title party's contentions and the evidence in Mr Papertalk's affidavit , that the various community and social activities (as outlined at [23]-[24] of this decision) take place within the proposed licence area and surrounding area. They contend (at 44) there is not likely to be interference with those activities because:

- the proposed exploration is relatively low-impact and non-intrusive;
- the proposed licence has been subject to prior mineral exploration and possible mining activity, and is entirely overlapped by a pastoral lease. Therefore, some of these interests would have at least affected any native title rights to control access

to and use the proposed licence. Further, the activities of the native title party have been 'subject to, or coexistent with, all of these lawful activities for a significant period of time';

- any intersection between the community and social activities of the native title party and the grant of the proposed licence would be the same as, or no more significant than, the previous and continuing use of the proposed licence area;
- there are no Aboriginal communities within the proposed licence;
- the low scale and infrequent exploration activities planned by the grantee party, their intention to conduct their activities with cultural sensitivity, and the comparative sizes of the proposed licence compared to the native title party's native title claim area do not appear likely to have any disruptive effect upon activities in the proposed licence area;
- while it may be possible for the activities of the native title party and grantee party to come into contact from time to time, it is not apparent that the activities of the native title party will be prevented or disrupted to any significant extent;
- hunting and mineral exploration are, by their nature, inherently capable of coexistence and the Tribunal has on numerous occasions found that to be the case and determined that the grant of an exploration licence is not likely to interfere with hunting; and
- to the extent that activities of the native title party consist of law ceremonies within the proposed licence area, the grantee party's activities may only potentially intersect with those ceremonies during the limited period in which law business is held. While there may be a small possibility that the grantee party could approach near a ceremony whilst it is being conducted, the stated intention of the grantee party to respect and accommodate Aboriginal cultural issues will likely minimise this risk. If the grantee party is made aware of the time and location of any ceremonies, the grantee party is unlikely to conduct its operations in a manner which interferes with any ceremony or the privacy of its participants.

s 237(b)

[39] In relation to s 237(b) the Government party submits that an area of particular significance means an area which stands out in some way from the general background of other sites and the country as a whole, and the evidence must show that it stands out in this way (at 54).

[40] The Government party refers to the identification by the native title party of caves in the south of the proposed licence that were inhabited by ancestors of the native title party, which they claim to be a valuable link to their ancestors and history (see [25] of this decision). The Government party accepts that these caves are sites of particular significance to the native title party (at 53).

[41] It also refers to the claim by the native title party that watercourses flowing within the proposed licence are sites of particular significance. While the Government party accepts that watercourses generally are of particular significance to the native title party, it does not accept that the watercourses within the proposed licence area have been sufficiently identified for them to be considered to be sites of particular significance (at 54).

[42] The Government party states (at 55) that, in the event there are any sites of particular significance within the proposed licence, interference is unlikely because:

- to the extent that the caves and watercourses are sites of particular significance to the native title party, the grantee party is now aware of the existence of those sites and of its legal obligations in respect of those sites;
- proposed exploration activities will be low impact and non intrusive;
- the native title party's concerns regarding interference with the balance of wildlife and food sources, and access to the land, overestimate the activities of the grantee party should the proposed licence be granted. There is no evidence that the grantee party will conduct activities with those effects, but rather the activities of the grantee party will cause relatively minor ground disturbance. Any negative effects will be further mitigated through the proposed conditions and endorsements the Government party intends to place on the grant of the licence;

- the proposed licence has been subject to prior mineral exploration and possibly mining activity, and is wholly covered by a pastoral lease. The proposed activities of the grantee party are likely to be the same as, or no more significant than, the previous and continuing use of the land; and
- the regulatory regime is likely to prevent interference with any site of particular significance.

s 237(c)

[43] The Government party submits that s 237(c) is only enlivened where there is a significant, direct, physical disturbance of the land or waters (by which the Act intends digging, drilling or some other means by which land or waters are moved, removed or diverted) (at 61). It further argues that the qualification of 'major' must be given its ordinary meaning and is to be objectively assessed, and that while the perspective of Aboriginal people is relevant, it does not convert the notion into a subjective one to be determined solely by the opinions of the native title party (at 62).

[44] The Government party states (at 63) that major disturbance to land or waters is unlikely because:

- the proposed exploration activities are low-impact, and any ground disturbing activities are intended to be conducted in a manner which will respect local Aboriginal cultural concerns and not adversely impact on heritage sites;
- the State's regulatory regimes, and the proposed conditions and endorsements, are likely to avoid and or mitigate any disturbance to land or waters;
- any authorised disturbance to land and waters caused by the grantee party may be mitigated by the proposed conditions requiring rehabilitation of the land following completion of exploration;
- the proposed licence has been subject to prior mineral exploration and possibly mining activity, and is wholly covered by a pastoral lease. The activities proposed by the grantee party are likely to be the same as, or no more significant than, the previous and continuing use of the area; and

- the proposed licence does not have particular characteristics that would be likely to result in major disturbance as per s 237(c).

Native title party reply

[45] In its reply, the native title party challenges various aspects of the Government party's contentions, including that the native title party's concerns about exploration activities in general, or things done by other grantee parties, are not sufficient to overcome the assumption that the grantee party will not comply with the relevant legislation. The native title party argues that:

- while the grantee party may comply with the relevant regulatory regime, it may still cause events to occur that have effects covered by one or more of the aspects of s 237 because the grantee party does not have the relevant expertise in respect of the relevant facts and issues to assess what effects under s 237 its activities may have (at 1.3-1.4);
- the people in possession of the relevant expertise are the elders of the native title party, and the evidence of the native title party as to the prevalence of sites of particular significance within the proposed licence establish that the risk of an event under s 237 is high (at 1.5 and 1.7);
- the grantee party's willingness to enter into a RSHA is subject to the unilateral decision-making of the grantee party, there is no compulsion for it to do so, and any entity that the grantee party may transfer the proposed licence to in the future is also not bound to enter into any such agreement with the native title party (at 1.8-1.10);
- despite the amount of data possessed by the grantee party in relation to heritage matters in the area of the proposed licence, no register of site data can be an exhaustive source of accurate site information (at 1.11-1.12);
- there will be no reliable protection for the prevalent and significant sites identified in the native title party's evidence against the risks identified in s 237 of the Act if the proposed licence is granted. The native title party's application should not fail because it has not lodged evidence as to the precise identity,

description and location of all the sites which Mr Papertalk says are at risk and require protection because it does not have the resources to place evidence of all such sites before the Tribunal (at 1.13-1.15).

[46] I am unable to accept the arguments of the native title party in these broad terms. It is an established principle that the Tribunal will assume the grantee party will not act in breach of the relevant regulatory regime unless evidence is provided to lead to a contrary conclusion, otherwise known as the *presumption of regularity* (see the detailed discussion of the presumption of regularity by Deputy President Sumner in *Murray v Money* at [34]-[39]). In addition to this, Mr Weaver has deposed to the grantee party's internal processes which require consultation with the native title party before any ground disturbing work can take place.

[47] I note the native title party's statement that its application should not fail because it has not lodged evidence as to the precise identity, description and location of all the sites which Mr Papertalk says are at risk and require protection. Mr Papertalk identified caves in the south of the proposed licence, and waterways within the proposed licence, as sites of particular significance to the native title party, and has said there *may* be other sites within the proposed licence.

[48] I appreciate that resources are required to present evidence of sites and areas of particular significance. However, the Tribunal does not necessarily need evidence of all the sites of particular significance on a tenement. Some further detail about the caves, which are located in the south of this proposed licence, and of the five waterways, would greatly assist the Tribunal in making an assessment regarding the likelihood of interference and in relation to the limbs of s 237 of the Act. For example, what is it about them, as distinct from other caves or waterways in the native title party claim area, which makes them of particular significance.

[49] Some information has been provided about the caves, but little in relation to the waterways. Of assistance to the Tribunal may be information such as: are these areas visited by members of the native title party; for what purpose; how often; are the sites cared for; are they incorporated into ceremonies or other stories of the native title party; are they related to sites outside of the proposed licence? These are only some of the types of information which have been provided by native title parties in previous inquiries before the Tribunal. In essence, as much information as possible, given the

resources available, can be provided about why such sites are important. The native title party is not under a compulsion to highlight a great many sites of particular significance on a proposed licence. A single site which is at risk of interference as per the limbs of s 237 of the Act may suffice for the Tribunal to find that an act should not be subject to the expedited procedure. Each matter is assessed on a case by case basis - the more information and evidence all parties can provide in relation to any assertions they make, the clearer a picture the Tribunal has in relation to the features on the proposed licence, and how they relate to the application of the expedited procedure as per s 237 of the Act.

[50] In addition, if areas are sensitive, the Tribunal may cover evidence with a non disclosure order under the Act (see s 155). If a written affidavit is not likely to capture the relevant information, other media may be used, such as evidence spoken on a DVD. In *Ward v Western Australia* Carr J said (at 217):

> ...where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence.

As the native title party note (at paragraph 1.5 of its reply), the elders of the native title party are the people with that knowledge and expertise so it is reasonable to expect that if other sites of particular significance to the native title party exist within the proposed licence, they will lead the requisite evidence to support those claims. If the native title party does not present evidence then it has made an evidential choice according to Carr J, and so must accept the risk of an unfavourable inference being drawn by the Tribunal in its common sense approach to evidence.

[51] The native title party has also challenged the Government party's contentions in relation to s 237(a) of the Act, specifically paragraphs 44(a) and (d) of the Government party contentions. At paragraph 44(a) the Government party said that most of the grantee party's activities will be low-impact, and that any ground disturbing activities will be respectful of local Aboriginal cultural concerns and will not adversely impact on heritage sites. At paragraph 44(d) the Government party contended (amongst other things) that the grantee party intends to conduct its low-scale exploration activities with cultural sensitivity. The native title party reply in relation to both those contentions says:

- ‘the good intentions of the Grantee Party do not form a reasonable basis to conclude that the proposed grant attracts the expedited procedure’, as the grantee party ’lacks the relevant expertise to recognise, identify and understand the traditional, community and/or social significance of sites’ (at 3.2); and
- ‘the good intentions of the Grantee Party are not legally enforceable’ and ‘may change with the passage of time’ (at 3.3).

[52] I accept the arguments of the native title party in that mere assertions cannot be sufficient for the Tribunal to base a decision on, and accept that it is the native title party who has the expertise to recognise and identify areas which are significant to the native title party. However, in this matter, the grantee party have provided their intentions in affidavit form, and as such, have provided sworn testimony as to their intentions which go beyond merely expressing good intentions. While there is no evidence an executed RSHA has been sent to the native title party, the grantee party have expressed a positive intention towards entering into such an agreement, should the native title party wish. The Government party states (at 44(b)) that some of the past and current mining and pastoral activities on the proposed licence are likely to have extinguished at least any native title rights to control use of, and access to, the relevant land. They contend the Tribunal is entitled to take this context into account in determining the likelihood of interference that the grant of the proposed licence may have on the community and social activities of the native title party. The native title party reply says (at 4.2) this assertion by the Government party identifies that the risks described in s 237 of the Act are impossible to evaluate, so the expedited procedure should not apply.

[53] I am unable to accept the native title party argument, as there are clear processes outlined in Federal Court and Tribunal decisions for evaluating such risks. For example, the Tribunal is required to undertake a predictive assessment of whether the grant of the exploration licence and the exercise of rights conferred by it would or would not be likely (in the sense of a 'real chance') to result in the interference or disturbance referred to (see *Smith v Western Australia* at [23]; *Cheinmora v Striker Resources* at 39; *Cornwall v Western Australia* at 4). The impact of past and current mining and pastoral activities on native title rights and interests within the proposed

licence is simply a thread in the larger tapestry of evidence which the Tribunal weaves together to make its predictive assessment.

[54] Finally, the native title party challenge the Government party's submissions (in paragraphs 45 to 55 of the Government party contentions) in relation to s 237(b) of the Act (see [39]-[42]). The native title party reply says (at 6):

- the Government party's contentions advocate that the Tribunal should engage in conjecture about how the grantee party might conduct itself in the future (at 6.1);
- the Government party contends (at 54) that general evidence is not sufficient and evidence as to an area or site of particular significance needs to be there to show that it stands out in this way (at 6.2.1-6.2.2);
- the Act is beneficial legislation and protection of the right to negotiate should not be narrowly construed (at 6.2.3);
- the word 'likely' requires a risk assessment by the Tribunal that will exclude from the expedited procedure any proposed act involving a real chance or risk of interference or major disturbance of the kind contemplated by s 237 of the Act, and that this argument is supported by the Explanatory Memorandum to the Native title Amendment Bill 1997 which requires the arbitral body to undertake a predictive assessment (at 6.2.4-6.2.5);
- Mr Papertalk's evidence was genuine and should be applied to reach a finding that the risks identified by s 237 of the Act are too serious to justify the application of the expedited procedure in this matter (at 6.2.6-6.2.7); and
- regarding the limitations on the native title party's ability to identify every site that stands out in the proposed licence area, the Tribunal should have regard to the following factors (at 6.2.8):
    - the relatively large size of the proposed licence;
    - the content and extent of elaboration in Mr Papertalk's affidavit;
    - the beneficial nature of the Act;
    - Aboriginal and Torres Strait Islander peoples are the most disadvantaged group in Australian society;

- the impracticality of the expectation on the native title party that they provide complete documentary evidence of every site on the proposed licence that stands out; and
- the identification, evaluation and appropriate and lawful management of all such sites is the activity which s 237 of the Act seeks to protect and enforce.

[55] In relation to the native title party's first point at 6.1, I repeat my comments at [47]-[51] and [55].

[56] The native title party's points at 6.2.1-6.2.5 do no more than repeat established points of law, and do not support the argument it makes at 6.2.6-6.2.7. In relation to the authenticity of Mr Papertalk's evidence, neither the Government party nor the grantee party dispute how genuine it is. I also believe that Mr Papertalk's evidence is genuine and accept it on that basis. Based upon Mr Papertalk's evidence, the Government party accepted that the caves located in the south of the proposed licence are a site of particular significance to the native title party (see the Government party contentions at 53). The grantee party is now on notice that such sites exist and have stated their practices and procedures for dealing with heritage issues. As to whether Mr Papertalk's evidence supports a finding that the expedited procedure should not apply, I will deal with that later in this determination.

[57] Regarding the native title party's arguments at 6.2.8, I weigh up all relevant matters in undertaking the predictive assessment required of me by the Act. I also reiterate the comments I made earlier in relation to the provision of evidence. This is the determination of the objection application made by the native title party. It is their choice as to what evidence they put before the Tribunal; evidence which is particularly within their knowledge and expertise, as they have pointed out in their reply. Held against the background of case law and legislation, I cannot accept the arguments the native title party make at 6.2.8.

Considering the evidence

Community or social activities (s 237(a))

[58] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken in relation to the grant are likely to interfere with the community or social activities of the native title party (in the sense of there being a real risk of interference), (see *Smith v Western Australia* at [23]). Direct interference involves an evaluative judgment that the future act is likely to be the proximate cause of the interference, and must be substantial and not trivial in its impact on community or social activities (see *Smith v Western Australia* at [23]). The assessment is also contextual, taking into account factors that may already have impacted on a native title party's community or social activities (such as mining or pastoral activity) (see *Smith v Western Australia* at [27]).

[59] The Tribunal has accepted that the intentions of the grantee party in a particular matter are relevant in assessing whether the activities are likely to directly interfere with the carrying on of a native title party's community or social activities, or interfere with areas or sites of particular significance to a native title party. I adopt the approach taken in *Silver v Northern Territory* (at [29]-[30]), where it was outlined that:

> The adoption of a predictive assessment necessarily allows the Tribunal to receive evidence of a grantee's intention where that evidence is adduced. In the absence of any evidence of intention, the Tribunal would be at liberty to assume that a grantee will fully exercise the rights conferred by the tenement...evidence of intention cannot be unilaterally discarded in advance, as it is logically relevant to the question of likelihood.

[60] The grantee party's intended activities have been outlined in terms of its initial exploration program, and its general approach to its activities, and its intentions are outlined at [30]-[36] of this decision.

[61] The grantee party has provided a sworn affidavit indicating its willingness to enter into an RSHA (as outlined at [33]).

[62] The native title party's submissions relating to s 237(a) of the Act are outlined at [24]-[26] above, which relate to its camping, hunting, fishing and education of children activities on the proposed licence. In response to the native title party's contentions, the Government party states (at 43) it accepts that members of the native title party carry out community or social activities such as camping, fishing, hunting and education of its children within the proposed licence. While the evidence demonstrates members of

the native title party carry out community and social activities on the proposed licence, the Government party submits that there is not likely to be direct interference due to the factors listed at [39] above.

[63] In relation to these points, I accept past and present exploration and mining activities are likely to have affected, and are likely to continue to affect, the community or social activities of the native title party if and where they exist. While there is no specific evidence of the degree of such interference, the Tribunal is entitled, as part of the overall context, to have regard to the fact that these previous activities will already to some extent have interfered with the native title party's community and social activities (see *Tullock v Bushwin* at [122]). It is unlikely that pastoral activities have interfered to any extent with native title party activities as Mr Papertalk attests to liaising with the pastoral owner when conducting activities or travelling through the area.

[64] The total area of the Mullewa Wadjari People claim is approximately 35,621.0516 square kilometres and the proposed licence is approximately 75.6913 square kilometres. Consistent with previous Tribunal decisions, such as *Cooke v Dioro Exploration*, I find the size of the proposed licence area, in the context of the much larger native title determination area, makes it less likely that the proposed exploration activity will interfere with the native title party's community or social activities.

[65] Further, while the native title party has provided evidence of the frequency of its community and social activities and the specific activities that take place on the proposed licence area, the native title party has not provided contentions or evidence as to why these activities could only take place on the proposed licence as compared to taking place elsewhere within the larger native title determination area.

[66] I acknowledge that the Wandanooka Aboriginal community is approximately 33 kilometres away from the proposed licence and this proximity adds weight to the claims of the native title party that its members regularly visit the proposed licence area to conduct the community and social activities outlined at [24]-[26]. However, the Tribunal must have regard to the fact that the grantee party's access to the area would be temporary and limited to the areas in which exploration is taking place. In general, the Tribunal has found that, because of its relatively limited and temporary nature, exploration activity is not likely to directly interfere with a native title party's

community or social activities except in an incidental and insubstantial way. I believe this is such a case.

[67] In the circumstances, taking into account the evidence available, I am unable to conclude there would be interference of the kind contemplated by s 237(a) of the Act in this matter.

Sites of particular significance (s 237(b))

[68] The issue the Tribunal is required to determine in relation to s 237(b) of the Act is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (that is, more than ordinary) significance to the native title party in accordance with their traditions. As noted above, it is established in DAA documentation that there are no registered sites within the proposed licence area and no 'other heritage places'. However, this does not mean there may not be other sites or areas of particular significance to the native title party over the area of the proposed licence or in the vicinity.

[69] The Register does not purport to be a record of all Aboriginal sites in Western Australia, and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. The AHA protects 'Aboriginal sites', as defined in s 4 of the AHA, whether those sites are registered or not. Section 4 defines 'Aboriginal site' to mean a place to which the AHA applies 'by the operation of section 5'. While some sites may be administratively assessed as not being an 'Aboriginal site' under the AHA, those sites may still be 'areas or sites of particular significance' to the native title party 'in accordance with their traditions' as per s 237(b) of the Act.

[70] The native title party contentions directed at s 237(b) of the Act are outlined at [27] in this decision. Mr Papertalk's affidavit identified caves in the south of the proposed licence where the native title party believe their ancestors once lived and camped, and Mr Papertalk has deposed (at 28-31) that the caves are a link to the native title party's ancestors and history which members of the native title party often visit. The Government party has accepted that the caves are a site of particular significance to the native title party (Government party contentions at 53). I also accept that the caves are a site of particular significance to the native title party. The grantee party has provided no relevant comment in relation to the particular significance of these caves.

[71] However, the grantee party is now alert to their existence and approximate location. The grantee party has detailed extensive procedures (including the requirement for heritage surveys to be conducted) to be followed before any ground disturbing work is carried out on the proposed licence. The grantee party has also expressed a clear attitude to abide by the State's regulatory regime and I have no evidence which causes me to doubt the grantee party's intentions. I find no basis upon which to infer that there is likely to be interference with this site of particular significance.

[72] Mr Papertalk also deposes that the native title party has a very strong cultural connection to the five watercourses located within the proposed licence and identifies the reasons for that connection (see [27]). He states (at 32-34) that it is very important to the native title party that the watercourses are not disturbed as the native title party will experience misfortune, ill health and possibly death. The Government party has said that while it accepts that watercourses generally are of particular significance to the native title party, it does not accept that the watercourses in the proposed licence have been sufficiently identified for them to be considered sites of particular significance (at 54).

[73] I appreciate that the water courses are special to the native title party on the basis of Mr Papertalk's affidavit. However, the evidence provided is quite broad, and specific watercourses within the proposed licence have not been identified (for example, as to their approximate location, direction, flow), nor identified why those watercourses are sites of particular significance to the native title party against the background of watercourses in general (see *Cheinmora v Striker Resources* at 34). On this basis, I cannot say that the watercourses within the proposed licence are sites of particular significance to the native title party.

[74] Mr Papertalk also says that as the native title party have not undertaken a heritage survey of the proposed licence, he believes there may be other sites of significance to the native title party within the proposed licence (at 37). The Tribunal has held, on previous occasions, that the native title party must provide evidence with sufficient detail and specificity to allow the Tribunal to make the predictive assessment required by s 237(b) (see for example *Parker v Iron Duyfken* at [39]; *Cheinmora v Heron Resources* at [43]). The evidence before me does not disclose a sufficient basis to reach

a conclusion that any further sites exist, the particular significance of these sites if they do exist, or the likelihood of them being interfered with.

[75] The native title party outlines damage done to nearby Tallering Peak, however, there is no evidence to suggest such damage was caused by the grantee party. The grantee party has detailed its own internal policies and procedures that minimise the risk of interference with sites or areas of particular significance to the native title party, as well as its proposed work plan.

[76] The regulatory regime based on the AHA has been described on numerous occasions by the Tribunal (see for example, *Parker v Ammon* (at [31]-[38], [40]-[41]). While the Tribunal has usually found the site protective regime based on the AHA is sufficient to ensure any interference with sites of particular significance is unlikely, each matter must be considered on its own facts (see *Cherel v Faustas Nominees* (at [81]-[91]). The Tribunal must consider, based on facts of particular cases and the nature and extent of sites of particular significance, whether this protective regime is sufficient to make it unlikely that there will be interference with sites of particular significance. I am satisfied, based on the available evidence, that the AHA and its associated processes, together with the endorsements and conditions to be placed on the proposed licence, are likely to prevent interference with any area or site of 'particular significance' in the context of exploration activities.

[77] Taking all of these factors into account, I find there is no real risk of interference with sites of particular significance as a result of the grant of the proposed licence, as envisioned by s 237(b) of the Act.

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

[78] The Tribunal is required to make an evaluative judgment on whether major disturbance to land and waters is likely to occur (in the sense that there is a real risk of it) from the point of view of the entire Australian community, including the Aboriginal community, as well as taking into account the concerns of the native title party (see *Little v Oriole Resources* at [41]-[57]).

[79] The native title party contentions directed at s 237(c) of the Act are outlined at [28] of this decision.

[80] The Government party (at 61) states that s 237(c) is only enlivened where there is a significant, direct physical disturbance of the land or waters (by which the Act intends digging, drilling, or some other means by which land or waters are moved, removed or diverted).

[81] It is well established that the starting point and pre-condition of any inquiry into matters relating to s 237(c) is evidence of proposed physical disturbance of land and waters (see *Rosas v Northern Territory* at [84]). To that extent, I agree with the Government party's response that s 237(c) relates to significant, direct physical disturbance of land or waters.

[82] The Government party contentions note that the grant of the proposed licence 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 reasons outlined at [45] of this decision.

[83] In relation to whether or not there is likely to be major disturbance to land or waters in this matter, I have had regard to a number of factors, including the following:

- there is no evidence of any sensitive topographical, geological or environmental factors which would lead people to think that exploration activities would result in major disturbance to land or waters
- the conditions imposed on the proposed licence deal with ground disturbing activities, including requirements for rehabilitation (standard conditions 1-4) and numerous additional conditions and endorsements;
- the grantee party is willing to enter into an RSHA with the native title party;
- the endorsements on the proposed licence direct the grantee party's attention to the *Environmental Protection Act 1986* (WA), the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA), the *Water Conservation Act 1976* (WA), the *Rights in Water and Irrigation Act 1914* (WA), the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* (WA), the *Country*

Areas Water Supply Act 1947 (WA), the *Water Agencies (Powers) Act 1984* (WA), and the *Water Resources Legislation Amendment Act 2007* (WA);

- the endorsements on the proposed licence restrict the grantee party's interference with water resources on the proposed licence; and
- there is no evidence that the grantee party is likely to fail to comply with the regulatory regime.

[84] I have dealt with the issues raised by the native title party in relation to s 237(c) of the Act (at 36 of their contentions) and within their reply at [57]-[79] above.

[85] Taking into account all of these considerations, I do not find it likely that major disturbance to land and waters is likely to occur in this matter, as envisioned by s 237(c) of the Act.

Determination

[86] The determination of the Tribunal is that the act, namely the grant of exploration licence E59/1934 to FMG Pilbara Pty Ltd, is an act attracting the expedited procedure.

Helen Shurven
Member
9 October 2014